



January 2018

2017 Was a Year of Change at the NLRB – but 2018 Promises Even Greater Changes

In the months following Donald Trump's inauguration, those interested in the National Labor Relations Board ("NLRB" or "Board") waited anxiously for the new President to fill key positions that would allow the Board to reconsider many of the actions of the past eight years. Over the last six months, the Board has begun to revisit, and overrule, several union-friendly and pro-employee Obama-era Board decisions. The Board's new General Counsel has also given clear guidance as to where else employers can expect to see his office pursue further changes in how the National Labor Relations Act ("NLRA" or "Act") will be interpreted and enforced.

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In this *Take 5*, we offer an overview of key aspects of what the new Board has done to date, and what can be expected going forward:

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1. What to Look Out for This Year at the NLRB

By Steven M. Swirsky

A. New Board Members and a New General Counsel Set the Stage

In August 2017, [Marvin E. Kaplan](#), a Trump nominee, was sworn in as a Board member, followed shortly afterwards by [William J. Emanuel](#), joining then-Chairman Philip A. Miscimarra, to give the Board its first 3-2 Republican majority in more than eight years. While Chairman Miscimarra's term expired on December 16, 2017, during the months that he was part of the majority with Members Emanuel and Kaplan, the Board decided a number of significant cases in which it overruled [Obama-era holdings](#). These are discussed in detail in the following portions of this *Take 5*.

On November 8, 2017, after the conclusion of the term of Obama-appointee Richard F. Griffin, Jr., Peter B. Robb was sworn in as the Board's General Counsel. According to [the NLRB website](#), as General Counsel, Mr. Robb "is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases."

On January 12, 2018, President Trump nominated management-side labor lawyer [John Ring](#) to replace the vacancy left by Miscimarra's departure. If confirmed, Mr. Ring should provide the majority necessary to carry out the agenda detailed below.

B. The General Counsel's Agenda

In December, General Counsel Robb issued [Memorandum GC 18-02](#) ("[Mandatory Submissions Memo](#)"), identifying those issues to be reviewed and reconsidered and where he is likely to ask the Board to reconsider and change how it interprets and applies the Act. Those identified include not only "cases that involve significant legal issues," but significantly all "cases over the last eight years that overruled precedent and involved one or more dissents, cases involving issues that the Board has not decided, and any other cases that the Region believes will be of importance to the General Counsel." In other words, every case in which the Obama Board overruled prior precedents will be carefully examined by the General Counsel.

The Mandatory Submissions Memo identifies a broad swath of recent Board precedents and topics that must be submitted to Advice, where there is a good chance that the new General Counsel will ask the Board to return to pre-Obama Board interpretations of the Act and practices. These precedents include:

- ***The Use of an Employer's Email Systems for Union Activity:*** All cases involving claims based on *Purple Communications'* holding that "employees have a presumptive right to use their employer's email systems to engage in Section 7 activities" will be reviewed. According to the Mandatory Submissions Memo, General Counsel Robb is effectively overruling prior Advice Memoranda in which

his predecessor noted his initiative “to extend *Purple Communications* to other [employer-owned] electronic systems,” such as the Internet, phones, and instant messaging systems that employees regularly use in the course of their work.

- ***Cases in Which the Obama Board Expanded the Definition of “Concerted Activity for Mutual Aid and Protection”***: In cases such as [*Fresh & Easy Neighborhood Market*](#), 361 NLRB No. 12 (2014), the Obama Board expanded the circumstances in which it would find an employee’s actions to be protected, holding that conduct was for mutual aid and protection even when “only one employee had an immediate stake in the outcome.”
- ***Cases Involving “Obscene, Vulgar, or Other Highly Inappropriate Conduct”***: The new General Counsel will be considering whether the Board went too far in cases such as [*Pier Sixty, LLC*](#), 362 NLRB No. 59 (2015), which held that even expletive-laden Facebook posts hurling vulgar attacks at a manager, his manager’s mother, and his family were protected by the Act.

