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INSIGHT: Off to the Races? After a Tumultuous Start to the Trump Era, the NLRB Looks to Make Major Changes

By J. Ian Downes

I. Joint Employer Drama

Without question, the most closely watched issue before the National Labor Relations Board in recent years has been the Obama Board's dramatic expansion of the joint employer doctrine, and the current Board's efforts to return to a narrower standard. While most Board watchers expected a near-immediate reversal of the broad ''Browning-Ferris'' rule following the election of President Donald Trump, the road to effecting this change has been surprisingly bumpy. As discussed below, change does now appear to be on the horizon, although new stumbling blocks may still arise.

A. Browning-Ferris Effects Dramatic Change

The Board's 2015 decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015), was one of the most significant, and highly controversial, decisions in years. In the case, a divided Board cast aside its long-standing joint employer test in favor of a highly union-friendly standard that promised to expand greatly the number of employers subject to collective bargaining and other obligations under the NLRA.

For nearly 30 years prior to *Browning-Ferris*, the Board's rule was that an entity that did not directly employ workers who provided services to it would only be deemed to be a ''joint employer'' of those workers if it ''share[d] or codetermine[d] those matters governing the essential terms and conditions of employment'' and exercised ''direct and immediate control'' over those terms and conditions. *See, e.g., TLI, Inc.*, 271 NLRB 798 (1984); *Laerco Transportation*, 269 NLRB 324 (1984).

The majority in *Browning-Ferris* rejected this latter requirement, holding that ''we will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a 'limited and routine' manner.'' Instead, the majority concluded, the ''right to control'' alone, even when unexercised, ''is probative of joint employer status.''

The majority's ruling was met with a vigorous dissent that denounced the decision as ''subject[ing] countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what would have heretofore been unlawful secondary strikes, boycotts and activities.''

The response to *Browning-Ferris* was swift and vociferous on all sides. The case was appealed to the D.C. Circuit, and employer groups and Republicans in Congress decried the decision, with several lawmakers introducing bills—the ''Save Local Business Act''—to reverse the new rule. Additionally, relying on the decision, the Board pushed forward with challenges to numerous alleged joint employer relationships, most notably in the franchise context. Among these were numerous complaints issued by the Board's General Counsel against McDonald's seeking to hold the company jointly liable for the unfair labor practices of its franchisees. See McDonald's USA LLC, a joint employer et al., Case No. 02-CA-093893 (Div. of Judges July 17, 2018) (rejecting proposed settlement as ''inadequate'').

B. The Board Rejects *Browning-Ferris*, but Hits a Roadblock

When President Trump was elected in 2016, it was expected that the Board would act quickly to overrule

Browning-Ferris. This came to fruition in December 2017 with the Board's decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017).

In *Hy-Brand*, the majority, led by outgoing Chairman Philip Miscimarra and joined by new Members Marvin Kaplan and William Emanuel, reversed Browning-Ferris, finding that its standard ''is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of 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.''

Concluding that Browning-Ferris ''fundamentally altered the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act,'' the *Hy-Brand* majority announced a ''return...to a standard that has served labor law and collective bargaining well, a standard that is understandable and rooted in the real world [and that] recognizes joint-employer status in circumstances that make sense and would foster stable bargaining relationships.''

Pursuant to this standard, ''a finding of joint-employer status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.' ''

Hy-Brand proved to be short-lived, however. In February 2018, in response to a finding by the Board's Designated Agency Ethics Official that William Emanuel should have been disqualified from participating in the *Hy-Brand* case due to his former law firm's representation of a party in *Browning-Ferris*, the Board vacated the decision and restored *Browning-Ferris* as the governing legal standard. Hy-Brand, 366 NLRB No. 26 (Feb. 26, 2018). This led the D.C. Circuit, which had remanded the appeal of *Browning-Ferris*, to recall the case to decide whether to affirm the remand or consider the case on the merits. Oral argument on the fate of the case was held in July 2018.

C. Change Via Regulation

With the fate of the *Browning-Ferris* appeal in limbo, and seemingly lacking a majority to overrule the case through adjudication, the Board announced in May 2018 that it was giving consideration to engaging in rulemaking to revise the joint employer standard. This announcement was met with objections from several Democratic members of Congress that the Board was improperly sidestepping the ethical concerns involving Member Emanuel.

Nevertheless, on September 14, 2018, the Board issued a Notice of Proposed Rulemaking seeking to revise the joint employer standard. See 83 Fed. Reg. 46681 (Sept. 14, 2018).

The proposed rule would return to the ''substantial direct and immediate control'' standard that governed prior to *Browning-Ferris*.

