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EMPLOYMENT LAW COMMENTARY

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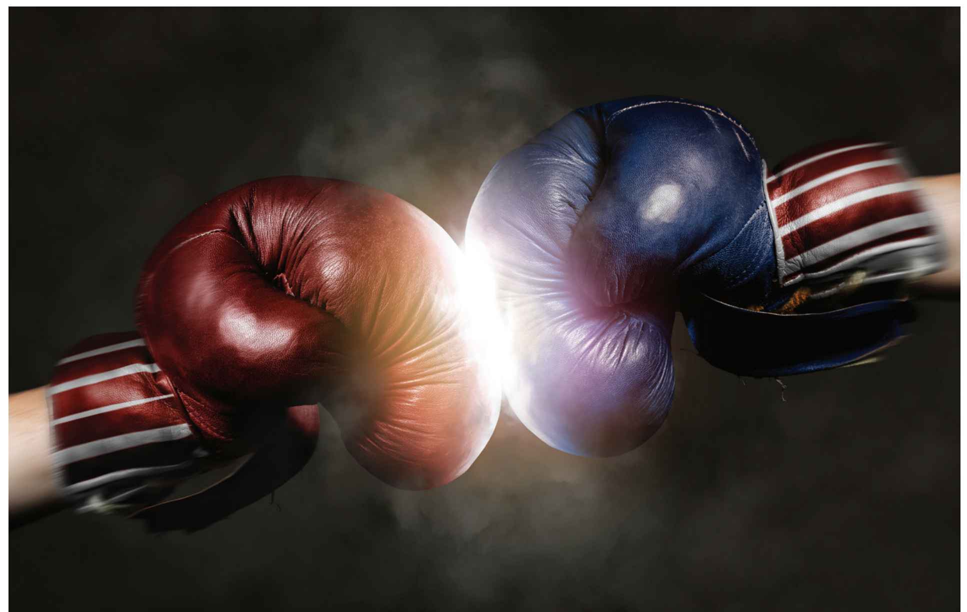

BOOMERANG: THE TRUMP NLRB SUPPLANTS THE OBAMA NLRB

By Timothy F. Ryan

When Donald Trump took office in 2017, the members of the NLRB ("Board")[1] were predominantly appointees of President Obama. During the Obama presidency, the Board issued decisions that were mostly favorable to the interests of organized labor and its employee-members. Those decisions reversed years of Board precedent that had been relied upon by employers as they formulated company policies and made decisions about their relationships with employees and the unions representing them. The changes in the law made during this period have been described as "radical." These new decisions changed what employers were allowed to put in their employee handbooks, took away employers' rights to restrict employees' use of their email systems, and forced employers into joint employer relationships with the independent contractors performing work for them. The union movement was pleased.

In 2017, President Trump named Peter B. Robb as the new General Counsel to the Board, replacing the former Obama appointee and beginning the Trump transformation of the Board. The General Counsel has significant responsibilities

continued on page 2

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at the Board, including determining which cases will be prosecuted by the agency, and what theories of law will be advanced. In December 2017, Robb issued a memo to Board offices around the nation, instructing the offices to send certain cases to Washington, D.C. for advice on how they should be handled.

In his memo, Robb advised the offices that it was mandatory that they seek his office's advice on matters involving "cases over the last eight years that overruled precedent," an undisguised announcement that he intended to undo eight years of Obama-inspired NLRB law.

At the same time, as the terms of Obama-appointed members expired, Trump appointed new members to the Board who had a vision different than that of their predecessors.

Trump appointees now dominate the Board and are guided by a General Counsel with a clear agenda to undo the work of the Obama Board. The employer community is excited.

Is the Trump Board and its General Counsel living up to employers' expectations? As the following sections of this article demonstrate, it would seem so.

EMPLOYEE HANDBOOKS AND WORK RULES

A number of decisions issued by the Obama Board strictly applied a standard developed in 2004 that held that, when judging the legality of provisions of employee handbooks or work rules, either will be found to be illegal if employees could "reasonably construe" the policy or rule to somehow prevent them from exercising their rights under federal labor law. That very "flexible" definition was taken to its extremes by the Obama-appointed General Counsel at the time. It seemed that almost no handbook or work rule was safe from attack because some employee *might* "reasonably construe" it to interfere with his or her rights. During that period, many employee handbook policies were found illegal, including, for example, rules that forbade camera-enabled devices such as cell phones on an employer's property, rules that prohibited criticizing an employer on social media, and rules restricting the making of recordings in the workplace.

In December 2017, the new Trump Board issued a decision in *The Boeing Company*, 365 NLRB No. 154 (2017). Boeing had a long-held policy that prohibited the taking of pictures on its property. The purpose of the policy was to maintain the security of Boeing's facilities and its proprietary information. Specifically overruling prior decisions, the Trump Board held that it would no longer judge employee handbook rules by the very fluid standard of finding a policy unlawful if an employee could "reasonably construe" a rule as somehow unlawfully restrictive of lawful conduct.

