NLRB Reverses Precedent on Key Employer Issues

By Robert N. Dare / Dec 20, 2017

Last week, the National Labor Relations Board reversed several controversial decisions of the Obama-era Board, all of which will significantly impact employers. The cases redefine joint employment, create a new analysis for examining work rules, and roll back specific collective bargaining rules and obligations. Employers should take time to review their employment policies and practices to ensure compliance with these new decisions.

Joint Employer Standard – Back to Basics

The Board began its flurry of notable decisions by altering the test for determining whether multiple businesses are joint employers under the National Labor Relations Act. In 2015, the Obama-era Board ruled that two companies could be joint employers if the user employer possessed indirect or potential control over the direct employer's workers. Under this broad standard, almost every employer who used contract workers was at risk of being found to be a joint employer under the Act.

In *Hy-Brand Industrial Contractors, Ltd.*, the Board reversed the prior Board's rule and returned to the traditional joint employment test, which requires that a company exercise actual, direct and immediate control over terms and conditions of employment, as opposed to control that is "limited and routine."

Hy-Brand provides employers who use third-party contract employees with an understandable and reliable standard for joint employment under the Act.

Employee Handbook Rules – Balancing Employer and Employee Interests

Over the past eight years, the Board has found many employer handbook provisions violate Section 7 of the Act because "employees would reasonably construe the language of the challenged rule to prohibit protected Section 7 activity." The Board found civility, no access to company property, limits on class actions, clothing, conduct, conflict of interest, criticism of the company, e-mail, and many other rules violate employees' Section 7 rights.

In *The Boeing Company*, the Board created a new test for determining whether employee handbook rules violate federal labor law. The new test balances employer and employee interests. It requires the Board's evaluation of (i) the "nature and extent" of a challenged rule's "potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule."

This case will affect employer handbooks, human resource and other policies. As a result of this decision, employers should review their policies to ensure they can articulate the business justification for the policies.

Bargaining Units and Community of Interest

Since its 2011 decision in *Specialty Healthcare*, the Board has permitted unions to organize employees using micro-units. A micro-unit consists of a smaller group of employees who may have similar community of interests as a larger unit.

In *PCC Structurals, Inc.*, the Board struck down *Specialty Healthcare*. The Board will now return to its prior approach, which is to evaluate whether petitioned-for employees share a community of interest "sufficiently distinct" from excluded employees to warrant their own unit. The community interest test requires the Board to determine:

- Whether the employees are organized into a separate department;
- Have distinct skill and training;
- Have distinct job functions and perform distinct work, including inquiry into the amount of job overlap between classifications;
- Are functionally integrated with the employer's other employees;
- Have frequent contact with other employees; interchange with other employees;
- Have distinct terms and conditions of employment and are separately supervised.

This decision strengthens employers' ability to combat fractured or "micro units" It may also make it more difficult for unions to organize a small group of employees in an effort to get in the door, and ultimately unionize the rest of the workforce.

Duty to Bargain

In 2016, the Board issued a much-criticized ruling that an employer must provide notice to, and bargain with, the union when it implements a past practice, even if the employer's actions were taken pursuant to an expired CBA. In *Raytheon Network Centric Systems*, the Board overturned this decision and restored the previous rule that allows employers to modify policies without union permission if the employer takes actions that are not materially different from what it has done in the past, even if the CBA under which the past practices occurred has expired.

This case welcomed the return of a 50 year-old precedent and reaffirms employers' ability to make important modifications, like unit employee health care benefits, in accord with past practices and without union notification.

What's Next?

The timing of these decisions coincides with the end of former NLRB Chairman Philip Miscimarra's tenure on the Board. Thus, the Board currently sits at a 2-2 tie between the Republican and Democratic members until the appointment of a new Board member. Although the NLRB General Counsel has signaled plans to examine other controversial Obama-era decisions, the Board will likely not issue such rulings until a new Member joins the Board.

In the meantime, if you have any questions about how these decisions impact your employment-related obligations please contact Rob Dare at (313) 965-8816 or rdare@clarkhill.com, or another member of the Clark Hill's Labor and Employment Law practice group.