KANE KESSLER, P.C.
666 THIRD AVENUE
NEW YORK, NEW YORK 10017-4041
TEL 212.541.6222
FAX 212.245.3009
WWW.KANEKESSLER.COM

WRITER'S DIRECT NUMBER
212-519-5154

WRITER'S EMAIL
drothfeld@kanekessler.com

PRIVILEGED AND CONFIDENTIAL MEMORANDUM

DATE: December 15, 2017

TO: Clients

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: NLRB Rulings – Employee Handbooks and Joint Employer Test

Introduction

Yesterday, the Republican-majority National Labor Relations Board ("NLRB") issued two sweeping decisions that directly impact workplaces across the country. In The Boeing Company and Society of Professional Engineering Employees in Aerospace, a 3-2 decision, the Board overruled Lutheran Heritage Village-Livonia, which had articulated the Board's standard governing whether facially neutral workplace rules, policies and employee handbook provisions unlawfully interfere with the exercise of rights protected by the National Labor Relations Act ("NLRA").

In Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., another 3-2 decision, the Board overruled the joint employer test set forth in the 2015 Browning-Ferris Industries case and reverted back to the long-standing test in existence prior to the issuance of that decision.

This Memorandum serves to provide a summary of each decision.

Workplace Rules

Boeing maintained a policy restricting the use of camera-enabled devices such as cell phones on its property. Initially, an Administrative Law Judge held that this rule violated the NLRA in that an employee would "reasonably construe" this rule to prohibit Section 7 activity[1]. In reaching this decision, the judge declined to take into account Boeing's security concerns related to the sensitive nature of its work.

Upon reviewing the judge's decision, the Board found that it exposed fundamental problems with the Lutheran Heritage Standard including 1) its failure to consider legitimate justifications for work rules, 2) its *de facto* requirement for precise language for facially neutral rules, and 3) its limitation on the Board's discretion to balance a rule against the Section 7 rights at issue. By overruling this test, the

[1] Section 7 of the National Labor Relations Act (the Act) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."

Board will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based solely on whether an employee "would reasonably construe" a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future.

In place of the Lutheran Heritage "reasonably construe" standard, the Board established a **new test**: when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights; and (ii) legitimate justifications associated with the rule.

The Boeing decision represents a victory for employers as the NLRB essentially raised the threshold complainants must meet in order to establish a violation of the NLRA based on claims that workplace rules negatively impact Section 7 activities. Still, it is important to remember that workplace rules should be applied consistently to all employees and without discrimination towards activity protected by the NLRA.

Joint Employer Test

In Hy-Brand, five Hy-Brand employees and two employees of another company (Brandt) were discharged after they engaged in work stoppages based on concerns involving wages, benefits, and workplace safety. The Board agreed that the work stoppages constituted protected concerted activity under Section 7 of the Act, and further agreed that the discharges constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1) of the Act.

On the question of whether or not Hy-Brand and Brandt were joint employers, the Administrative Law Judge applied the test set forth in Browning-Ferris. In the 2015 Browning-Ferris decision, the Board majority held 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." While the Board agreed that Hy-Brand and Brandt were joint employers, the Board disagreed with the legal standard the judge applied to reach that finding.

In analyzing the Browning-Ferris standard, the Board found that it represented a distortion of common law as interpreted by the Board and the courts, is contrary to the Act, is ill-advised as a matter of labor policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations. Accordingly, the Board overruled Browning-Ferris and returned to the principles governing joint-employer status that existed prior to that decision.

Under the standard in existence prior to Browning-Ferris, two or more entities will be deemed joint employers under the NLRA only if there is proof that one entity **has actually exercised control** over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) **and has done so directly and immediately** (rather than indirectly) in a manner that is not limited and routine.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Lois M. Traub, Alexander Soric, Jennifer Schmalz, Jaclyn Ruocco, Michael C. Lydakis or Robert L. Sacks.