NLRA UPDATE: THE STATUS QUO IS CHANGE

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I. NLRB Scrutiny Of Employment Policies And Employee Handbooks.

A. *The Boeing Company*, 365 NLRB No. 154 (12/14/2017).

In 2004, the Board ruled in *Lutheran Heritage Village – Livonia*, 342 NLRB 646 (2004), that employers may violate Section 8(a)(1) of the NLRA by maintaining a work rule that: (1) *employees would reasonably construe to restrict section 7 activity*; (2) the employer promulgated in response to union or other section 7 activity; or (3) the employer applied to penalize exercise of section 7 rights. *See Lutheran Heritage*, 343 NLRB at 646-47. During the last administration, the NLRB seized on the *Lutheran Heritage* test in several cases to find that facially neutral work rules were unlawful under the NLRA. Boeing was on the losing end in one such case at the administrative hearing phase. That case involved Boeing's policy prohibiting employees from taking photographs or videos in an assembly plant. 365 No. 154 (2017).

The work rule in dispute in Boeing was neutral. Boeing did not explicitly restrict activity protected by the NLRA, but the petitioners challenged the rule on grounds that it could reasonably be construed to prohibit section 7 activities. *Id*. at 1. Boeing argued that the rule was important for the protection of classified information and proprietary methods. *Id*. at 18-19. Nonetheless, NLRB Region 19 issued a complaint and eventually an administrative law judge ("ALJ") found the rule to be unlawful. The ALJ concluded that Boeing's work rule could be construed as discouraging employees from engaging in activity protected by the NLRA, such as preserving evidence of unsafe work conditions. *Id*. at 44 45.

On December 14, 2017, the Board overturned the ALJ's decision and prescribed a new standard for evaluating facially neutral work rules under the NLRA. *Id*. at 1. The Board adopted a balancing test that weighs: (1*)* the nature and extent of the potential impact of a facially neutral work rule on employee rights, against (2*)* the employer's legitimate justifications for maintaining the rule. *Id*. at 3. This approach had previously been advocated by former NLRB Chair Miscimarra in his dissent in *Lutheran Heritage*.

Based on the new balancing test, work rules will fall into one of three categories: (1*)* lawful rules that do not restrict the rights of employees under the NLRA or whose restrictions are *de minimis*; (2*)* rules that require an individualized assessment concerning interference with employees' rights under the NLRA to significance of business considerations for the rule; and (3*)* rules that are unlawful because they plainly restrict the rights of employees under the NLRA in a way that outweighs any legitimate justification associated with the rule. *Id*. at 3. When applying the new balancing test, the Board in *Boeing* advised that five duties must be considered:

- to provide clarity in the law;

- to consider the various types of protected activity (how fundamental to employee rights) and the significance of the business justification for the work rule;

- to be reasonable – do not tackle a rule that when reasonably interpreted does not infringe on section 7 rights;

- to view the rule form the employee's perspective when considering potential impact on protected activity;

- to refrain from declaring a rule invalid even though it might not be lawfully applied in a particular context.

With this balancing test and requisite considerations in mind, the Board determined that Boeing's no-camera rule is lawful. *Id*. at 5. Though the rule could in some circumstances inhibit exercise of employee rights under the NLRA, Boeing's security justifications for the rule outweighed any deterrence impact on protected activity. *Id*. The ALJ was overruled.

B. *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265 (5th Cir. 2017).

Paradoxically, and shortly before Boeing was decided, the Fifth Circuit affirmed an NLRB order striking down T-Mobile's rule that banned the use of recording devices in the workplace. *T-Mobile, USA, Inc. v. NLRB*, 865 F.3d 265 (5th Cir. 2017). T-Mobile argued that the rule did not violate section 7 of the NLRA because it advanced a secure workplace, similar to the reasons asserted by the employer in *Boeing*. *Id*. at 14. The Fifth Circuit rejected this argument under *Lutheran Heritage*. *Id*. 15. Timing is everything and there is no way to know for sure, but there is a considerable chance that the Board would have upheld the no recording rule under the test articulated in *Boeing*.

In the overall scheme, however, T-Mobile prevailed at the Fifth Circuit. The court in *T-Mobile* disagreed with the NLRB on other handbook provisions the Board had found to be in violation of the Act. Specifically, the Fifth Circuit rejected the Board's holdings striking down: (i*)* a rule prohibiting employees from providing access to information to unauthorized individuals without written authorization from the company; (ii*)* a code of conduct provision requiring employees to treat co-workers and management respectfully; and (iii*)* a rule requiring employees to maintain a positive work environment. *Id*. at 208.

C. General Counsel Memorandum 18-04 (June 6, 2018).

Early this summer, NLRB General Counsel Peter Robb distributed a memo to the NLRB Regional Directors and Regional Attorneys across the country concerning unfair labor practice charges that involve employee handbooks and work rules. General Counsel Robb's purpose was to provide guidance to the regional offices for analyzing and processing such cases after the *Boeing* decision. At its core, the memo stresses that the Regional offices must decide whether a work rule in question would be interpreted by employees as prohibiting protected, concerted activity, not whether it could potentially be so interpreted. General Counsel Memo 18-04 is a useful tool for practitioners as well as NLRB Regional Offices staff.