The Mandatory Submissions Memo also identifies each of the following as issues that must be submitted to Advice:

- work stoppages on employer premises;
- the circumstances in which employers may restrict access to employer property at times when employees are off duty;
- the recent expansion of *Weingarten* rights in the context of employer-mandated drug testing;
- employer obligations and rights with respect to wage increases during bargaining, where the increases are provided to unrepresented employees but not the employees whose wages and increases are being bargained;
- claims by unions that employers are successors by virtue of their hiring a predecessor’s employees as required by local laws;
- the circumstances in which a new employer will be found to be a “perfectly clear successor” and obligated to follow its predecessor’s terms and conditions rather than being free to set new terms and conditions for those it hires from a predecessor’s workforce;
- whether an employer must disclose and produce witness statements prior to arbitrations; and
- whether employers will be required to continue to honor contractual dues check-off provisions after a collective bargaining agreement expires.

There is no doubt that the list will continue to grow and be refined.

2. *Hy-Brand Industrial* Overrules *Browning-Ferris* and Sets New NLRB Standard for Determining Joint-Employer Status

By Daniel J. Green

As part of the Board's [larger trend](#) of scaling back some of the Obama Board's more radical departures for traditional precedent, in [Hy-Brand Industrial Contractors](#), 365 NLRB No. 156 (2017), issued on December 14, 2017, the Board returned to its traditional joint-employer test. In so doing, the Board scrapped the controversial test for joint employers set forth in [Browning-Ferris Industries of California](#), 362 NLRB No. 186 (2015). In its *Hy-Brand* decision, the Board summarizes the joint-employer standard under *Browning-Ferris* as providing 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 will still be joint employers based on the mere existence of reserved joint control, or based on indirect control or control that is limited and routine." *Hy-Brand* alters the standard by requiring that the putative joint employer actually exercise (rather than merely reserve) "direct and immediate" control over its putative employees. And *Hy-Brand* goes on to specify that joint-employer status will not result from control that is "limited or routine."

The NLRB's reasoning in the *Hy-Brand* decision signals the Board's increasing emphasis on legal certainty and predictability. An important criticism of the *Browning-Ferris* standard was its tendency to punish customers with detailed or demanding product specifications and to overlook the reality that many employers are constrained by competitive pressures. For example, many firms enforce [corporate social responsibility policies](#), which require suppliers to abide by minimum standards, such as providing employees paid leave. Unions representing the supplier's employees used *Browning-Ferris* to argue that, by including minimum workplace standards in their product specifications, these customers should be treated as joint employers of their suppliers' employees.

In *Hy-Brand*, the Board specifically focuses on returning predictability to its jurisprudence and expresses a refreshing willingness to consider issues from the perspective of employers as well as employees. The Board sets out to provide a standard that permits employers to enter into contracts with one another without the risk of unpredictable legal consequences. This trend is not limited to *Hy-Brand* but is a common feature of many of the Board's recent decisions. For example, the Board's decision in [The Boeing Co.](#), 365 NLRB No. 154 (2017), focuses heavily on an employer's need to prospectively know which workplace rules will, and will not, run afoul of the NLRA.

Despite these promising developments, employers should be vigilant in monitoring future developments in this area of the law. The Board announced its decision in *Hy-Brand* while the U.S. Court of Appeals for the District of Columbia Circuit was still

considering the appeal of *Browning-Ferris*. The Board asked the DC Circuit to remand the case to be redecided under the *Hy-Brand* standard, but the International Brotherhood of Teamsters (the union in the *Browning-Ferris* case) as well as other unions and pro-union groups still hope to have the DC Circuit decide the case in a manner that will compel the Board to return to the *Browning-Ferris* standard.

3. NLRB Ruling in *The Boeing Co.* Establishes New Standards Governing Employee Handbook Rules and Policies

By Michael F. McGahan and Laura C. Monaco

One of the signatures of the Obama Board was an expansive application of the NLRA in the review and consideration of facially neutral workplace policies and procedures and a standard for review that gave little, or no, consideration to an employer's reasons for adopting the policy. In [The Boeing Co.](#), the NLRB overruled a decision by an earlier Board in *Lutheran Heritage Village*, 343 NLRB 646 (2004), and set aside that approach and articulated a new standard for determining whether facially neutral workplace rules, policies, and employee handbook provisions (collectively, "Work Rules") unlawfully interfere with employees' ability to exercise their rights under the NLRA.

