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NLRB Delivers Early Holiday Gifts To Employers

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Holiday gift giving has started early this year thanks to a busy week by the revamped, employer-friendly National Labor Relations Board (NLRB). On Dec. 15, the board handed down two opinions, one overturning a 2004 decision on work rules and handbook policies and the other overruling the infamous Obama-era joint employer standard. We'll start with the biggest gift of all: the overturning of *Browning-Ferris* and the return to a more sensible joint-employer standard.

In *Hy-brand Industrial Contractors*, the board found two employers to be jointly liable for the discharge of seven employees who were participating in a work stoppage. But in doing so, the NLRB erased the two-year old joint-employer test that allowed for two employers to be deemed joint employers despite having only "reserved" or "indirect" control over the same workers. The decision brings back into existence the prior standard that stood for more than 30 years before *Browning-Ferris*. That long-standing standard and new board law requires joint employers to have "immediate" and "direct" control over a group of employers.

Philip Miscimarra, the outgoing NLRB chairman and *Browning-Ferris* dissenter, was joined in the majority by new members Marvin Kaplan and William Emanuel. The majority opinion cast aside the two-year old *Browning-Ferris* decision, calling it "a distortion of common law as interpreted by the Board and the courts." As we've discussed on this blog, the standard had its gravest impact on employers utilizing staffing agencies, franchise models, and other contractual work relationships, who were at an increased risk of being found liable for each other's workers. The board gave those employers, and all employers, a gift this holiday season when they succinctly said, "we return today to a standard that has served labor law and collective bargaining well, a standard that is understandable and rooted in the real world."

The second gift came via *The Boeing Co.* decision. In upholding Boeing's

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no-camera policy, the NLRB overturned its 2004 *Lutheran Heritage* standard for evaluating the legality of facially neutral employee workplace rules. The past standard barred employee handbook policies and other work rules that could be "reasonably construed" by employees to prohibit the exercise of their rights under the National Labor Relations Act (NLRA). The Obama board used that standard in invalidating numerous handbook policies over the years from social media policies to rules limiting recording devices and more. The decision stated that "[t]hough well-intentioned, the *Lutheran Heritage* standard prevents the board from giving meaningful consideration to the real-world 'complexities' associated with many employment policies, work rules and handbook provisions." Instead, when scrutinizing a facially neutral rule that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the board will evaluate two things: 1) the nature and extent of the potential impact on NLRA rights, and 2) legitimate justifications associated with the rule.

These decisions top off a busy week for the board, which started Monday by overturning its first Obama-era precedent, *Postal Service*, a decision that made it harder for NLRB judges to accept proposed settlements from the parties in their cases. Without wasting any time between successes, the board on Tuesday announced that it is seeking input from the public on the future of its 2014 Election Rule. Happy holidays!