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Employment Law Note

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NLRB Delivers Early Holiday Presents Under Management's Tree

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The much-promised "Trump overhaul" of the Obama National Labor Relations Board ("Board") suddenly shifted into high gear, as the newly minted Republican-led Board recently overturned a number of key Obama Board rulings. A major impetus for the flurry of pro-management decisions was the December 16, 2017 exit of Board Chair Phil Miscimarra, a Republican appointee, and the resulting decisions involve significant rulings by the Obama Board including the controversial joint employer test, handbook "civility" rules, micro units, and the duty to bargain about changes to past practice.

Starting with the *Hy-Brand Indus. Contractors, Ltd.*, decision handed down on December 14, 2017, the Board overruled its 2015 *Browning-Ferris Industries* to return to a standard requiring the exercise of actual control by two entities rather than mere indirect or potential control over workers employed by another entity. While finding that the employers did exercise sufficient joint control to be joint employers in the *Hy-Brand* case, the Board went out of its way to overturn the *Browning-Ferris* standard.

In *The Boeing Company* decision issued on December 14, 2017, the Board also overturned the 2004 *Lutheran Heritage* decision calling for the setting aside of neutrally-worded employer handbook rules if they could be "reasonably construed" by employees to chill their protected rights. The Board, instead, will now follow a new two-part test looking at "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." The new standard is viewed as providing greater clarity in determining whether employer handbook policies, especially those involving so-called "employee civility" requirements, violate federal labor law.

Employer holiday dreams to move away from so-called "micro units" favored by the Obama Board were answered by the overturning of the *Specialty Healthcare & Rehabilitation Center of Mobile* decision. This decision and others allowed unions to define smaller subsets of workers within a larger group as an "appropriate unit" for unionization purposes. This allowed unions to bite off smaller groups in initial elections even if the union did not enjoy majority support within the larger workforce. In reversing this trend, the Board announced that it would return to a "community of interest" test to determine whether such smaller proposed units should be included with other employees based on the types of work performed, their skills and training, and the nature of the organization.

Finally, in *Raytheon Network Centric Sys.*, the Board held that a unionized employer was not required to bargain with a union regarding changes to an employee benefit plan when the employer could establish a past practice of making unilateral changes without a bargaining demand by the Union. The Board has also signaled a willingness to revisit its implementation of union election changes, including

the much-maligned "quickie election" rules implemented during the Obama administration. These stocking stuffers are sure to please management.

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