The old standard provided that even if a Work Rule did not explicitly restrict Section 7 activities, it was still unlawful if employees could reasonably construe its language as prohibiting protected activity. Over the years of the Obama Board, the standard further evolved, and with the Board's announced policy of enforcing the NLRA, including application of this standard in non-union workplaces, many employers were surprised to find that their standard and common-sense Work Rules were subject to Board scrutiny and potentially violated the "reasonably construe" standard.¹ With the prior Board's expanded interpretation of "reasonably construe"—and its findings that more and more facially neutral Work Rules violated the Act—employers repeatedly hastened to revise their Work Rules in an increasingly difficult attempt to meet the "reasonably construe" standard.

Under the Board's newly articulated test, announced in its *Boeing* decision issued in December 2017, when it considers a facially neutral Work Rule that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, it will continue its analysis and will *also* examine (i) the nature and extent of any potential impact on NLRA rights and (ii) the employer's legitimate justifications for the Work Rule. In particular, the Board will now differentiate between Work Rules that impact activities that are "central" to the Act, as opposed to those that are merely "peripheral." The Board will also now consider an employer's business justification for a challenged Work Rule (and, in so doing, will draw reasonable distinctions between different industries and

¹ See *Boeing*, 365 NLRB No. 154, at 3 (noting that the "problems" with the *Lutheran Heritage Village* test have been "exacerbated by the zeal that has characterized the Board's application" of that test and, that "[o]ver the last decade and one-half, the Board has invalidated a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain").

work settings) and look at particular events that might shed light on the purpose(s) or impact of the challenged Work Rule.

In *Boeing*, the Board delineated three categories of Work Rules that, while not part of the test itself, will provide guidance to employers in future cases:

- **Category 1** will include Work Rules designated as *lawful* by the Board either because (i) when reasonably interpreted, the Work Rule does not interfere with statutory rights, or (ii) the Work Rule's potential adverse impact on protected rights is outweighed by the employer's justifications. For example, the "no-camera" rule at issue in the *Boeing* case is a Category 1 rule, because it had substantial justifications (i.e., it played an integral role in Boeing's security protocols and in allowing Boeing to comply with its duties as a federal contractor to prevent the disclosure of sensitive information), and any potential adverse impact on Section 7 rights would be slight. Similarly, the Board reaffirmed its holding in [Flagstaff Medical Center](#), 357 NLRB No. 65 (2011), which found a hospital's no-camera rule lawful because it was supported by "substantial patient confidentiality interests," as compared to only a "slight" potential impact on statutory rights. The Board announced that Work Rules requiring employees to abide by basic standards of civility are also considered Category 1 rules.
- **Category 2** will include Work Rules that warrant *individualized scrutiny* to determine whether they would interfere with Section 7 rights and, if so, whether any potential adverse impact is outweighed by legitimate justifications.
- **Category 3** will include Work Rules that are *unlawful* because they limit Section 7 activity and are not outweighed by any justification. A prohibition against employees discussing wages or benefits with one another is a Category 3 rule.

Going forward, the Board will decide on a case-by-case basis the types of Work Rules that fall into each category. Last month, before the issuance of *Boeing*, General Counsel Robb issued the [Mandatory Submissions Memo](#), which advises that the General Counsel's office will seek to "provide the Board with an alternative analysis" for cases involving Work Rules commonly found unlawful under the now-overruled *Lutheran Heritage Village* standard, including Work Rules requiring employees to maintain the confidentiality of workplace investigations or prohibiting the use of employer trademarks and logos. All employers should consult with their labor counsel to determine what changes to Work Rules may now be permissible.

Employers also should be aware of the following:

- New rules will be developed in future Board decisions. Therefore, employers should keep up to date on changes that will impact how they can now amend Work Rules.

- They should develop articulable and evidence-based business reasons to support their Work Rules.
- Because the Board will now make distinctions between different industries and work settings, it is possible that a Work Rule that is upheld in one setting may be struck down in another.
- The Board will still find that a facially neutral Work Rule adopted in spite of protected activity or applied discriminatorily against protected activity is a violation of the Act.
- The *Boeing* decision did not alter the fact that Section 7 rights are enforceable in non-union workplaces.

4. The Trump Board Signals a Return to Traditional Standards in Representation Cases

By Donald S. Krueger and Richard A. Stern

One of the hallmarks of the Obama Board was an effort to rebalance the landscape in its interpretation and application of the Act, through decisions and rulemaking, to create an environment in which unions were better able to organize and had a greater chance of prevailing in representation elections. Through a series of actions in the past several months, the Board, with its first Republican majority in close to a decade, has sought to reverse that pattern and return to prior long-standing precedents.

