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Client Alert

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NLRB Issues Two Significant Decisions Overturning Prior Standards

On December 14, 2017, the National Labor Relations Board (the "NLRB" or "Board") issued decisions that overruled two cases from 2004 and 2015. In *The Boeing Company*, 365 NLRB No. 164 (12/14/17), the Board explicitly overturned its 2004 decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which provided the oft-criticized test used for the last 13 years for whether the mere maintenance of a handbook rule violated the National Labor Relations Act (the "Act"). Under Section 7 of the Act, union and non-union employees are permitted to engage in union organizing activity or protected concerted activity regarding terms and conditions of their employment. Protected concerted activity includes discussions (or social media postings or emails) about wages, benefits, safety, harassment, workplace conditions, etc. Using the *Lutheran Heritage* test, the Board had found numerous workplace policies unlawful because employees could "reasonably construe" the policy to forbid them from engaging in protected concerted activities. Some recent examples cited by the Board in *Boeing* included policies that:

- Prohibited conduct that "impedes harmonious interactions and relationships";
- Prohibited employees from recording "record[ing] conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership";
- Prohibited employees from using "loud, abusive or foul language";
- Prohibited employees from showing "any type of negative energy or attitude;"
- Required employees to "keep customer and employee information secure"; and

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- Required employees to represent the Employer "in the community in a positive and professional manner."

The *Lutheran Heritage* test was also used by the Board frequently to invalidate social media policies that could be construed by employees to prohibit certain conduct, such as rules preventing them from engaging online in "inappropriate discussions about the company". The new *Boeing* test will allow employers to argue that any adverse impact on protected conduct is outweighed by legitimate justifications. The new standard will provide employers greater ability to structure workplace policies that protect its interests.

On December 14, the Board issued *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (12/14/17), which expressly overrules its controversial 2015 decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015). In announcing the decision, the Board highlighted that "under the pre–*Browning Ferris* standard restored today, proof of indirect control, contractually-reserved control that has never been exercised, or control that is limited and routine will not be sufficient to establish a joint-employer relationship." It concluded that its restored standard adheres to the common law standard of joint employer liability.

With a Republican majority on the Board and a new General Counsel just confirmed, we expect more employer-friendly rulings in 2018. For further guidance on the new standards announced, their impact on your business and policies, or what to expect in 2018, please contact the Olshan attorney with whom you regularly work or the attorney listed below.

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