

The NLRB Rings in the New Year by Unringing a Few Bells

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Over the last month, we have seen a number of significant restorations of status quo antes. These have come in the form of reverting to earlier precedent, regulations, or guidance. Without further ado, we present some of the more notable developments:

1. Return to predictability for potential joint employers

As we wrote in December, in a case called [Hy-Brand](#), the National Labor Relations Board (NLRB), returned to a previously-established test to determine joint employer status. In other words, this test determines when two or more employers are jointly responsible for complying with legal requirements (e.g., wage and hour law) or when the employers must together bargain with their joint employees.

Prior to its [2015 ruling in *Browning-Ferris*](#), the NLRB found employers were joint employers when two companies actually shared or co-determined their workers' terms and conditions of employment. This required direct and immediate control over such matters as hiring, firing, discipline, supervision and direction, and wages and compensation. *Browning-Ferris* upended this longstanding test by holding that joint employer status exists when the employer has mere possession of such control—for instance, when indirect control existed or the parties' contracts contained otherwise unused language that made such control possible.

By overturning the 2015 decision, the *Hy-Brand* ruling returns this area of the law to a [much greater level of predictability](#) in determining responsibilities and liabilities in a franchise or temporary employment arrangement.

2. Micro bargaining units harder to establish

We have also seen recent changes regarding how appropriate bargaining units are determined: as we [predicted](#) may happen. On December 15, 2017, in *PCC Structurals, Inc.*, the NLRB overturned its 2011 *Specialty Healthcare* decision.

In 2011, *Specialty Healthcare* made it easier for unions to form sub- or “micro” units of small groups of employees, instead of units encompassing all employees at a facility. A union could petition for a very small subset of employees to form a bargaining unit, and the burden was on the employer to prove that the smallest possible

appropriate unit must instead include additional employees. The employer had to show that the excluded employees shared an overwhelming community of interest with the employees included in the petitioned-for unit.

Under *Specialty Healthcare*, employers potentially faced bargaining multiple times with several small units and the creation of several different collective bargaining agreements. Further, workforces or industries which had been resistant to union organization would see possible “footholds” in these smaller units—potentially easing the path for future organization.

The return to the former test results in a more even playing field for all parties. In *PCC Structural*s, the Board reinstated the traditional “community of interest” test, reviving the Board’s statutory obligation to determine the appropriateness of bargaining units on a case-by-case basis, rather than effectively rubber stamping petitioned-for units. The reinstated test requires the union to show that the employees within the petitioned-for unit have interests that are sufficiently distinct from the excluded employees so as to warrant the smaller unit.

3. Employee handbook

In 2004, the NLRB held in *Lutheran Heritage* that an employer could violate the National Labor Relations Act (NLRA) by maintaining workplace rules (including in an employment handbook) that could be reasonably construed by an employee to prohibit the employee’s exercise of his NLRA rights (i.e., protected activities)—even when the rule did not *explicitly* prohibit those protected activities.

By overturning that ruling in *The Boeing Company*, the NLRB determined that it will now evaluate facially neutral rules with a new test. When such rules would, as reasonably interpreted, potentially interfere with the exercise of NLRA rights, the [NLRB will evaluate two things](#): (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

Within that framework, the NLRB also provided three categories of rules to “provide greater clarity and certainty:”

- Category 1 consists of rules which are essentially per se permissible. These include rules that are designated as lawful to maintain, either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Here the NLRB overruled decisions that invalidated employer rules requiring employees to foster “harmonious interactions and relationships” or to maintain basic standards of civility in the workplace.
- Category 2 includes rules that 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 consists of rules which are essentially per se impermissible. These are rules that the Board will designate as unlawful to maintain because they prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. The most notable example here is a rule that prohibits employees from discussing wages or benefits with one another.

Even with the new standard, if a rule is appropriate to maintain, employers should continue to ensure that that rule is applied in a manner that does not prohibit or limit employees from engaging in NLRA-protected activities.

Please contact Evan Bonnett of Hinshaw's Rockford office or your regular Hinshaw attorney for assistance with or further questions about any of these NLRB changes.

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Topics

National Labor Relations Board (NLRB), Bargaining, Collective Bargaining Agreements, Joint Employers, Employee Handbook, Collective Bargaining, Joint Employment, Joint Control