In his Memorandum, General Counsel Robb provides several examples of rules or policies and where they fall under *Boeing* categories 1, 2, and 3 (see page 1 above). Category 1 rules and policies, which are the presumptively lawful under the *Boeing* balancing test include:

- Rules barring employee disloyalty or self-enrichment;
- Rules protecting customer information and confidential propriety information of the employer;
- Rules barring insubordinate or disruptive conduct;
- Rules against defamatory communications or misrepresentation; and
- Rules protecting employer logos and intellectual property.

Going to the other extreme, Category 3 rules or policies that presumably violate section 7, Memorandum 18-04 cites: (i) confidentiality rules as to wages, benefits and terms of employment; (ii) rules against joining outside organizations, and (iii) rules about voting on matters that may affect the employer. Where the most guidance is needed, naturally, is for Category 2 rules or policies that may or may not run afoul of section 7 depending on how they are drafted (or applied). As to Category 2, General Counsel Robb listed the following types of rules in Memorandum 18-04:

- Rules restricting use of the company name in employee communications to third parties, as distinguished from rules protecting the employer's logo and trademarks;
- Confidentiality rules that appear designed to protect proprietary information and trade secrets as distinguished from rules requiring confidentiality of wages, benefits and conditions of employment;
- Accuracy rules: *i.e.*, rules against making false or inaccurate statements about the employer was distinguished from general disparagement rules;
- Conflict of interest rules that are broadly written;
- Rules prohibiting speaking with the media or third parties about the employer as opposed to rules prohibiting employees from speaking on the employer's behalf;
- Rules constraining disparagement or criticism of the employer; and
- Rules barring off-duty conduct that might harm the employer.

A recent case applying the NLRB General Counsel's guidance following *Boeing* are discussed immediately below.

D. *Lyft, Inc.*, Case 20-CA-171751 (*NLRB Advice Memo*, June 14, 2018).

The once common "advice memorandum," in which the NLRB Division of Advice publishes internal opinions about issues raised by charges, has been a rarity for several years. Advice memos appear to be making a comeback. Under General Counsel Robb, several advice memos have been published in the past nine (9) months. Advice memos are released only after a case has been closed.

One recent advice memorandum was issued following dismissal of an unfair labor practice charge by the Teamsters against ridesharing company Lyft. The Teamsters urged that Lyft's intellectual properly policy and its confidentiality policy are overbroad and infringe on section 7 rights. Lyft's intellectual property policy prohibited employee use of the company logo without permission. The confidentiality policy barred employees from using and disclosing customer information among other categories of information.

Upon consideration of these two policies at the request of the NLRB Region 1 Director in San Francisco, the NLRB Division of Advice concluded that Lyft's policies are lawful. These policies were viewed by the Division of Advice as Category 1 policies under the new *Boeing* standard. Specifically, inability to use the Company logo or customer information was deemed "unlikely to interfere" with employee rights under section 7 of the NLRA.

II. Mandatory Arbitration Agreements And Class Action Waivers, And NLRB Deferral To Contractual Grievance/Arbitration Awards.

A. *Epic Systems v. Lewis*, Nos. 16-285, 16-300 (S.Ct. May 21, 2018).

On May 21, 2018, the Supreme Court held that arbitration agreements between employees and employers containing class and collective action waivers are enforceable. *Epic Systems Corp. v. Lewis*, No. 16 285 (May 21, 2018). This important decision puts to rest a long legal skirmish that began in 2012 when the National Labor Relations Board held in *In re D.R. Horton, Inc.* that class and collective action waivers in employment agreements violate Section 7 of the National Labor Relations Act ("NLRA"). *D.R. Horton, Inc.*, 357 NLRB 2277 (2012).

Section 7 of the Act protects employees' ability to engage in concerted activity for mutual aid and protection with regard to terms and conditions of employment. In *D.R. Horton*, three members of the five-member NLRB reasoned that: (i) employees who sue their employer on behalf of themselves and other employees are engaged in concerted activity; and (ii) agreements requiring employees to resolve disputes with their employer in one-on-one arbitration are unenforceable violations of NLRA § 7. With its singular focus on the NLRA, the NLRB discounted another federal statute central to the enforceability of arbitration agreements—the Federal Arbitration Act. The FAA is a venerable law enacted years before the NLRA was signed into law.

The FAA, enacted in 1925 in response to widespread judicial hostility to arbitration in the early 20th Century, provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

In other words, unless the arbitration agreement is unconscionable as written or was procured by fraud or duress, the agreement to arbitrate must be enforced. Seizing upon the FAA's requirement for the enforcement of arbitration agreements and decades of Supreme Court cases rejecting challenges to their enforceability, the Fifth Circuit overruled the NLRB's *D.R. Horton* decision in 2012. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). A six year debate in the courts thus followed: which statute controls?

The NLRB and groups opposed to class and collective action waivers argued that section 7 of the NLRB represents a "contrary congressional command" overriding the FAA. Employer associations and other proponents of arbitration and freedom of contract stressed the public policy favoring arbitration expressed by Congress in enacting the FAA — in contrast to the absence of language in the NLRA removing employee class and collective actions from the FAA's mandate.

