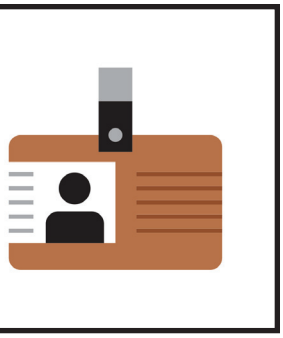
PHILLIPS LYTLE LLP ALERT
FOR BNHRA MEMBERS
LABOR & EMPLOYMENT
FEBRUARY 2018



Recent Important Changes at NLRB Promising for Employers

In 2017, President Trump filled three vacancies at the National Labor Relations Board ("NLRB" or the "Board"). These appointees included two new Board Members, Marvin E. Kaplan and William J. Emanuel, as well as new General Counsel Peter B. Robb.

As the new Republican-led NLRB begins to take shape, employers have already seen a number of major developments, most of which are aimed at walking back policies established during the Obama administration. This alert recaps the recent developments at the NLRB and discusses potential next steps for employers.

Decisions Issued by the Board

The Boeing Company – Handbook Rules

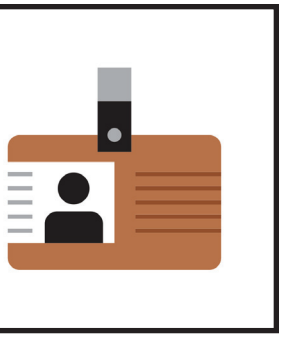
In *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017) the Board overruled *Lutheran Heritage*, 343 NLRB 646 (2004), crafting a new test for determining whether facially neutral handbook rules interfere with employees' rights under Section 7 of the National Labor Relations Act ("NLRA" or the "Act"). Under the standard from *Lutheran Heritage*, the Board found that simply maintaining a facially neutral handbook rule violated the Act if the rule would be "reasonably construed" by employees to prohibit activity protected by Section 7 of the Act.

However, in *Boeing*, the Board eliminated the *Lutheran Heritage* "reasonably construe" standard and adopted a two-prong balancing test, weighing (1) the nature and extent of the potential impact on rights protected by the Act, and (2) legitimate justifications associated with the rule. In connection with this new balancing test, the Board outlined three categories of rules to provide greater consistency going forward:

- **Category 1** – rules that are lawful to maintain, either because (i) when reasonably interpreted, the rule does not prohibit or interfere with the exercise of rights protected by the Act; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules include the "no camera" rule in *Boeing* (i.e., a policy restricting the use of camera-enabled devices such as cell phones on company property), rules encouraging "harmonious interactions and relationships," and other rules requiring civility in the workplace (e.g., a policy that employees are expected "to behave in a professional manner that promotes efficiency, productivity, and cooperation").
- **Category 2** – rules that warrant individualized scrutiny as to whether the rule would prohibit or interfere with rights protected by the Act, and if so, whether such adverse impact is outweighed by legitimate justifications.
- **Category 3** – rules that are *unlawful* to maintain because (i) they would prohibit or limit conduct protected by the Act, and (ii) the adverse impact on rights protected by the Act is not outweighed by the business justification for the rule. An example of a Category 3 rule would be a rule prohibiting employees from discussing wages or benefits with one another.

Hy-Brand – Joint-Employer Status

In *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017), the Board overruled *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), and returned to its prior standard for joint-employer liability. In *Browning Ferris*, the Board had held that, when determining whether two or more entities are joint employers, the Board would focus on the alleged employer's



right to control those employees and not whether it *actually* exercised control.

However, in *Hy-Brand*, the Board returned to the previous standard, requiring proof that (1) the alleged joint employers "actually exercised" joint control over essential employment terms (rather than simply "reserving" the right to do so); (2) the joint control was "direct and immediate" (rather than indirect); and (3) the joint control was not "limited and routine."

Raytheon – Unilateral Changes after CBA's Expiration

In *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017), the Board overruled *E.I. DuPont de Nemours*, 364 NLRB No. 113 (2016), which had barred an employer from taking unilateral action after the collective bargaining agreement's ("CBA") expiration, if the employer's ability to act unilaterally was a result of the expired CBA, even if consistent with a past practice of the parties. In *DuPont*, the Board held that, despite the CBA permitting the employer to make certain unilateral changes, the employer was unable to do so after the CBA's expiration. The Board found that the employer's ability to take unilateral action had ended when the CBA expired.