Under the rule, ''an employer may be considered a joint employer of a separate employer's employees only if the two employer's share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.'' With respect to this last element of the test, the Board noted in its explanation of the rule that ''it will be insufficient to establish joint-employer status where the degree of a putative joint employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer.''

Board Member Lauren McFerran dissented from the issuance of the proposed rule, arguing that ''there is no good reason to overrule *Browning-Ferris*, much less to propose replacing its joint-employer standard with a test that fails the threshold test of consistency with the common law and that defies the stated goal of the [NLRA]: 'encouraging the practice and procedure of collective bargaining.' ''

The period for submitting comments on the proposed rule was scheduled to close Nov. 13, 2018, but the board has twice pushed back that deadline. The current due date for comments is Jan. 14, 2019.

II. New Framework for Evaluating Work Rules

A. The Boeing Balancing Act

A particularly vexing development for employers during the Obama administration was the Board's increased scrutiny of employers' work rules, even where those rules had not been relied on to take specific adverse actions against employees.

In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board held that an employer's ''maintenance'' of a work rule will violate the NLRA if it ''reasonably tends to chill employees in the exercise of their Section 7 rights.'' Under this rule, even if an employer policy does not explicitly prohibit protected conduct and has not been applied to prevent such conduct, the policy will be impermissible if employees would ''reasonably construe'' it to cover protected conduct.

Although the *Lutheran Heritage* rule was not created during the Obama administration, the Board in recent years increasingly relied on it to invalidate employer policies in a variety of areas, including confidentiality, use of social media, and workplace conduct. See, e.g., *Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (Aug. 22, 2014) (social media policy); *Laurus Technical Institute*, 360 NLRB No. 133 (June 13, 2014) (employee conduct policy); *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54 (Jan. 25, 2013) (confidentiality policy).

In another of its significant December 2017 decisions, the Board in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), abandoned the *Lutheran Heritage* standard in favor of a new test that the majority contended more appropriately took into account employers' interests in promulgating and enforcing workplace rules.

In particular, the majority explicitly overruled the ''reasonably construe'' prong of *Lutheran Heritage* on the basis that the standard ''prevents the Board from giving meaningful consideration to the real world 'complexities' associated with many employment policies, work rules and handbook provisions.'' The appropriate standard, the majority wrote, should not involve a ''single-minded consideration of NLRA-protected rights,'' but should instead take into account employers'

legitimate justifications for adopting work rules and policies.

Pursuant to the new standard, ''when evaluating a facially neutral policies, 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'' in order to ''strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy.''

Application of this new test, the majority stated, will result in the creation of three categories of work rules: 1) those that are designated by the Board as ''lawful to maintain'' because they either do not interfere with protected rights or the ''potential adverse impact'' is outweighed by an employer's justifications; 2) those that ''warrant individual scrutiny;'' and 3) those that are unlawful to maintain because they prohibit or limit protected conduct.

In providing examples of rules falling within the different categories, the Board stated that among the first category of rules are the ''no camera policy'' that was at issue in *Boeing* and ''other rules requiring employees to abide by basic standards of civility.'' Among the third category of unlawful rules are rules ''that prohibit employees from discussing wages or benefits with one another.''

The majority emphasized that the new ''categories are not part of the test itself,'' and that ''the Board will determine, in future cases, what types of additional rules fall into which category.'' Further, ''when deciding cases in this area, the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral), and the Board must recognize those instances where the risk of intruding on NLRA rights is 'comparatively slight.' Similarly, the Board may distinguish between substantial justifications—those that have direct, immediate relevance to employees or the business—and others that might be regarded as having more peripheral importance.''

B. General Counsel Memo on Work Rules

On June 6, 2018, the Board's General Counsel, Peter B. Robb, issued a memorandum concerning ''Guidance on Handbook Rules Post-Boeing.'' Memorandum GC 18-04. The purpose of the memorandum, Rob wrote, was to provide guidance ''regarding the placement of various types of rules into the three categories set out in *Boeing*, and regarding Section 7 interests, business justifications, and other considerations that the Regions should take into account in arguing to the Board that specific Category 2 rules are unlawful.''

Robb began the memorandum by noting that while *Boeing* ''significantly altered [the Board's] jurisprudence on the reasonable interpretation of handbook rules,'' there are a number of aspects of the law that it did not change. First, the memorandum notes, ''Boeing did not change the balancing test involved in assessing the legality of no-distribution, no-solicitation, or no-access rules.'' Further, ''[t]he Board in Boeing specifically noted that the decision only applied to the mere maintenance of facially neutral rules. Rules that specifically ban protected concerted activity, or that are promulgated directly in response to organizing or other protected concerted activity, remain unlawful. Moreover, the Board held that the application of a facially neutral rule against employees engaged in protected concerted activity is still unlawful. A neutral handbook rule does not render protected activity unprotected.''