The most significant developments occurred in a flurry of decisions preceding the conclusion of the term of outgoing Board Chairman Miscimarra on December 16, 2017, through which the Board has signaled a return to traditional and [well-established Board law](#) in representation matters and the rejection of decisions favoring union organizing efforts under the Obama Board, and the potential for rulemaking to undo some or all of the Board's 2014 Amended Representation Election Rules, considered by most observers to be an effort to make it easier for unions to win elections.

No More Micro-Units

On December 15, 2017, in a 3-2 split decision along party lines, the Board overturned the Obama Board's "micro unit" decision in [Specialty Healthcare & Rehabilitation Center of Mobile](#), 357 NLRB 934 (2011). 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 under the Board's long-standing tests, by placing the burden on employers to prove that employees they wanted to include in the petitioned-for unit shared an "overwhelming community of interest" with the union's proposed bargaining unit. Essentially, unions were able to cherry-pick small groups of employees

to get a foothold in the door of larger employers that were traditionally harder to organize under established Board law.

In [PCC Structurals, Inc.](#), 365 NLRB No. 160 (2017), the Board rejected *Specialty Healthcare*'s "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 will no longer be constrained by the extraordinary deference that *Specialty Healthcare* affords to the petitioned-for unit." Rather, the Board announced in *PCC Structurals* that it would return to its traditional community-of-interest analysis and discard the "overwhelming community-of-interest" test. While the Board remanded *PCC Structurals* to the Region for further action, it did not address what would be done in the many pending cases across the country in which these same issues had been raised.

One week after the *PCC Structurals* decision, the General Counsel's office issued [Memorandum OM-18-05](#) (Dec. 22, 2017) in which it concluded that the change in Board law was so "unusual" and/or "extraordinary" that it warranted reconsideration of the propriety of any bargaining unit defined under a Stipulated or Consent Election Agreement or a Decision and Direction of Election ("DDE") in a currently active case. As such, Regional Directors and employers can now argue that open representation cases decided under *Specialty Healthcare* should be reconsidered. Employers should carefully consider whether, in light of the Board's *PCC Structurals* decision, the Board should reopen the record to hear additional evidence bearing on the appropriate bargaining unit to include additional employees. Employers should be prepared to submit to the Region an offer of proof regarding community-of-interest factors that would lead to a different bargaining unit than that set forth in the Election Agreement or DDE. This is expected to materially slow down the numerous cases in these categories.

Are the Ambush Election Rules on the Way Out?

The newly constituted Board also took direct aim at the Obama Board's 2014 Amended Election Rules, commonly referred to as the "ambush election rules." Employers and Republican Board members vigorously objected to these rules, which heavily favored unions by shortening the time that employers had to prepare for a representation hearing and cutting in half the time between the filing of a petition and an election, and materially changing procedures and the parties' rights to litigate important questions before a vote, all of which severely limited the ability of employers to campaign against union representation.

On December 12, 2017, the Board published a Request for Information seeking comments on whether the 2014 election rules should be retained as is, kept with modifications, or rescinded entirely. The Board was clear to note, however, that while it may engage in administrative rule-making to amend these rules, it may also retain them. The two Democratic Board members dissented. On January 26, 2018, the [NLRB extended the time](#) for interested parties to file responses to the Request for Information,

from February 12, 2018, to March 19, 2018. The Request for Information, coupled with earlier dissents by Republican members of the Obama Board, signals that the Trump Board is looking to dismantle all or some of the more onerous and one-sided [election rules and regulations](#).

Additional Representation Changes

As further evidence of the erosion of Obama-era precedent, the new Board has withdrawn the former General Counsel's position on whether certain graduate students and student athletes qualify as "employees" under the Act, as well as whether faculty at religious universities teaching secular subjects would be able to organize and otherwise be protected under the Act.

The Board will also seek to review a tactic long used by unions opposing efforts to decertify a union by filing frivolous unfair labor practice charges in order to block a decertification election, the so-called "blocking charge" rule. Former Board Chairman Miscimarra, while sitting on the Obama Board, was a vocal critic of the Board's blocking charge rule.

