Sea Change in Labor Policy as the Newly Minted Trump NLRB Loosens Restrictions on Workplace Policies and Narrows the Joint-Employment Standard

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In the past eight plus years, the National Labor Relations Board (the "NLRB" or the "Board") with a Democratic majority under former President Barack Obama (the "Obama Board") has issued labor friendly decisions that have had profound effects on employers across industries. Chief among these decisions are Lutheran Heritage and Browning-Ferris.

Under Lutheran Heritage the Board consistently struck down seemingly innocuous workplace and handbook policies. Moreover, the Board did so under a theory that such policies could reasonably be construed to interfere with employees' rights under Section 7 of the National Labor Relations Act (the "NLRA") to, among other things, discuss the terms and conditions of their employment and otherwise engage in activity for their mutual aid or protection.

Further, under Browning-Ferris, the Board greatly expanded the joint-employment standard. In that decision, the Board held that two or more companies - including staffing companies and their clients as well as franchisors and franchisees - could be jointly liable for violations of the NLRA and required to engage in bargaining together if one of the companies had the potential to exercise control over the wages and working conditions of the other company's workers even if that potential was never made real.

However, on December 14, 2017, the Board, now with a 3-2 Republican majority since the appointment of two additional Republican members (the "Trump Board"), suddenly reversed course as it issued two decisions (Boeing and Hy-Brand International) overturning Lutheran Heritage and Browning-Ferris. In doing so, the Board made it clear that these decisions would apply immediately to all cases pending before the NLRB, as well as to new cases going forward.

Simply put, Boeing and Hy-Brand International represent a sea change in the Board's approach to both workplace policies and the joint-employment relationship specifically. Further, the language used in the decisions, as well as the political makeup of the Trump Board, may result in further changes in labor policy generally as the Trump Board continues to issue pro-employer decisions. A summary of the Boeing and Hy-Brand International decisions, as well as the limitations of and key takeaways from the decisions, can be found below.
Boeing

*Boeing* involved an aircraft manufacturer with a workplace camera usage and picture taking policy under which employees could not take pictures or make video recordings without the approval of the company's security team. Further, employees could not get approval unless they had a specific business purpose for taking pictures or recording video. Boeing adopted the policy to, among other things, (a) implement security measures commiserate with its status as a federal contractor; (b) comply with federal statutes prohibiting the disclosure of export-controlled information; (c) prevent the disclosure of Boeing's proprietary information including manufacturing methods and processes; (d) prevent the disclosure of Boeing employees' personal information; and (e) prevent Boeing, as a company in a safety sensitive field with a large operations facility, from becoming the target of a terrorist attack.

The General Counsel for the NLRB (the "General Counsel") challenged the policy arguing that, under *Lutheran Heritage*, the policy could be reasonably interpreted to restrict employees' Section 7 rights. At the trial level, the Administrative Law Judge (the "ALJ") agreed with the General Counsel and found that the policy was unlawful. In doing so, the ALJ discounted Boeing's concerns over protecting its confidential information, and its security concerns. Boeing appealed the ALJ's decision to the Board. The Board reversed the ALJ's decision and made three key holdings.

First, the Board explicitly rejected and outright overturned the *Lutheran Heritage* framework. Specifically, the Board held that in determining whether employers' workplace policies are lawful, it will not only examine whether the policies may theoretically effect employees' Section 7 rights but will also **weigh the potential effects against the employer's legitimate justifications for maintaining such policies**. In doing so, the Board highlighted the importance of legitimate business interests, and the NLRB's central role in striking the appropriate balance between employees' statutory rights and the legitimate concerns of employers.

Second, the Board then applied its new balancing standard to hold that Boeing's policy restricting picture taking and camera usage is indeed lawful. In its analysis, the Board conceded that the company's policy could potentially affect employees' Section 7 rights by, for example, prohibiting employees from posting their engagement in protected activity on Facebook. However, the Board noted that Boeing's business justifications far outweighed the infringement on employees' Section 7 rights. In doing so, the Board found that Section 7 rights were only lightly impacted as, even though employees could not post their engagement in protected activity on Facebook, they could still engage in that activity. Further, in dicta, the Board noted that similar camera rules are likely to be held lawful for similar reasons.