The NLRB unsuccessfully tried to persuade the Fifth Circuit to overrule *D.R. Horton* in later cases. Other federal courts of appeals, including the circuits based in St. Louis and New York, agreed with the Fifth Circuit. The essence of the decisions approving class action waivers in arbitration agreements between employees and employers is that the FAA's language creating a presumption in favor of enforcement of arbitration agreements is a more compelling expression of Congressional intent than the general language of NLRA § 7.

Clarity of congressional intent is often influenced by one's point of view, however, and two federal circuits saw the FAA v. NLRA balance much differently. First to reject the Fifth Circuit's *D.R. Horton* decision favoring class action waivers was the Seventh Circuit in Chicago. In May 2016, in *Epic Systems v. Lewis*, the Seventh Circuit held that agreements requiring employees to resolve disputes in one on one arbitration are not enforceable under the NLRA and FAA. *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016) The court's syllogism was: (i) pursuit of collective and class actions concerning wages, terms and conditions of employment is protected concerted activity under the NLRA; (ii) requiring employees to waive statutorily protected rights is "illegal"; therefore (iii) since illegality is a ground for revocation of a contract, the FAA does not support enforceability of employee class and collective action waivers. *Id*. at 1151, 1155.

The Ninth Circuit in San Francisco was quick to side with the Seventh Circuit. Two months after the Seventh Circuit's decision in *Epic Systems*, a divided panel of the Ninth Circuit held that a contract requiring Ernst & Young LLP employees to pursue employment claims through individual arbitration was unenforceable. *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) The dissenting judge on a three judge panel, Sandra Ikuta, characterized her colleagues' decision as "breathtaking in its scope and in its error." Judge Ikuta added that the majority's decision was "directly contrary to Supreme Court precedent and… [on] the wrong side of a circuit split." *Id*. at 990 (Ikuta, J. dissenting).

With or without Judge Ikuta's parting shot in her *Ernst & Young LLP* dissent, there was no doubt by mid-2016 that a direct circuit split had emerged on the FAA v. NLRA clash. There was also little doubt that the Supreme Court would grant certiorari to resolve the circuit split. And so it did. On January 13, 2017, the Supreme Court granted the NLRB's petition for writ in *NLRB v.*

Murphy Oil USA (one of the cases the NLRB lost in the Fifth Circuit), as well as the petitions by the employers in Epic Systems and Ernst & Young LLP cases.

The three cases were consolidated in the Supreme Court. They were also the first cases to be argued during the past Supreme Court term. That was on October 2, 2017. Highlighting just how divided opinions are on this subject, attorneys for the federal government appeared on both sides of the docket.

After reversing course following the 2017 elections, the Justice Department sided with the petitioner-employers. The NLRB General Counsel argued in favor of the employees. Most pundits present for oral argument reported that questioning by the justices indicated a 5 4 split with the majority favoring enforceability of class action waivers in arbitration agreements.

The pundits were right. In a 5-4 decision written by Justice Gorsuch, and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, the Court stressed the overriding public policy favoring arbitration expressed in the FAA. The majority cited several considerations demonstrating that Congress did not exclude class and collective actions by employees from waiver by agreement to resolve all disputes in one on one arbitration.

- The savings clause in the FAA allows courts to refuse to enforce arbitration agreements only for "generally applicable contract defenses, such as fraud, duress or unconscionability" (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). Interference with one's ability to file a class or collective action is not a defense applicable to contracts in general.

- The FAA was enacted before the NLRA. There is a presumption that if Congress intends a later enacted statute to impact pre-existing law it will be clear about its intent.

- The Court rejected the argument that section 7 of the NLRA protects employees' rights to file class or collective action. Rather, the NLRA applies to union organizing and collective bargaining—not to litigation.

- In other contexts, Congress has been clear when it meant to prescribe dispute resolution procedures that override the FAA. Congress did not express any such intent in the NLRA.

- In the context of collective wage-hour actions under the Fair Labor Standards Act, the Court has previously held that individual arbitration agreements are enforceable to defeat collective actions authorized by the FLSA. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

- Finally, and notably, Justice Gorsuch reasoned that the National Labor Relations Board's opinion on the subject is entitled to no deference under the *Chevron* doctrine. Although the NLRB administers the NLRA, it does not administer the FAA. In a clash of two statutes, the NLRB's perspective is of no consequence.

The dissenting opinion was authorized by Justice Ginsburg. Justices Breyer, Kagan, and Sotomayor joined in the dissent. The dissenters emphasized that the majority's opinion means that employees will have little to no practical ability to enforce their rights under law.

Requiring employees to litigate compensation or discrimination claims that, on an individual basis, often involve relatively small amounts in controversy effectively undermines enforcement of one's rights. Justice Ginsburg argued that the NLRA was enacted on the premise "that employees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of employment." Employment agreements containing arbitration clauses are rarely the result of arm's length bargaining and, Justice Ginsburg observed, arbitration agreements with class and collective action waivers diminish the ability of employees to enforce workplace rights.

