Out with the old, in with the new

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January 12, 2018

The National Labor Relations Board (“NLRB”) signaled an early new year’s resolution with two December 14, 2017 rulings: a more employer-friendly approach to interpretation of the National Labor Relations Act (“NLRA”). In its earliest decisions, a new Board re-defined the joint employer test and workplace rule analysis.

The NLRB flexed its administrative muscle with two major decisions announcing its clear departure from Obama-era policy. The first decision reversed the Browning-Ferris standard for determining when two legal entities are considered joint employers. In Hy-Brand, the Board sharply criticized Browning-Ferris, repealed its holding, and held the more narrow pre-2015 test as controlling. See Hy-Brand Industrial Contractors1. Now, an entity will be deemed a joint employer with another entity for purposes of the NLRA only when it directly exercises control over essential terms of the other entity’s employees.

In The Boeing Company, the Board considered Boeing’s workplace rule banning camera phones, which was part of its larger security protocols meant to protect trade secrets and other sensitive information of its products. A lower judge struck down the camera phone ban because employees could construe it to prohibit Section 7 activity. Section 7 of the NLRA serves as essentially the heart of the NLRA and protects employees’ rights to self-organize and engaged in concerted activity. For more information, click here.

However, the Board reversed. It found that the rule – which was neutral on its face – protected legitimate security interests and was not intended to curtail Section 7 rights. In so holding, the Board reversed the Lutheran Heritage standard for analysis of workplace policies.

The Lutheran Heritage standard required determining whether the employees would “reasonably construe” the rule to limit their Section 7 rights. The Board majority overruled Lutheran Heritage, noting it had caused extensive confusion, led to arbitrary results, and spurred unnecessary litigation. Instead, the Board announced a new test for analyzing workplace rules:

When evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (1) the nature and extent of the potential impact on NLRA rights; and (2) legitimate justifications associated with the rule.

After announcing this new standard, the Board determined that Boeing’s justifications for its rule banning camera phones from the workplace outweighed the potential adverse effect on its employees’ Section 7 rights. Boeing articulated good grounds including that the camera ban was a central component of its strenuous security protocols necessary for Boeing’s accreditation as a federal government contractor and necessary to protect its proprietary information. The Board majority determined that these reasons, as well as others, provided sufficient business justifications and did not implicate any NLRA rights.

After upholding the no camera ban, the Board also announced that all of its future decisions with regard to workplace rules will fall into only one of three categories.

• **Category 1**: rules that are lawful in all cases, either because (1) the rule cannot reasonably be interpreted to prohibit or interfere with workers’ NLRA rights; or (2) any interference is outweighed by business justifications. (Boeing’s rule fell into this category.)

• **Category 2**: rules that may be lawful but warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

• **Category 3**: rules that are always unlawful because they prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not justified with business reasons. (A rule prohibiting discussion of wages or benefits, for example.)

**Takeaways:**

1. The new Board strives to provide greater clarity and certainty for employers.
2. Two companies will be joint employers only when they exercise “direct and immediate” control over terms and conditions of the employment.
3. Employers can maintain and set workplace rules based on sufficient business justifications, even if the rule could be construed by employees to implicate Section 7 rights.

Should you wish to evaluate your current workplace policies or implement new policies in light of the NLRB’s recent decision, please contact our WOODEN MC Laughlin LLP employment law team.

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