Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

The NLRB's Shift to Employer Friendly Positions

The National Labor Relations Board has been retreating from the pro-labor positions that it took during Barack Obama's presidency. In August 2017, the new administration's appointments gave the Board its first 3-2 Republican majority in over eight years. Although the departure of NLRB Chairman Philip A. Miscimarra on December 16, 2017 returned the Board to a 2-2 Republican-Democratic split, management-side labor attorney John Ring was nominated to the Board on January 12, 2018. Once the Senate confirms Mr. Ring, the NLRB will again have a 3-2 Republican majority. In addition, on November 8, 2017, Peter B. Robb became the Board's General Counsel. The new General Counsel is expected to ask the NLRB to reconsider how it enforces the Act in many instances, and has also been considering substantial changes in the operation of the Board's Regional offices. These developments affect both union and non-union employers, because the rights that the National Labor Relations Act provides to employees apply in both union and non-union workplaces.

The Board's recent pro-employer actions include the following decisions.

The Boeing Company

In its recent decision in *The Boeing Company*, the Board rejected the standard it established over a decade ago in *Lutheran Heritage Village–Livonia*. In *Lutheran Heritage*, the NLRB ruled that an employer violates the NLRA when it maintains a workplace rule that "reasonably tends to chill" employees in their exercise of their rights under the Act. Using this reasoning, the NLRB previously found in many cases

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that facially neutral workplace rules violated employees' rights under Section 7 of the NLRA. Some of those rules involved policies requiring employees to behave in a professional manner or to work harmoniously, and policies banning profanity and abuse among co-workers. In particular, some of those rules included civility requirements in employers' social media policies. To prevail, employees merely had to show that the language of the rule could be interpreted as violating their right to engage in concerted activity. The Board would then not consider the employer's reason for the rule.

In *The Boeing Company*, the employer, a manufacturer of military and civilian aircraft, established a blanket ban of camera-enabled devices on its premises to protect highly-sensitive information and to avoid security and safety risks. The Administrative Law Judge found that this Boeing policy tended to chill employees' exercise of their Section 7 rights. However, the NLRB reversed the ALJ, and overturned the standard established in *Lutheran Heritage*. The Board held the camera ban rule to be lawful, reasoning that employers' interests in maintaining certain workplace rules should be taken into consideration. The Board explained that *Lutheran Heritage* failed to take into account real life facts and circumstances that may necessitate the implementation of restrictive workplace rules.

The new standard for workplace rules established in *The Boeing Company*, is that if a rule does not explicitly restrict activities protected by Section 7 of the NLRA, then it will only be deemed a violation of the Act if: (a) employees would reasonably construe the language of the rule to prohibit Section 7 activity, (b) the rule was promulgated in response to union activity, or (c) the rule was applied to restrict the exercise of Section 7 rights. This standard provides for consideration of both employees' interpretation of work policies and employers' interest in instituting the policies.

PCC Structurals, Inc.

The Board in *PCC Structurals, Inc.* recently overturned its prior "micro unit" rule that it established in *Specialty Healthcare & Rehabilitation Center of Mobile*. In *Specialty Healthcare*, the Board had adopted new standards for determining whether it would conduct elections among small groups of employees, i.e., micro-units, when employers challenged such units as inappropriate because they excluded other employees with whom the petitioned-for employees shared a community of interest. In such situations, the *Specialty Healthcare* decision placed the burden on employers to prove that the employees they desired to include in the petitioned-for unit shared an "overwhelming community of interest" with the union's proposed bargaining unit. Under *Specialty Healthcare*, unions could cherry-pick small groups of employees at larger employers that were traditionally harder to organize.

In *PCC Structurals, Inc*., the Board rejected the "overwhelming community-of-interest" test and clarified the correct standard for determining whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees. The Board explained in *PCC Structurals* that it would return to its traditional community-of-interest analysis and abandon the "overwhelming community-of-interest" test.

Quickie Election Rules

On December 12, 2017, the Board published a Request for Information seeking comments on whether the "quickie" union election rules it adopted in 2014 should be retained as is, kept with modifications, or rescinded entirely. We believe that, after it has reviewed all comments, the Board will revise the "ambush" election rules to make them less hostile to employers.

Hy-Brand Industrial Contractors, Ld.

Before Chairman Miscimarra's term ended, the Board, in *Hy-Brand Industrial Contractors, Ld.*, had overruled the pro-union joint employer test that it had adopted in 2015 in *Browning-Ferris Industries*. However, on February 26, 2018, the NLRB vacated its decision in *Hy-Brand*, thus reinstating the Board's *Browning-Ferris* union-friendly joint employer test that *Hy-Brand* had overruled. The Board decided to vacate *Hy-Brand* after the NLRB's Inspector General issued a report that concluded that Member William Emanuel should have recused himself from participating in the *Hy-Brand* decision. Emanuel's former law firm represented one of the joint employers in the *Browning-Ferris* decision. Under the reinstated *Browning-Ferris* standard, the Board's position is that two entities are joint employers where one exercises indirect control over the other's employees, or where one entity has reserved rights of control over the other's employees, even if unexercised. However, it is very likely that the Board will reverse *Browning-Ferris* again when the opportunity arises.

KHRG Employer LLC

The Board recently upheld an employer's decision to discharge an employee for engaging in dishonesty and a security breach in circumstances where the prior Board likely would have ruled for the employee. In *KHRG Employer LLC*, a hotel discharged a worker after he engaged in a security breach while leading a delegation of nearly twenty individuals — many of whom were not fellow employees — into the non-public areas of the hotel to deliver a petition to the hotel's General Manager. The General Manager's office, where the delegation delivered the petition, was in a secure area of the hotel, behind a locked door. In order to enter the secured area, where the hotel stored cash and personnel files, the worker falsely insisted that the

entire delegation was comprised of hotel employees. The Board reasoned that the employee's conduct in presenting the petition with other workers ordinarily would be protected concerted activity under the NLRA. Nevertheless, the NLRB concluded that where non-verbal misconduct is part of the "res gestae" of an employee's protected concerted activity, the Board will "balance employees' right to engage in concerted activity, allowing some leeway for impulsive behavior, against employers' right to maintain order and respect." Here, where the employee's conduct was not impulsive, and where the employee had lied to a security guard, the Board ruled for the employer hotel.

Employer Tips

As soon as the Senate confirms John Ring and he assumes a seat on the Board, we expect many more pro-employer rulings from the NLRB. Employers also can take this opportunity to revisit some of the policies in their handbook, particularly social media policies, which had been informed by the prior Board's positions. We will continue to keep you informed about developments under the National Labor Relations Act.

The following attorneys in our Employment and Labor Law Practice Group can assist employers in answering questions about the NLRB decisions and their impact on workplace policies.

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