In doing so, the Board noted that "over the past decade and one/half, the Board has invalidated a large number of common sense rules and requirements that most people would reasonably expect every employer to maintain." In *Boeing*, the Board said that, in the future, it would consider the "nature and extent" of a challenged rule's "potential impact on [employee legal rights]" and the "legitimate justification associated with the rule." The Board then laid out three categories the Board would use in future analysis of workplace rules.

Boeing makes it possible now for an employer to determine if a rule is legal, without the need to speculate if an employee could "reasonably construe" the rule to be illegal. The *Boeing* decision brings enormous relief to human resource directors across the nation who had been spending an inordinate amount of time trying to decide if any of its company's rules were unlawful and litigating over rules that the Board considered a violation of employee rights.

MICRO UNITS

In another Obama-era decision, the Board held that if a union petitioned for an election among a specific group of employees, no matter how small the group, and those employees shared a "community of interest" among themselves, the Board would let an election proceed in that specific unit unless the employer could prove that other employees, not included in the unit shared an "overwhelming" community of interest with the petitioning group, an almost impossible standard to meet. The harm of allowing these "micro-units" to be formed is that some employees, working for an employer in the same location, sometimes even if they are working with another like group, could be represented by a union and their coworkers would not be represented. Micro units create divisions in the workplace, undermine retail operations, and limit opportunities for employees who need to move easily across various aspects of an employer's operations to gain advancement. The Trump Board, in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), ended this foolishness and returned to the traditional community of interest standard that had been the rule during most of the Board's history.

JOINT EMPLOYERS

The most reviled decision of the Obama Board was its decision in *Browning-Ferris*, 362 NLRB No. 186 (2015), which loosened the standard for determining whether two separate employers should be considered "joint employers" and thus share each other's labor law liability and bargaining obligations to a union. Under *Browning-Ferris*, an employer could be considered a joint employer with one of its contractors or franchisees even if it merely had "indirect and unexercised control over the other party." The traditional standard before *Browning-Ferris* required that

continued on page 3

an employer have “direct and immediate” control over the employees of another employer, such as setting the wages, hours, and working conditions of a franchisee’s employees, to be covered as a joint employer. The Obama Board’s revision of the standard to “indirect and unexercised” control put most national fast food chains at risk for liability for the acts and conduct of their franchisees, even those located thousands of miles from corporate headquarters.

After a couple of false starts involving issues of whether the Trump Board’s members should hear a particular case that would have served as the vehicle for reversing *Browning-Ferris* and returning to the traditional standard, the Board decided to change the law through Rule Making, a process of issuing rules governing a certain issue rather than a decision following litigation. Not surprisingly, the Board’s proposed rule returns the law on joint employer to its traditional form.

USE OF EMPLOYER EMAIL

In *Purple Communications*, 361 NLRB No. 126 (2014), the Obama Board determined that employees should be allowed to use their private employer’s email system to discuss and further unionization. The U.S. Chamber of Commerce and other business groups argue that the decision takes away an employer’s right to control its own email systems.

This issue is currently up for consideration in *Caesars Entertainment Corp*, 28-CA-060841. The Board has invited the public’s input on this issue and has set an October deadline for comments before it decides the case. Because of recent comments submitted in a footnote to a brief by the General Counsel in another case, it is expected that he will argue to the Board that *Purple Communications* should be reversed because the decision ignores the facts of the workplace and because there are First Amendment concerns about forcing an employer to pay for speech on its own email systems that it might oppose.

MORE TO COME?

Of course there is. There are many other cases and policies viewed by the employer community as improper and disruptive. For example, employers are hoping that the Trump Board will revise a Rule established by the Obama Board that created “quickie” or “ambush” elections, requiring that elections be held almost immediately after a petition is filed, effectively denying an employer the time necessary to inform its employees of the consequences of unionization. The Board, of course, will have to wait for cases raising these issues, before it can address them.

Ever since the Regan Administration there have been reversals of decisions by Democratic and Republican administrations alike. However, nothing before compares to what the Obama Board did and, of course, the Trump Administration is determined to undo much of the Obama Board’s work.

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To view prior issues of the ELC, click here.

1 The National Labor Relations Board (NLRB) is a federal executive agency that administers the National Labor Relations Act. That law controls the rights and obligations of employees, unions, and employers with regard to their relationships to one another. The Board also administers elections to determine if a union will represent the employees of an employer. The Board consists of five members, all appointed by the President with the advice and consent of the Senate. By tradition, a majority of the Board is made up of members of the President’s party.

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