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Reporter

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# The only constant is change: Trump NLRB reverses Obama NLRB decisions

## Revisiting the "Quickie Election" Rule

The National Labor Relations Board (NLRB) recently published a Request for Information (RFI), seeking public comment regarding its 2014 Election Rule, i.e., the "Quickie Election" or "Ambush Election" rule. The NLRB's pending RFI includes the following questions:

1. Should the 2014 Election Rule be retained without change?

2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?

3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Election Regulations? If the Board should make changes to the prior Election Regulations, what should be changed?

All responsive public comment must be provided to the NLRB on or before February 12, 2018.

## Return to the pre-*Browning Ferris* "joint employer" standard

In *Hy-Brand Industrial Contractors Ltd.* (December 14, 2017), the NLRB ruled that in all future and pending cases, two or more entities will be considered "joint employers" if, and only if,

> (1) both entities exercise control over essential terms and conditions of employment (as opposed to merely having reserved the right to exercise such control), and
>
> (2) both entities exercise such control directly and immediately (as opposed to indirectly or indefinitely) in a manner that is not limited and routine.

Under this legal standard, proof of indirect control, contractually-reserved control that has not been exercised, or control that is limited and routine is no longer sufficient to establish "joint employer" status. *See* NLRB Joint-Employer Press Release, December 14, 2017, https://www.nlrb.gov/news-outreach/news-story/nlrb-overrules-browning-ferris-industries-and-reinstates-prior-joint.

## New legal standard for workplace policies

Under past NLRB decisions, employers violated the NLRA by maintaining workplace rules or policies that could be "reasonably construed" by employees to prohibit the exercise of Section 7 rights, even if the employer's policy was not adopted in response to Section 7 activity, and even if the policy was not applied to restrict such activities

In *The Boeing Company* (December 14, 2017), the NLRB overruled its previous rulings on this subject, and replaced the "reasonably construed" standard with a new test, i.e., when evaluating a facially neutral company policy, rule or employee handbook, which, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, the NLRB will now evaluate two things: (i) the nature and extent of the potential impact on the exercise of Section 7 rights, and (ii) the employer's legitimate justification(s) for the facially neutral policy or rule in question.

By so ruling, the NLRB created three categories of company rules or policies and the following related legal analysis applicable to each category:

1. Category 1 includes rules or policies the NLRB considers lawful either (a) because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights; or (b) because the potential adverse impact on Section 7 rights is outweighed by the employer's justification(s) for the rule or policy in question. Examples of Category 1 policies include a "no-camera requirement" maintained by an airline and rules requiring employees to abide by basic standards of civility. The current NLRB overruled past decisions in which the NLRB had ruled that employers violated federal labor law by requiring employees to maintain and to foster "harmonious interactions and relationships" in the workplace, or by requiring employees to maintain "basic standards of civility in the workplace."

2. Category 2 includes rules or policies that require individualized scrutiny in each case, so the NLRB can determine whether the rule or policy in question would prohibit or interfere with the exercise of Section 7 rights, and if so, whether any adverse impact on Section 7 rights is outweighed by the employer's legitimate justification(s) for the policy in question.

3. Category 3 includes rules or policies the NLRB considers unlawful because they prohibit or tend to "chill" the exercise of Section 7 rights, and the potential adverse impact resulting from the rule or policy is not outweighed by the employer's justification(s). An example would be a policy that prohibits employees from discussing wages or benefits with one another, regardless of the circumstances.

NLRB Workplace Policies Press Release, December 14, 2017, https://www.nlrb.gov/news-outreach/news-story/nlrb-establishes-new-standard-governing-workplace-policies-and-upholds-no.

Marshall & Melhorn's labor and employment law practice group expects more developments from the NLRB, and we will keep you updated. If you have questions regarding recent labor and employment law developments, please contact a member of our practice group.

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