Turning to the three categories that the Boeing Board held should guide the analysis of work rules, the memorandum placed certain specific types of rules in each category and discussed the principles applied in placing the rules in such categories. According to the memorandum, certain types of rules should be categorized as follows:

Category 1 – Rules that are Generally Lawful to Maintain

- Civility rules
- No-photography and no-recording rules
- Rules against insubordination, non-cooperation or on the job conduct that adversely affects operations
- Disruptive behavior rules
- Rules protecting confidential, proprietary, and customer information and documents
- Rules against defamation or misrepresentation
- Rules against using employer logos or intellectual property
- Rules requiring authorization to speak for company
- Rules banning disloyalty, nepotism or self-enrichment

Category 2 – Rules Warranting Individualized Scrutiny

- Broad conflict-of-interest rules
- Confidentiality rules ''broadly encompassing 'employer business' or 'employee information' ''
- Rules regarding disparagement or criticism of ''the employer''
- Rules regarding use of the employer's name
- Rules generally restricting speaking with the media or third parties
- Rules banning off-duty conduct that might harm the employer
- Rules against making false or inaccurate (as opposed to defamatory) statements

Category 3 – Rules that are Unlawful to Maintain

- Confidentiality rules regarding wages, benefits or working conditions
- Rules against joining outside organization or voting on matters concerning the employer

With respect to the types of rules about which there is the most uncertainty, those in Category 2, the memorandum notes that ''often, the legality of such rules will depend on context.'' ''General or conclusory prohibitions do not have to be perfect,'' the memorandum states, ''and do not have to catalogue every instance in which activity covered by the rule might be protected by Section 7.'' Additionally, even where a rule prohibits Section 7 activity, ''the key question is then whether the employer's particular interest in having the rule outweighs the impact on Section 7 rights.''

Finally, the memorandum noted that, for cases involving Category 2 rules or Category 1 rules that might involve special circumstances rendering them unlawful, the Regions should submit the cases to the Board's Division of Advice before issuing a complaint, as dictated by General Counsel Memorandum 18-02 (Dec. 1. 2017).

C. The New Rule in Operation

While there have not been a substantial number of cases decided under the *Boeing* framework to date,

some guidance on how the new rule is likely to be applied has started to emerge.

■ UPMC, 366 NLRB No. 142 (Aug. 6, 2018) – In this case, a panel of the Board unanimously held that a hospital's solicitation and no-distribution policy was overbroad because it ''prohibits off-duty employees who are permissibly on the Respondents' property from engaging in Section 7 activity.'' Without undertaking an extensive application of *Boeing*, the Board ruled that ''in the healthcare setting, a ban on employee solicitation outside immediate patient care areas during nonworking time is presumptively invalid.'' According to the panel, the hospital failed to meet its burden of demonstrating that the non-solicitation rule was ''necessary to avoid disruption of health care operations or disturbance of patients.''

■ Long Beach Memorial Medical Ctr., Inc., 366 NLRB No. 66 (April 20, 2018) – In a decision from which Member Emanuel partially dissented, the Board ruled that two uniform-and-appearance rules that barred nurses from wearing union pins and badge reels was unlawful. While hospitals and other health care facilities have greater leeway than most employers with respect to certain work rules in order to avoid disruption of patient care, the majority wrote, employees are presumptively permitted to wear union insignia in nonpatient care areas absent special circumstances. Since the employer's rules prohibited wearing of such insignia outside of patient care areas, they were presumptively unlawful. The panel ruled that the employer had not demonstrated special circumstances, finding that ''a uniform requirement alone is not a special circumstance'' and the employer's assertion that it sought to ''create a unique experience distinct from its competitors'' was unavailing.

■ Interstate Management Company, LLC, Case 28-CA-206663 (Div. of Judges, Sept. 11, 2018) – An administrative law judge of the Board found that the employer hotel maintained unlawful work rules prohibiting employees from responding to questions from police or regulatory authorities without employer authorization and from sharing any personal information concerning co-workers. With respect to the ''governmental investigations'' policy, the ALJ found that the rule imposed a severe restriction on Section 7 rights since it would reasonably be interpreted to responding to requests for evidence from the Board without employer consent. In light of this burden, the judge ruled, the employer's justification for the policy—that it was ''merely seeking to prevent employees from providing any official response on behalf of Respondent''—was unpersuasive since a ''more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company's presumed interest.'' Similarly, with respect to the prohibition on sharing employee information, the ALJ concluded that the rule interfered with Section7 rights by preventing employees from sharing ''information that comes to their attention in the normal course of their work activity and association with colleagues, including the names and contact information of their coworkers, for self-organizing purposes.''

