BURR ALERT 2018

Out With the Old, In With the New: Is This the "New" NLRB?

By Meryl Cowan January 2018

As you have likely seen by now, December was *quite* a busy month for the National Labor Relations Board ("the Board"). The Board issued major decisions affecting employers, and Peter Robb, the new General Counsel for the Board ("GC"), shed light on his agenda in a new memorandum calling for change within the Board's judicial and enforcement branches.

The trend is clear: the "new" Board is bringing the "old" Board back: 2018, meet 2010. For the past eight plus years, the "old" Board (with a Democratic majority under former President Barack Obama) issued labor-friendly decisions affecting *all* employers, with an unprecedented impact on non-union workplaces. In one month, it appears that the "new" Board is correcting the imbalance employers have seen over the past eight years with a return to neutrality. An overview of the major highlights from December of 2017 may predict where the Trump Administration is heading:

1) **New GC Memo 18-02: GC Peter Robb Debuts with a Clear Message, "No Winter Blues"**

On December 1, the newly appointed GC Peter Robb issued memorandum GC 18-02, calling for clear reform and reconsideration of the "old" Board's former reign. GC 18-02 orders Board officials to consult the GC's office on cases involving precedents set on worker rights during the last eight years for a potential "alternative analysis" -- suggesting the old regime's decisions are about to change (as several key decisions subsequently did).

It also rescinds former Advice Memorandums issued over the past eight years, paving the way for a sea change. Notably, GC Memo 18-02 rescinded GC Memorandum 15-04, which comprised almost thirty pages of discussion on (potentially) unlawful workplace rules. What does this "new" interpretation of potentially unlawful workplace rules really mean? The last eight years were peppered with NLRB decisions determining that common handbook policies were unlawful.[1] Now, cases involving potentially unlawful handbook policies, such as rules prohibiting disrespectful conduct, rules restricting social media posts, rules prohibiting use of employer trademarks and logos, and rules prohibiting recording in the workplace, must be submitted to the Division of Advice first.

The full implications GC 18-02 are yet to be determined. We can say, through this memorandum, the GC appears to be single-handedly shaping labor policy and moving towards a more neutral NLRB, in direct contrast to the activism the NLRB has engaged in over the last eight years.

[1] (*See, e.g.*, M. Cowan, Burr Alert: *"WTF", Under the NLRB, Employers Should "Cut the Crap?"* June 12, 2015, available here.

2) **NLRB Settlement Agreements: Removing Unreasonable Impediments**

On December 11, the Board decided *UPMC and UPMC Presbyterian Shadyside and UPMC Presbyterian Hospital and UPMC Shadyside Hospital and SEIU Healthcare Pennsylvania CTW, CLC*,[2] making it simpler for parties to reach NLRB settlement agreements.

In reaching its decision, the Board overruled a 2016 case and returned to the prior practice of permitting judges to accept a respondent's proposed settlement terms over the objection of the General Counsel and charging party if the terms are deemed "reasonable" based on factors set forth in *Independent Stave*.[3] Now, one lone holdout to an otherwise reasonable settlement cannot single-handedly force parties into litigation.

3) **Employer Work Rules: Employers, Your Opinion Now Matters to the NLRB**

On December 14, the Board issued its long-awaited decision in *The Boeing Co. and Society of Professional Engineering Employees in Aerospace IFPTE Local 2001*,[4] overruling *Lutheran Heritage*,[5] and directing the Board's judicial branch to give more weight to employer's business interests behind implementing work rules.

Lutheran Heritage, a decision that all employers likely remember, dictated that all employers (whether unionized or not) could not maintain any workplace policies that employees could "reasonably construe" to block them from exercising their rights under Section 7 of the National Labor Relations Act ("NLRA"). As countless former Burr & Forman Labor & Employment E-Notes made clear, the Board used this standard vigorously, challenging employer's policies ranging from social media to "being happy" and cursing in the workplace. The Board has thrown this old standard out, and now requires the Board's judicial branch to balance the "nature and extent" of a challenged rule's "potential impact on NLRA rights" and the "legitimate justifications associated with the rule." This allows employers to explain and defend rules which were previously considered per se violations under *Lutheran Heritage*. While the full impact of this decision is not yet clear, it is a clear signal that the unpredictable and, in some cases, surprising decisions from the past eight years regarding handbooks are at an end.

