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Miscimarra Era Ends With Four Key Employer-Friendly Decisions

After years of writing cogent dissents in a series of union-friendly decisions, former National Labor Relations Board (NLRB) Chairman Miscimarra ended his term on the newly-constituted NLRB with four employer-friendly decisions. The following summary sets forth the seminal holdings of those four decisions.

New Standard for Reviewing Handbooks and Employment Policies

The NLRB reversed its existing standard and developed a new test for analyzing the legality of work rules, policies, and employee handbook provisions under the National Labor Relations Act (NLRA). Under the previous test, if a rule did not explicitly restrict protected activity, then it nevertheless violated the Act if: “(1) *employees would reasonably construe the language to prohibit Section 7 activity*; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage*, 343 NLRB 646, 646–47 (2004) (emphasis added). That test, as interpreted by the prior NLRB, led to numerous decisions where the Board “had invalidated a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain.”

In *The Boeing Co.*, decided on December 14, the NLRB recognized “multiple defects” with the prior test, expressly overruled it, and developed a new test. Under the new standard, to evaluate a facially neutral workplace rule, policy, or handbook provision that may be reasonably interpreted to potentially interfere with 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.” *Id.* at 3 (emphasis added). This standard allows the NLRB to strike a more equitable balance between employees’ rights under the NLRA and employers’ business justifications for their policies. This new standard will be applied

retroactively to all pending cases and will “provide far greater clarity and certainty to employees, employers and unions regarding whether and to what extent different types of rules may lawfully be maintained.”

Elimination of Micro-Units

The NLRB reversed its position on micro-units, overruling its controversial 2011 *Specialty Healthcare* decision. *Specialty Healthcare* made micro-units possible by requiring challengers of a proposed bargaining unit to demonstrate that additional employees not included in the proposed unit shared “an *overwhelming* community of interest” with the petitioned-for unit. 357 NLRB 934 (2011).

In *PCC Structural*s, decided on December 15, the NLRB reversed the “overwhelming community of interest” standard as fundamentally flawed and returned to the traditional community-of-interest standard applied by the NLRB for decades. Under this revived test, the NLRB analyzes the appropriateness of a proposed bargaining unit by considering factors including, but not limited to, whether employees are organized in separate departments, have distinct skills and training, have distinct jobs and work, are separately supervised, and have distinct terms and conditions of employment. *Id.* at 5. The return of the traditional community of interest test is expected to make micro-units a thing of the past.

Reversal of Joint-Employment Test

The NLRB also eliminated the expansive joint employment test it issued in the landmark 2015 *Browning-Ferris* decision. In its place, the NLRB returned to its prior standard for determining joint employer status. In *Browning-Ferris*, the NLRB majority rewrote decades-old precedent by redefining and expanding the joint employer test. Indeed, it determined that even when two entities have *never* exercised joint control over essential terms and conditions of employment, and even when any joint control is not “direct and immediate,” the two entities still will be joint employers based on the mere existence of “reserved” joint control, or based on indirect control or control that is “limited and routine.”

In *Hy-Brand Industrial Contractors, Ltd.*, decided on December 14, the NLRB overturned *Browning Ferris*, indicating it “is “a distortion of common law,” “contrary to the Act,” “ill-advised as a matter of policy,” and “prevent[s] the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations.” In so doing, the NLRB returned to its prior standard governing joint-employer status. Thus, a finding of joint-employer status requires proof the alleged joint-employer entities have *actually exercised* joint control over essential employment terms (rather than merely having “reserved” the right to exercise control). That control, in turn, must be “direct and immediate” (rather than indirect), and joint-employer status will not result from control that is “limited and routine.” This “new” standard will be applied retroactively to all pending cases.

NLRB Clarifies Its “Past Practice” Unilateral Change

In *Raytheon Network Centric Systems*, decided on December 15, the NLRB overruled its 2016 *E.I. Du Pont de Nemours* decision – concerning an employer’s bargaining obligations before it can implement a unilateral change (via an established past practice) in terms and conditions of employment. In doing so, the NLRB held employers were not legally required to provide unions with notice and an opportunity to bargain over changes to terms and conditions of employment (e.g., revisions to insurance, benefits, wage increases) when these changes were consistent with an employer’s established past practice.

Contrary to the *Du Pont* decision, the above principle (consistent with over 50 years of NLRB prior precedent) applies even if a labor contract was in effect when the past practice started or no labor contract existed when the challenged actions arose. Finally, a unilateral action consistent with such a past practice does not trigger a bargaining obligation simply because that action may involve some degree of employer discretion. One cautionary note: An employer must bargain over any such changes where the union seeks to bargain over those announced changes and where the changes are a mandatory subject of bargaining. This new standard

will be applied retroactively to all pending cases.

Next on the Chopping Block? “Ambush” or “Quickie” Election Rules

As we [previously](#) discussed, the NLRB implemented “ambush” or “quickie” election rules in 2014. Those rules significantly reduced the time between the filing of an election petition and the date of the election, along with numerous changes that worked to the disadvantage of employers. Last week, the NLRB [announced](#) it is seeking public input on those rules, asking whether the rules should remain as written, be modified, or be rescinded. The NLRB made clear the request for information does not indicate the rule will be repealed or modified. Rather, the NLRB simply is conducting “an objective and critical review of the effectiveness and appropriateness” of its rules.

Former Chairman Miscimarra’s absence leaves only four of the five NLRB positions filled. Consequently, we will not see any other key NLRB decisions overturned until a fifth NLRB member is confirmed.

If you have any questions regarding the NLRB’s recent decisions or public input regarding the “quickie” election rules, please contact [Tessa Castner](#), [Anne Duprey](#), or [Jeffrey Shoskin](#), or any other attorney in Frost Brown Todd’s [Labor and Employment Practice Group](#).

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