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Electronic Alert

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The Pendulum Swings at the National Labor Relations Board

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On Thursday, December 14, 2017, the National Labor Relations Board (NLRB) issued two decisions overturning precedent established and heavily relied on by the Obama Board. These decisions send a strong signal that the NLRB has shifted to being more favorable to employers. We expect to see the Trump Board overturn many more decisions issued by the Obama Board in the coming months.

A New Test for Work Rules and the End of NLRB Scrutiny

Over the past few years, the NLRB has issued a number of decisions finding common and seemingly innocuous work rules unlawful, often to the detriment of non-union employers. The NLRB relied on the test announced in *Lutheran Heritage* in finding an employee could "reasonably construe" a work rule to chill the exercise of rights protected by the National Labor Relations Act (NLRA). On Thursday, the NLRB's decision in *The Boeing Company* case put an end to the "reasonably construe" standard. The NLRB announced a new balancing test by which work rules will be judged. Under the new test, the NLRB will balance the work rule's potential impact on employees' rights against the employer's legitimate justifications for the work rule. The NLRB applied the new balancing test to a Boeing work rule that prohibited the use of cameras without a valid business need. Boeing explained the rule is necessary to protect its proprietary information from espionage, including information related to the production of military aircraft, which has national security implications. The NLRB held Boeing's justification outweighed the potential effect on employees' NLRA rights.

On December 1, 2017, Peter Robb, the NLRB's new General Counsel (GC) issued Memorandum 18-02, which signaled that the scrutiny over work rules has ended. Robb's memorandum expressly rescinded the prior GC's memorandum, which provided guidance expanding the scope of work rules subject to complaints for violations of the NLRA.

Restoration of Joint Employer Test Requiring Exercise of Control

The second NLRB decision, *Hy-Brand Industrial Contractors*, restored the long-standing joint employer test to require exercise of direct and immediate control. *Hy-Brand* explains the test for determining when two or more companies are joint employers under the NLRA. This case overturns the previous joint employer standard announced in 2015 in *Browning Ferris*, which held that one or more companies would be joint employers if they reserved the right to control the employment terms of another entity's employees. Now, two or more entities are considered joint employers if there is proof that one of the entities *actually exercised* control over the essential employment terms of another entity's employees and has done so directly and immediately, rather than in a limited and routine manner.

The Boeing Company and *Hy-Brand Industrial Contractors* cases are both independently significant developments in labor law, but they could be just the tip of the iceberg. It is more important than ever

to stay current on labor laws. Watch for announcements from us on opportunities for employers to engage in roundtable discussions with our labor lawyers.