Now that the Court has spoken, non-union employers that have not already done so are free to request applicants and employees to enter into agreements requiring individual arbitration of employment disputes. The question for employers is whether arbitration agreements with class action waivers is an appropriate and desirable employment practice for their business. The answer will be "yes" for many companies, and "no" for others. Arbitration has costs and disadvantages that in some contexts are not worth incurring. For some employers, for example, an historical lack of employment claims or the costs associated with private arbitration may weigh against entering into arbitration agreements with its employees.

For other employers, especially those with large workforces and that are vulnerable to unfair compensation claims, arbitration agreements can be very useful. In view of *Epic Systems*, employers in labor intense industries and those with sizable contingent work forces should consider the pros and cons of arbitration agreements in the context of their business and industry. *Epic Systems* also presents an opportunity for employers that have arbitration agreements in place to review and possibly revise their agreements with the Court's strong endorsement of employment arbitration in mind.

Finally, *Epic Systems* was not well received among many members of Congress and their constituencies. A legislative effort to undo this decision and bar class and collective action waivers is foreseeable. In fact, in December 2017, before the Supreme Court's decision, Senators Kristen Gillibrand (D - N.Y.) and Lindsey Graham (R - S.C.) introduced a bill to prohibit employment agreements compelling employees to press claims of sexual harassment through arbitration. That bill is entitled the Ending Forced Arbitration of Sexual Harassment Act (EFASHA). A parallel version of EFASHA is under consideration in the House of Representatives as H.R. 4734.

B. *Verizon New England, Inc. v. NLRB*, Case 15-1062 (10th Cir. June 21, 2016).

A lot of attention has been given to Supreme Court nominee Brett Kavanaugh's attitude toward labor, employment, and arbitration law—deservedly so. In one case, *Verizon New England, Inc. v. NLRB*, 15-1063 (D.C. Cir. 2016), Judge Kavanaugh refused to defer to the NLRB in a dispute involving NLRB deferral to arbitration under the *Spielberg-Olin* standard. The underlying dispute involved alleged violation of a labor contract no-picketing clause by employees who placed picket signs in their parked cars in plain view to the public.

An arbitrator hearing a grievance over this contractual dispute ruled for Verizon. The NLRB declined to honor the arbitration award, however, and proceeded to prosecute the union's unfair labor charge alleging interference with contract protected activity. On appeal to the District of Columbia Circuit, Judge Kavanaugh concluded that the NLRB had gone too far.

The NLRB must accept an arbitration award, under the *Spielberg* and *Olin* standard, unless it is "palpably wrong" or "clearly repugnant" to the Act. That standard was not satisfied in *Verizon* as found by Judge Kavanaugh. In addition to suggesting appreciation for arbitration of disputes involving statutory rights, one aspect of *Verizon* of potential significance is a possible indication that Judge Kavanaugh shares Justice Gorsuch's skepticism about the *Chevron* standard for deferral to administrative agencies. *See* p. 7 *supra*.

III. Janus: Union Dues, The First Amendment, And Exclusive Representation Under The NLRA/RLA.

A. *Janus v. AFSCME*, No. 16-1466 (June 27, 2018).

For a generation, the one sector of the American workforce that has grown in union represented employment is the public sector. To some degree, this growth in union representation is creditable to the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In that case, the Court held that public sector employees in union-represented bargaining units may be required to pay "agency fees" to a union to cover the costs of collective bargaining and labor contract administration. In other words, an employee who chooses not to join the union could still be forced to pay for representation minus costs associated with union political and ideological activities.

The tension between forced financial support of a union among public sector employees and the First Amendment is apparent. The majority in *Abood* concluded, however, that sparing non-members from supporting a union's political and social agenda is an appropriate balance. *Abood* survived as precedent for four (4) decades. Nonetheless, among conservatives, libertarians, and First Amendment literalists, *Abood*'s entitlement to *stare decisis* was never accepted.

The opportunity to revisit *Abood* materialized in 2017, when the Supreme Court granted certiorari in *Janus v. AFSCME*. Supreme Court observers were largely in agreement that the challenge to agency fees in the public sector would be decided 5-4, with a ruling favoring the petitioner projected. Holding all in suspense for several months, the Supreme Court released its decision in *Janus* on June 25, 2018 at the near end of its term.

Plaintiff-Appellant-Petitioner Mark Janus won. Justice Alito's opinion for the majority concluded that all union activity in the public sector is inherently political in nature. From that perspective, requiring employees in the public sector who do not want to associate with a union or support a union with dues infringes on their First Amendment rights. Going one step further, Justice Alito and the majority stated that no payments by a public sector employee may be deducted from a paycheck for remittance to a union without the employee's "affirmative consent."

Janus is an obvious blow to public sector unions. Many employees who have been forced to pay agency fees will now stop doing so. Another segment of employees, those who paid full dues only because they considered the incremental differences between full dues and agency fees inconsequential, may now decide that the opportunity to avoid paying anything to their liking. *Janus* also raises fundamental questions. For instance, does the First Amendment extend to unions the option not to represent bargaining unit employees who do not pay dues? Is *Janus* a crack in the long prevailing principle that once elected a union is the exclusive representative of all bargaining unit employees? What is the meaning of "affirmative consent"?

