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NLRB Establishes New Employer-Friendly Standards

As was expected, the Republican-majority National Labor Relations Board ("NLRB" or "the Board") has begun to address and modify decisions rendered during the Obama Era. Yesterday, the NLRB ruled on two issues that swung the pendulum from employee- to employer-friendly.

In the first, case, the Board made it more difficult to conclude that an employee handbook is illegal. In the second case, the Board reverted back to the previous standard of determining joint employer status.

New Employee Handbook Standard

Under the old *Lutheran Heritage* standard, employers violated the National Labor Relations Act ("NLRA") by maintaining workplace rules or handbooks that were "reasonably construed" to prohibit employees from exercising NLRA-protected rights. For example, under the previous standard, the Board found against employers who had rules or policies that prohibited workers from criticizing their employers on social media as well as making recordings in the workplace.

In yesterday's ruling in *The Boeing Co. and Society of Professional Engineering Employees in Aerospace IFPTE Local 2001*, the NLRB established the following, new employer-friendly test:

> [W]hen 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: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

This new test balances a policy's impact on workers' rights with the employers' reasons for maintaining the policy. Employers are no longer bound by their employees' "reasonably construed" interpretations of workplace policies. Instead, employers may now balance the potential impact of the policy will have on limiting workers' rights with the employers' legitimate justifications for implementing the rule. This decision should enable employers to amend certain workplace policies that they had previously determined violated *Lutheran Heritage*.

Joint-Employer Test

In a much-anticipated decision by employers, the Board overturned the *Browning-Ferris* joint-employer test. Under the previous standard, a company, and its contractor or franchisees, could be deemed as a joint-employer if the company exerted direct or *indirect* control over the workforce of the contractor/franchisees. This lax standard made it easier for workers, particularly at franchised businesses, to organize into unions and seek collective bargaining.

The new ruling resorts back to the old standard of "direct and immediate" control. The Board held that there is no joint employer status from a company that exhibits control that is "limited and routine." This change should be received very favorably by employers who had contractors and were concerned about being "dragged into" litigation or disputes by the contractor's workforce. Companies still need to be mindful about crossing the line of "direct control," but their concerns should be considerably less under this new ruling.

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