Third, the Board cautioned that even when it finds policies are justified by legitimate business interests, the policies may still form the basis of unlawful employer activity. Specifically, the Board noted that an employer may not use a lawful policy to justify the termination or discipline of an employee who was engaged in otherwise protected concerted activity.
Hy-Brand International

*Hy-Brand International* involved two separate construction companies - Brandt and Hy-Brand. Brandt and Hy-Brand were both owned by a father and his three sons. Further, the companies shared a corporate secretary who was involved in hiring and termination decisions for both companies. Likewise, the companies provided their respective employees the same 401(k) and health benefits. Moreover, the companies' respective employees were governed by a set of the same employment policies and were required to attend joint mandatory training on the same.

Not surprisingly, the General Counsel alleged that Brand and Hy-Brand were joint-employers. The ALJ at the trial level agreed and held that, under *Browning-Ferris*, the two companies were joint-employers. The Board, after an appeal by both companies, upheld the ALJ decision but overturned *Browning-Ferris* in the process.

In overturning *Browning-Ferris* the Board criticized the *Browning-Ferris* decision for finding joint-employment in cases where a company, let's call them the client, did not directly control the terms and conditions of another company's, let's call them the provider, workforce but instead either reserved, through contract or otherwise, the right to control the workforce's terms and conditions of employment or consulted with provider on who it wanted to work with and/or how the provider's employees were to complete a task for the client. Further, the Board stated that it:

- Will return to focusing its joint-employment analysis on instances where a company actually, directly, and consistently tells another workforce how to perform work; and
- Will no longer focus on a company's limited or routine supervision of another workforce like monitoring, evaluating, and improving the results or ends of that workforce's performance.

Limitations of Boeing and Hy-Brand International

As you can see *Boeing* and *Hy-Brand International* drastically altered the Board's approach to both workplace policies and the joint-employment relationship in employers favor. However, employers should be careful as these decisions have some limitations. Specifically:

- It is unclear under *Boeing* how the Board will weigh different types of business justifications. For example, it's unclear whether the result in *Boeing* would have been different if the employer did not serve as a government contractor in a sensitive industry that could be affected by terrorism.
- Likewise, the Board did not clarify in *Boeing* how it will weigh different types of Section 7 rights. For example, it's unclear whether the result in *Boeing* would have been different had the policy at issue directly affected a core Section 7 right like discussing the terms and conditions of employment.
- The Board in *Boeing* cautioned employers that they may be liable for an unfair labor practice if they terminate or discipline an employee engaging in protected activity and use the lawful policy as the impetus for doing so.
• It is unclear under *Hy-Brand International* how the Board would've handled a much closer case and more traditional joint-employment case involving a temporary staffing agency and a manufacturer for example.

**Key Takeaways**

*Boeing* and *Hy-Brand International* are sure to have lasting effects on labor policy under the Trump Board as subsequent decisions expand the new workplace policy and joint-employment standards. For now, employers should be cognizant of the limitations noted above, and aware that:

1. *Lutheran Heritage* is no longer the law of the land and, under *Boeing*, the Board will now consider business justifications when determining the lawfulness of workplace and handbook policies.
2. *Browning-Ferris* is no longer the law of the land and, under *Hy-Brand International*, the Board's joint-employment analysis (a) no longer focuses on a company's limited or routine supervision of another workforce like monitoring, evaluating, and improving the results or ends of that workforce's performance; and instead will (b) focus on instances where a company actually, directly, and consistently tells another workforce how to perform work.

In light of these decisions, do not hesitate to contact Burr should you have any questions or concerns about whether and how these new decisions affect your existing workplace policies and relationships with third-party companies like staffing companies, and/or franchisors or franchisees.

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