The holding in *Janus*, that public sector employees may not be required to financially support a labor union, is rather narrow. This simply puts public sector employees in the same posture as union represented employees in right-to-work states. The implications of Judge Alito's majority opinion are much broader, however, and are already being seen in important cases in the federal circuit courts and the Supreme Court.

B. *Purple Communications, Inc. v. NLRB,* No. 17-71062 (9th Cir.) (*The E-mail Case*).

Four years ago, the NLRB held that employees who have been given access to their employer's e-mail system for work purposes are presumptively entitled to use that system during non-working time to communicate about union activity and other matters concerning wages, hours, terms, and conditions of employment. *Purple Communications, Inc.*, 361 NLRB 1050 (2014). *Purple Communications* was hailed by those aligned with labor, and assailed by those associated with management. This is a classic example of how the NLRA can pit property rights against statutory rights.

The First Amendment also weighs in the balance, as a government mandate that an employer be required to open up its communication lines to a discourse that it does not approve of is a form of compelled speech. *Janus* may add support to the compelled speech argument to the extent that the Supreme Court has rejected the implicit reasoning in *Abood* that the First Amendment is nuanced and may require employers to accommodate employee communications concerning subjects protected by section 7.

There are two pending challenges to the Board's decision in *Purple Communications*. One is the appeal of that case to the Ninth Circuit. *Purple Communications, Inc. v. NLRB*, Case No. 17-71276 (Ninth Circuit). Promptly after the Supreme Court's decision in *Janus* was released, Purple Communications filed a letter brief in the Ninth Circuit pointing out that some long held understandings in federal labor law cannot be squared with the First Amendment. Another aspect of *Janus*, one that touches our profession closely, is discussed immediately below.

C. Implications Of *Janus* For Licensed Professions?

Individuals in several professions must be licensed in states in which they practice. In some professions and in some states, the state licensing requirement also requires membership in

a professional association whose mission is both to promote public interests and to support the profession. That of course is the situation in Texas, where membership in the State Bar of Texas is a requirement to practice of law in our state.

Going back to *Keller v. State Bar of California*, 496 U.S. 1 (1990), and undoubtedly long before then, there have been lawyers who object to an integrated bar, one in which association membership is a legal condition to practice. The Supreme Court in *Keller* took a pragmatic view, recognizing the Constitution, of integrated bars and holding that such bar associations may not lobby or engage in political/ideological endeavors that are not directly related to administration of the profession and interests of the public and lawyers practicing in that state. Presently before the Court on petition for writ of certiorari is a case asking the Supreme Court to take a fresh look. That case, arising out of North Dakota is *Fleck v. Joe Welch, et al*, No. 17-886, in the Supreme Court of the United States.

IV. *Recent Social Media Cases At The NLRB.*

From 2009-2016, the NLRB was particularly attentive to social media policies. Relying on the test enunciated in *Lutheran Heritage Village-Livonia*, the Board determined that many neutral social media policies could be reasonably construed to prohibit Section 7 activity. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). For instance, in *Costco Wholesale Corp.*, the Board reviewed a social media policy that warned employees that they may be subject to disciplinary action for social media posts that damage the company, defame other employees, or that violate Costco policies. The Board determined that employees could reasonably conclude that Costco's social media policy prohibited them from engaging in protected activity because there was nothing in the policy that suggested that protected communication was excluded from the rule. *See Costco Wholesale Corp.*, (Case No. 34-CA-012421, Sept. 7, 2012).

Under the new analytical framework enunciated in *Boeing* which overruled the *Lutheran Heritage* test for evaluating company policies and rules, employers have more latitude to craft social media policies to protect their interests. Nevertheless, recent cases suggest that employers should remain cautious. *In Apex Linen Services, Inc.*, an administrative law judge reviewed a policy that "urge[d] all employees to refrain from posting information regarding the Company that could embarrass or upset co-workers or that could detrimentally affect the Company's business." The ALJ applied the *Boeing* framework and found the social media policy unlawful under category three of the *Boeing* test.

The ALJ in *Apex Linen* determined that the employer instituted its policy to protect itself at the expense of employee section 7 rights, without a reasonable justification. *See Apex Linen Services, Inc.*, 2018 WL 2733700 (Jun. 6, 2018). The employer in *Apex Linen* did not file exceptions and the ALJ's decision has been adopted by the Board. Similarly, in *SOS International, LLC*, another ALJ analyzed a similar (to *Apex Linen's)* social media policy under *Boeing*. Along the same lines discussed in *Apex Linen*, the ALJ found the social media policy unlawful under category three of the Boeing test. *See SOS International*, LLC, 2018 WL 1292639 (Mar. 12, 2018). *SOS* is on appeal to the Board.