Beyond standing alone, the importance of these decisions cannot be overstated as a clear indication that once the Board returns to a Republican majority, none of the Obama-era precedent is safe.

5. As the NLRB Steps Back, Cities Step Forward

By Kate B. Rhodes

Soon after the confirmation and swearing in of NLRB Members Kaplan and Emanuel, who joined outgoing Chairman Philip Miscimarra to give the Board a Republican majority, the NLRB moved quickly to overturn some key cases decided during the Obama administration. The Board has also signaled that it is likely to revisit, and may do away with, additional Obama-era decisions and rules.

Perhaps in anticipation of, or in reaction to, the new Republican-controlled Board, which is expected to be less friendly to unions and employees, some states and cities have moved into areas traditionally under the NLRB's purview by enacting new laws designed to encourage unionization and employee organizing. Thus far, Seattle and New York City have been the most active in this area of legislation.

These laws, however, have faced significant court challenges resulting in the delayed implementation or invalidation of the laws. For example, in 2015, the city of Seattle passed a law requiring companies that hire or contract with drivers (i.e., Uber and Lyft) to bargain with the drivers if a majority of them show that they wish to be represented by a union, despite the fact that the drivers are independent contractors, not employees. Prior to taking effect, this law was challenged in two separate lawsuits: one filed by the U.S. Chamber of Commerce ("Chamber") and the other by 11 drivers represented by

the National Right to Work Legal Defense Foundation. The primary challenge to the Seattle law is that it flouts federal labor law and attempts to regulate matters reserved by Congress to the federal government, and the Seattle law may violate the federal antitrust laws by, allegedly, price fixing. The federal district court [dismissed these suits](#), and permitted the city of Seattle to move forward with implementation. Shortly thereafter, the Chamber appealed to the U.S. Court of Appeals for the Ninth Circuit, which [granted](#) the Chamber's request that the law be stayed pending the outcome of the appeal. The Ninth Circuit has not yet issued a ruling. In addition to these two cases, Uber also filed a suit just last month challenging the same law in state court, but no ruling has been issued to date.

New York City has made similar efforts that appear to be intended to promote unionization in the car wash and fast-food industries. In June 2015, New York City passed a law that encouraged the unionization of car wash employees by requiring significantly lower bonds for car wash business that are unionized than those that are not. Specifically, as part of the licensing process under the new law, car wash owners with unionized employees were only required to purchase \$30,000 in special bonds, while non-unionized car wash owners had to purchase \$150,000 in special bonds. These legally required bonds are intended to ensure that the car wash operators pay and reimburse employees properly and also provide healthy working conditions. This law was challenged by the Association of Car Wash Owners, Inc., which argued that the law was preempted by the NLRA and the New York Labor Law and violated the car wash owners' rights to equal protection and due process under the U.S. Constitution. In March 2017, a federal court [struck down](#) this law, finding that it "explicitly encourages unionization, and therefore impermissibly intrudes on the labor-management bargaining process."

In 2017, New York City enacted another law aimed at promoting worker organizing in the fast-food industry. Specifically, this law permits fast-food employees who want to contribute to nonprofit, non-union workers' rights groups to direct their employers to deduct contributions from their wages and then forward the deductions to the nonprofits. The law required any nonprofit group receiving contributions as a result of this statute to obtain pledges to contribute from at least 500 workers, and, on January 10, 2018, a nonprofit named Fast Food Justice [announced](#) that 1,200 workers pledged to contribute to the organization under this law.

Prior to the law's implementation, however, the National Restaurant Association [filed a lawsuit](#) alleging that the law is preempted by the NLRA and violates the restaurant owners' First Amendment rights by forcing them to contribute to organizations that they disagree with. This case is currently pending in the U.S. District Court for the Southern District of New York.

In the coming months and years, it is likely that the Board will continue to overturn Obama-era cases, rules, and procedures, especially with regard to worker organizing. In light of this anticipated shift, it is expected that additional cities, and even states, may attempt to legislate in the labor relations space, as well as in the employment law space

more broadly. As has been seen from the efforts thus far, it is likely that these laws will meet great resistance from employers and other business interest groups. Employers should continue to monitor their applicable state and local laws and either be prepared to comply with them or consider initiating or participating in a formal challenge to them.

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