However, in its *Raytheon Network* decision, the Board rejected the *DuPont* rule and embraced a different standard:

> [R]egardless of the circumstances under which a past practice developed – i.e., whether or not the past practice developed under a collective-bargaining agreement containing a management-rights clause authorizing unilateral employer action – an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past.

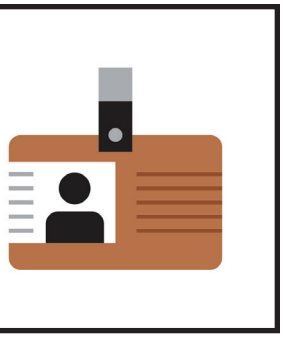
The Board's decision in *Raytheon Network* affirms that simply continuing a past practice of unilateral changes following a CBA's expiration does not create a duty to bargain with the union and/or constitute an unfair labor practice.

General Counsel's New Guidelines – GC Memo 18-02

In addition to the above, on December 1, 2017, less than a month into his term, General Counsel Robb issued an advice memorandum, GC Memo 18-02. GC Memo 18-02 outlines the NLRB's new policy objectives, including reviewing and overturning a number of decisions issued by the prior Democrat-led Board.

Specifically, GC Memo 18-02 rescinds a number of memoranda issued by Robb's predecessors, including the controversial Memorandum GC 15-04. GC 15-04 had greatly expanded the categories of ordinary work rules considered to be unlawful under the Act. As such, most employers will benefit from its rescission. Other memoranda rescinded by GC Memo 18-02 include:

- GC 17-01 (General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context);
- GC 16-03 (Seeking Board Reconsideration of the Levitz Framework);
- GC 13-02 (Inclusion of Front Pay in Board Settlements);
- GC 12-01 (Guideline Memorandum Concerning Collyer Deferral);
- GC 11-04 (Revised Casehandling Instructions Regarding the Use of Default Language in Informal Settlement Agreements and Compliance Settlement Agreements); and
- OM 17-02 (Model Brief Regarding Intermittent and Partial Strikes).



GC Memo 18-02 also identifies certain types of cases that regional offices must submit to the NLRB's Division of Advice prior to issuing a complaint. These cases include:

- Concerted activity for mutual aid and protection;
- Common employer handbook rules found unlawful;
- Off-duty employee access to property;
- Conflicts with other statutory requirements;
- Disparate treatment of represented employees during contract negotiations;
- Joint-employer status;
- Successorship;
- Unilateral changes consistent with past practice;
- Duty to provide witness statements to a union;
- Dues check-off; and
- Remedies.

Finally, GC Memo 18-02 provides that certain NLRB initiatives are no longer in effect, including the initiatives seeking to:

- Extend *Purple Communications*, in which the Board held that employees generally have a right to use company email for Section 7 purposes (e.g., union organizing, discussions among employees about wages, and other terms and conditions of employment) during non-working time, to electronic systems beyond email (e.g., phones, instant messaging);
- Narrow certain employer rights to communicate with employees during a union organizing campaign;
- Put the burden of proof on an employer to demonstrate that a union salt would not have remained with the employer for the duration of the claimed backpay period;
- Establish that misclassification of employees as independent contractors is a violation of the Act; and
- Apply *Weingarten* in non-union settings.

What Should Employers Do Now?

The recent changes at the NLRB are promising for employers. Based on the Board's decisions in *Boeing*, *Hy-Brand* and *Raytheon*, as well as GC Memo 18-02, employers should be optimistic.

That said, other Board precedent will continue to be enforced until it is specifically overturned and employers should not expect to see any instant changes with respect to other NLRA issues. Further, certain standards and legal theories have been adopted by the courts. As a result, employers should continue to prudently examine their business decisions to ensure those decisions comply with applicable case law.

Additional Assistance

Should you have any questions regarding the NLRA, or require assistance with any other labor and employment matters, please contact any of the attorneys on Phillips Lytle's Labor & Employment Practice Team. ■

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