Finally, the Board recently affirmed its position that social media posts by employees critical of their company's employment practices are generally protected by section 7. *See Natural Life, Inc.*, 366 NLRB No. 53 (Mar. 30, 2018). In *Natural Life*, the Board affirmed an ALJ's finding that the employer violated section 8(a)(1) of the NLRA by refusing to rehire an employee because the employee made allegations of compensation and discrimination against the company on Facebook. *Natural Life* illustrates that, while a policy itself may be lawful, application of that policy in particular circumstances might not be.

V. The Representation Process: Status Of The Quickie Election Rules.

A. The 2015 Election Rule.

On December 15, 2014, the Board adopted new expedited election rules that became effective on April 14, 2015. 79 FR 74308. As described by former NLRB Chairman Mark Pearce, the rules are meant to avoid delays in the election process by focusing only on major questions concerning representation raised by the parties before conducting elections, rather than litigating all disputes up front. They are also meant to ease the filing process for petitioners. Although the final rules do not set a hard deadline, or even a target timeline, for the amount of time between filing of an election petition and an election, the election is to be held "as soon as practicable."

In March 2015, majorities in both houses of Congress voted in favor of a joint resolution disapproving the rules. President Obama vetoed the resolution on March 31, 2015. Business organizations also raised legal challenges to the new rules in the U.S. District Court for the Western District of Texas and in the U.S. District Court for the District of Columbia. Both challenges were rejected. *See Associated Builders & Contractors of Texas, Inc. v. NLR*B, 826 F.3d 215 (5th Cir. 2015), *affg*. No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015); *Chamber of Commerce of United States of Am. v. Nat'l Labor Relations Bd.*, 118 F. Supp. 3d 171 (D.D.C. July 29, 2015). Surviving these challenges, the amendments took effect on April 14, 2015. The changes included:

- Allowing filing of representation petitions electronically;
- Requiring employer posting and distribution of a Board notice about the petition and election to the employees;
- Scheduling of the pre-election hearing 8 days from the notice of hearing;
- requiring non-petitioning parties to file a position statement and requiring the employer to provide names, shifts, work locations, and job classifications of the employees in the petitioned-for unit 1 day before commencement of the pre-election hearing;
- Giving the regional director discretion to decide, in light of the purpose of the hearing, which, if any, voter eligibility issues should be litigated before an election is held;

- Requiring that the hearing close with oral argument unless the regional director grants permission to file briefs;

- Requiring the regional director to decide the matter and prohibiting *sua sponte* transfer to the Board;

- Allowing a party to request Board review only after the election and eliminating the automatic stay of elections in anticipation of requests for Board review;

- Requiring an employer to provide a list of voters, including their shifts, job classifications, and work locations, within 2 business days of the direction of election;

- Requiring that parties file objections and offers of proof in support within 7 days of the conclusion of the election; and

- Requiring that any post-election hearing on challenges and objections commence 21 days after the tally or "as soon as practicable thereafter."

As part of its rulemaking on the expedited election rules, the Board directed the General Counsel to provide guidance about use of electronic signatures to support a showing of interest for an election. In a Memorandum originally released in September 2015 and amended on October 26, 2015, the NLRB General Counsel concluded that electronic signatures would be accepted, and that the evidentiary standards that the Board traditionally applied to handwritten signatures shall be applied to electronic signatures. *Guideline Memorandum on Electronic Signatures to Support a Showing of Interest*, Office of the General Counsel, Memorandum GC 15-08 (Revised) (Oct. 26, 2015).

B. *NLRB's Request for Information Regarding Representation Regulations,* 82 Fed. Reg. 58783 (12/14/2017)

On December 14, 2017, the Board published a Request for Information (RFI) with respect to the amended rules. *See* 82 FR 58783. The RFI invited submissions on three questions:

- Should the 2014 Election Rule be retained without change?

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

- 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?

The RFI provoked strong and lengthy dissents from Members Pearce and McFerran. Member Pearce stated that the RFI "ignores the Final Rule's success in improving the Board's representation-case procedures and judicial rejection of Members Miscimarra and Johnson's legal pronouncements about the Final Rules." Member McFerran agreed with Member Pearce's conclusion with respect to the effectiveness of the rule and argued, among other things, that "the nature and timing of this RFI, along with its faulty justifications, suggests that the majority's interest lies not in acquiring objective data upon which to gauge the early effectiveness of the Rule, but instead in manufacturing a rationale for a subsequent rollback of the Rule in light of the change in the composition of the Board."

The majority response rejected these criticisms and suggested that the RFI route was preferable to the process followed by the Board in adopting the 2014 election rule. That process "started with a lengthy proposed rule that outlined dozens of changes in the Board's election procedures, without any prior request for information from the public regarding the Board's election procedures." The response concluded by noting that "the Board merely poses three questions, two of which contemplate the possible retention the 2014 Election Rule." The deadline for submission of responses to the RFI was twice extended and expired on April 18, 2018.

C. Micro-Units: The Short Life Of *Specialty Healthcare*.

One of the more controversial decisions by the NLRB during the eight (8) years of the Obama Administration was *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). *Specialty Healthcare* involved the size and scope of bargaining units that could appropriately be certified for a union representation election. The NLRB agreed with the union's desire to represent a narrow range of health care professionals in a nursing center and, in doing so, re-shaped the standard for certifying a bargaining unit.

