

NLRB Scales Back Obama-Era Expansions Of Employee Protection

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On December 14, 2017, the National Labor Relations Board (NLRB) overruled two NLRB decisions under which the Obama-era NLRB had expanded the scope of rights provided to employees under the National Labor Relations Act (NLRA).

First, in ***Boeing Co.***, the NLRB overruled the 2004 decision of *Lutheran Heritage Village-Livonia*, regarding the NLRB's standard for whether facially neutral workplace rules, policies and employee handbook provisions unlawfully interfere with the exercise of rights protected by the NLRA. Under the previous standard, the NLRB had held that employers violated the NLRA by maintaining facially neutral rules that could be "reasonably construed" by an employee to prohibit the exercise of NLRA rights, which included policies requiring employees to foster "harmonious interactions and relationships" or to maintain basic standards of civility in the workplace. In *Boeing Co.*, the NLRB overruled this standard and held that, in evaluating facially neutral workplace rules, the NLRB will consider (1) the nature and extent of any potential impact on NLRA rights and (2) the employer's legitimate justifications for the workplace rule. As opposed to the old standard, which failed to take into consideration an employer's reasons for adopting a policy, this new standard allows for the NLRB to consider reasonable distinctions between different industries and work settings and to examine the purpose and impact of the challenged workplace rule. Accordingly, employers should develop workplace rules and policies that are based on legitimate and neutral business purposes. Furthermore, employers should note that although the *maintenance* of

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particular workplace rules may be lawful, the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the NLRA, depending on the circumstances.

Second, in ***Hy-Brand Indus. Contrs., Ltd.***, the NLRB overruled the 2015 decision of *Browning-Ferris Industries*, and returned to the pre-*Browning Ferris* standard that governed joint-employer liability. Under *Browning-Ferris*, the NLRB had held that proof of indirect control, contractually-reserved control that has never been exercised or control that is limited and routine could be sufficient to establish a joint-employer relationship. In returning to the pre-*Browning Ferris* standard, the NLRB held in *Hy-Brand* that two or more entities will be deemed joint employers under the NLRA only if there is proof that one entity has exercised control over essential employment terms of another entity's employees. According to the NLRB, this return to the pre-*Browning Ferris* standard narrows the joint-employer definition in line with common law.