4) **Joint Employment Clarification: Staying Single or Joining Together**

On December 15, the Board decided *Hy-Brand Industrial Contractors Ltd. and Brandt Construction Co.*("*Hy-Brand*"),[6] reverting back to the former joint employer standard. *Hy-Brand* overruled *Browning Ferris*[7] (which held that two businesses can be joint employers when one has "indirect" or "reserved" control over the other's employees). Now, the Board has returned to the once-

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[2] Case numbers 06-CA-102465, 06-CA-102494, 06-CA-102516, 06-CA-102518, 06-CA-102525, 06-CA-102534, 06-CA-102540, 06-CA-102542, 06-CA-102544, 06-CA-102555, 06-CA-102553, 06-CA-104090, 06-CA-104104, 06-CA-106636, 06-CA-107127, 06-CA-107431, 06-CA-107532, 06-CA-107896, 06-CA-108547, 06-CA-111578 and 06-CA-115826.

[3] 287 NLRB 740 (1987).

[4] Case numbers 19-CA-090932, 19-CA-090948 and 19-CA-095926

[5] 343 NLRB 646 (2004).

[6] Case numbers 25–CA–163189, 25–CA–163208, 25–CA–163297, 25–CA–163317, 25–CA–163373, 25–CA–163376, 25–CA–163398, 25–CA–163414, 25–CA–164941, and 25–CA–164945

[7] *Browning-Ferris Industries*, 362 NLRB No. 186 (2015).

rejected, and now embraced, standard that only businesses sharing "direct and immediate control" are joint employers, abandoning the vague "indirect" and "reserved" control language.[8]

5) **Micro Unit Standard: It's Now Less Overwhelming**

On, December 15, the Board decided *PCC Structurals Inc. and International Association of Machinists & Aerospace Workers AFL-CIO District Lodge W24*, number 19-rc-202188, overruling *Specialty Healthcare & Rehabilitation Center of Mobile*,[9] returning to the traditional standard for determining an appropriate bargaining unit in union election cases.

Specialty Healthcare & Rehabilitation Center of Mobile required an employer assume the (incredible) burden of proving that so-called micro-units proposed by a union in a representation election that excluded employees were inappropriate. To do this, employers had to establish that the employees excluded from the micro-unit shared an "*overwhelming*" community of interest with the proposed micro-unit, and therefore should have been included all along.

Now, the Board has abandoned the "overwhelming" community-of-interest standard, stating it is returning to "the traditional community-of-interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees—both those within and those outside the petitioned-for unit—without regard to whether these groups share an 'overwhelming' community of interests."[10]

What's Next?

This is just a peppering of the rapid-fire changes from the Board in December of 2017, but there is likely more to come. However, there might not be a repeat this meteoric until conditions are right: with the Board's partisan split now at 2-2 since December 21, 2017,[11] a confirmation for the vacant seat is necessary. On January 12, President Trump selected Morgan Lewis & Bockius LLP partner John Ring to fill the vacancy on the five-member Board. If confirmed, his seat would restore a Republican majority. Once the vacancy is filled, it may take time for the Board to find the right "test cases" to overrule existing precedent. Union and Non-union employers should keep attuned to labor policy as it continues to develop and change under the new Administration.

To discuss further, please contact:

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or the Burr & Forman attorney with whom you regularly work.

[8] For an in-depth analysis, *see,* H. Hishamuda, *Burr Alert: Sea Change in Labor Policy as the Newly Minted Trump NLRB Loosens Restrictions on Workplace Policies and Narrows the Joint-Employment Standard*, Dec. 15, 2017, available here.

[9] 357 NLRB 934 (2011).

[10] *PCC Structurals Inc. and International Association of Machinists & Aerospace Workers AFL-CIO District Lodge W24*, number 19-rc-202188 (Dec. 15, 2017).

[11] *See* National Labor Relations Board, *Members of the NLRB* since 1935.