As a first step, the Board would look to see if the petitioned-for unit was comprised of a readily identifiable group that shared a community of interests as to wages, hours, and working conditions. If so, the second step would shift the burden to the employer to show that the excluded employees shared "an overwhelming community of interests" with the included employees and that there was "no legitimate basis upon which to exclude certain employees from the 'petitioned for unit.'" That set a very high bar for employers to challenge a "Gerry-mandered" representation petition, and it set off alarms among management that: (i) union organizing with a Trojan Horse strategy would become common; and (ii) that many employers could be forced to collectively bargaining with multiple small units of employees in the same workplace.

Predictably, *Specialty Healthcare* was high on the new constituted NLRB's list of cases to reconsider following appointment of new Board members during the Trump Administration. That did not take long. On December 15, 2017, in *PCC Structurals, Inc.*, 265 NLRB No. 160 (2017), the Board in a 3-2 vote overruled *Specialty Healthcare*. In this so called "micro-unit" case, the union petitioned to represent approximately 100 welders and metal rework specialists at three (3) facilities in the Portland, Oregon area. The company objected to the proposed unit, arguing that the only appropriate unit must include all 2,565 production employees at those facilities.

The Board determined that the *Specialty Healthcar*e standard should be rejected for several reasons. First, the Board concluded that the standard was "an unwarranted departure" from the standards that had previously been applied to the Board's bargaining unit determination. *Id*. at *9. Second, the Board determined that application of the Specialty Healthcare standard had resulted in departures from the Board's established rules for determining bargaining units in specific industries. The Board cited as one example the Board's prior decisions in *Macy's, Inc.*, 361 NLRB 12 (2015), in which the Board determined that a bargaining unit limited to the store's cosmetics and fragrances department was appropriate instead of a store-wide unit.

As its third rationale for overruling *Specialty Healthcare* and returning to the prior standards for unit certification, the Board found that sections 9(b) and 9(c)(5) of the Act strongly favor applying the traditional community-of-interest standard to bargaining unit determinations. *Id*. Giving the petitioned-for unit the deference accorded under *Specialty Healthcare* substantially limited the Board's discretion in discharging its "statutory duty to determine bargaining unit appropriateness." *Id*. The Board determined that the law requires that the Board take "a more active role" in bargaining unit determinations than the standard in Specialty Healthcare allowed. *Id*.

Finally, the Board found that applying the traditional community-of-interest standard rather than the "overwhelming" community-of-interest standard will ensure that the Board does not "unduly limit its focus" to the section 7 rights of employees in the unit. The section 7 rights of excluded employees must also be considered. *Id*. The Board noted that "all statutory employees have section 7 rights" and that "the two core principles at the heart of Section 9(a) – the principles of exclusive representation and majority rule – require bargaining-unit determination that protect the section 7 rights of all employees." *Id*.

VI. The Joint Employer Doctrine — Who's On First?

There is perhaps no better representation of the tumult at the Board in recent years than the joint employment doctrine. New administrations, shifting political winds, and a member recusal have caused the Board to whipsaw back and forth on this issue with no immediate or apparent resolution in sight.

Joint employment is the idea that under certain circumstances the employees of one company may be legally deemed the employees of another company. The implications of this doctrine are numerous and significant. In the non-labor context, joint employment creates the potential that Company B might owe employment-law obligations to the employees of Company A (*i.e.*, wage-and-hour compliance, etc.) or have vicarious liability for the actions of the employees of Company A. For purposes of labor law, joint employment raises the possibility that Company B might have bargaining obligations to the employees of Company A or be held responsible for the alleged unfair labor practices of Company A.

The question over which the Board has gone back and forth is what standard to apply when considering whether two separate businesses are both employers of the same set of employees.

A. *Browning-Ferris Industries v. NLRB.*

Historically, the Board addressed questions of joint employment under a test stated in the cases of *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation*, 269 NLRB 324 (1984). Those cases adopted the reasoning of the Third Circuit in *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982).

Under reasoning of *TLI* and *Laerco*, "The basis of the [joint-employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." This inquiry focused on the degree of control actually exercised by the alleged joint employer and whether it "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." In subsequent cases applying *TLI* and *Laerco*, it became apparent that where no actual control had been exercised, joint employment was unlikely.

In a 3-2 decision in the 2015 case of *Browning-Ferris Industries of California*, 362 NLRB 186 (2015) ("*BFI*"), the Board revisited the topic of joint employment. Noting "additional requirements" that had developed under *TLI* and *Laerco* that had "significantly and unjustifiably narrow[ed] the circumstances where a joint-employment relationship can be found" as well as the "recent dramatic growth in contingent employment relationships," the Board sought to expand the reach of the joint employment doctrine.

While the Board reiterated that it would continue to weigh the degree to which the alleged joint employer actually exercised control over the subject workers, the Board held for the first time that it would consider any reserved right of control—even if unexercised—to be indicative of a joint employment relationship. Further, "indirect control" that was "otherwise sufficient" would also be representative of joint employment.

Critics of the *BFI* decision—including dissenting Members Miscimarra and Johnson—contended that the Board had uprooted decades of joint-employment jurisprudence in favor of a nebulous standard rife with potential for unintended consequences and that ignored the realities of business. In particular, the Board's elevation of "otherwise sufficient" indirect control and reserved but unexercised control troubled critics. In his dissent in the *BFI* decision, Member Miscimarra worried that under the Board's new standard, "a homeowner hiring a plumbing company for bathroom renovations could well be deemed a joint employer of the plumbing company's employees!"

BFI appealed the Board's decision to the D.C. Circuit Court of Appeals. As explained below, after some brief detours, the appeal is still pending.

B. *Hy-Brand Industrial Contractors.*

Following the presidential election in 2016, composition of the Board changed. Appointees William J. Emmanuel and Marvin E. Kaplan joined Chair Phillip Miscimarra to form the first Republican-controlled Board in approximately ten years. On the eve of the expiration of

Member Miscimarra's term in December 2017, the Board issued its decision in *Hy-Brand Industrial Contractors*, 365 NLRB 156 (2017).

In *Hy-Brand*, the Board reassessed its reassessment of the joint-employment doctrine in *BFI*. Relying heavily on the reasoning of Member Miscimarra's dissent in *BFI*, the Board overruled *BFI* and held it would return to its prior articulation of the joint-employment standard. That being, joint employment requires actual exercise of control rather than the theoretical potential to do so.

When *Hy-Brand* was issued in December 2017, appeal of the Board's decision in *BFI* was still pending before the D.C. Circuit Court of Appeals. The *BFI* case was thus remanded to the NLRB following *Hy-Brand*. Although many thought *Hy-Brand* settled the issue (at least until the next administration), it did not.

Following *Hy-Brand*, questions arose regarding the propriety of Member Emmanuel's participation in the decision. The law firm at which Member Emmanuel had worked prior to joining the Board had represented an entity involved in the prior *BFI* case. Critics contended it was inappropriate for Member Emmanuel to participate in the *Hy-Brand* decision considering that legal issue presented there was identical to the one presented in *BFI* and in which his former firm had an interest and taken a position.

In February 2018, the Board vacated *Hy-Brand*. That action followed a report from the inspector general of the NLRB finding that Member Emmanuel should have recused himself from the case. As a result, the Board's decision in *BFI* was reinstated and, at present, remains the standard for joint employment. The D.C. Circuit Court of Appeals has reinstated the appeal in *BFI*, and a decision is expected this year.

C. NLRB Joint Employer Rulemaking Initiative.

Following the merry-go-round of *BFI* and *Hy-Brand*, the Board took an unexpected additional step in the joint-employment saga. In May 2018, the Board announced that it is considering regulation on joint employment through notice-and-comment rulemaking. The move is unusual because the NLRB typically establishes precedent through its administrative litigation process. Formal rulemaking is rare, although the Board has been more prone to rulemaking in recent years.

The Board's likely motivation is both political and practical. Through the rulemaking process, the Board will avoid any basis for political opponents to argue for further recusal of Member Emmanuel on the topic of joint employment. Additionally, as a practical matter, repeal of regulations enacted through notice-and-comment rulemaking can only happen through additional notice-and-comment rulemaking, which is far more arduous than issuance of a new Board decision. In this way, notice-and-comment rulemaking would likely insulate joint employment from the fluctuations of the Board's ever-changing political orientation.

VII. #Me Too, Take A Knee, And A Day Without Immigrants: The NLRA And Employee Activism.

There are signs that the NLRB is weighing in on the #metoo movement, other gender discrimination issues, and employee support for other social movements. In February, the NLRB vacated an ALJ's decision. The ALJ dismissed a breach of duty of fair representation case against a union based on a claim by a female employee that she was subjected to groping and sexual propositions from union officers. The NLRB explained that the ALJ's determination about the credibility of the female employee was based on sex stereotypes and gender other biases. *See ILA Local 28 (Ceres Gulf, Inc.)*, 366 NLRB No. 20 (Feb. 20, 2018).

In the ALJ's decision, he referred to the employee as a "tough woman." Based on that characterization, the ALJ determined that it was implausible that the female employee allowed union officers to harass her multiple times before she complained about the conduct. The NLRB did not cast its decision as a proposition of law in *ILA Local 28*, but sent a strong signal that gender stereotyping and other gender biases will not be tolerated. In short, the NLRB appears to understand that employers, unions, and judges must step up to a 21st-Century understanding about right and wrong.

In January, the NLRB's Division of Advice issued an Advice Memorandum in response to an unfair labor practices charge filed by a former engineer at Google. Google terminated the employee for circulating a memo about his belief that women are not "biologically suited" for certain types of jobs. *See Google Inc.*, Case No. 32-CA-205351 (Jan. 16, 2018). In the Division of Advice's opinion, the former employee's use of stereotypes based on purported biological differences between genders should not be treated differently than other types of conduct that the NLRB has found to be unprotected. Specifically, conduct that disrupts the work process creates a hostile work environment, or constitutes racial or sexual discrimination is not protected. Accordingly, the Division Advice advised that the charge should be dismissed.