■ Nicholson Terminal & Dock Co., Case 07-CA-187907 (Div. of Judges May 16, 2018) – In this case, an ALJ found that a stevedoring company maintained unlawful policies concerning moonlighting by employees, strikes and work stoppages, and use of computers and electronic equipment, but that, pursuant to *Boeing*, the employer's policy prohibiting use of cameras and recording equipment in the workplace was permissible. With respect to the no-strike policy, which applied to both union and non-union employees, the judge found the policy fell outside the scope of the Boeing analysis since it on its face restricted Section 7 activity and was therefore unlawful. Applying the Board's 2014 decision in Purple Communications, Inc., 361 NLRB 1050 (2014), the ALJ concluded that the employer's policy prohibiting all ''nonwork use of email'' was unlawful because non-union employees who were granted access to the company's email system were prohibited from engaging in protected communications. Finally, the ALJ analyzed the employer's policy prohibiting outside employment that ''could be inconsistent with the Company's interests'' and requiring approval from the employer for ''any other employment.'' Applying the balancing test applicable to ''Category 2'' rules under Boeing, the judge found that the potential impact on NLRA rights—the right to engaging in ''salting'' or other union activities—outweighed the employer's asserted interests in maintaining an ''alert and attentive'' workforce and preventing work for competitors.

■ Lyft, Inc., Case 20-CA-171751 (Div. of Advice June 14, 2018) – In an advice memorandum to the Regional Director of Region 20, the Board's Division of Advice found that two policies of ride-sharing company Lyft that had previously been held unlawful were permissible under the *Boeing* standard. At issue in the case were Lyft's ''Intellectual Property'' policy, which prohibited use of the company's logos without permission, and its ''Confidentiality'' policy, which prohibited use of confidential and proprietary information, including ''user information.'' With respect to the intellectual property rule, the Division concluded that it was a ''traditional prohibition on employee use of employer trademarks/logos that belongs in Category 1.'' The Division found the union's complaint that the policy on its face prohibited use of the logos in connection with protected conduct, such as on picket signs and leaflets, to be misplaced, stating that ''usually employees will understand this type of rule as protecting the employer's intellectual property from commercial and other non-Section 7 related uses,'' and finding that employees engaged in a labor dispute ''are unlikely to be deterred from fair use of a logo on a picket sign by a rule in an employee manual.'' Turning to the confidentiality policy, the Division concluded that the policy was a ''Category 1'' rule since ''employees would not reasonably interpret it to cover Section 7 activity.'' Because the rule focuses on ''user'' information (which includes both riders and drivers), and not ''employee'' information, the Division found that ''employees would not reasonably interpret the rule to prohibit the sharing of information about working conditions or of employee names and contact information.''

III. Access to Employer Email Systems

In another highly controversial decision, the Board in *Purple Communications, Inc.*, 361 NLRB 1050 (2014), addressed the right of employees to use employer email systems for Section 7 activities. In a 3-2 decision, the Board overruled its prior decision in *Register Guard*, 351 NLRB 1110 (2007), which held that employers may validly restrict use of their email systems provided that they do not discriminate ''along Section 7 lines.'' Under the Board's new rule, employees who have rightful ac-

cess to their employer's email system have a presumptive right to use the system to engage in § 7 protected communications during nonworking time, and that an employer may only rebut that presumption by demonstrating that ''special circumstances necessary to maintain production or discipline justify restricting its employees' rights.''

In March 2017, the Board declined to revisit its rule, a decision in which Chairman Miscimarra dissented. See *Purple Communications, Inc.*, 365 NLRB No. 50 (March 24, 2017). In his dissent, Miscimarra stated that the Board's rule is ''incorrect and unworkable,'' ''fails to accommodate employers' property rights in their information technology resources,'' and ''improperly presumes that when an employer reserves the use of its email system for business purposes, this unreasonably impedes employees' NLRA-protected activities.''

While the Board has not to date overruled or scaled back the rule announced in *Purple Communications*, such a decision appears on the horizon. On August 1, 2018, the Board issued a Notice and Invitation to File Briefs addressing the continued viability of the current rule in *Caesars Entertainment Corp.*, Case 28-CS-060841. In the Notice, the Board invited briefing on the following issues:

- Should *Purple Communications* be overruled?
- If so, what standard should the Board adopt?
- If the Board returns to the rule of *Register Guard*, should there be exceptions ''for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system (e.g., a scattered workforce, facilities located in areas that lack broadband access)?
- Should the Board apply a different standard to the use of computer resources other than email (e.g., text messages, instant messages, social media)?

In the Notice, the Board pledged ''to keep an open mind with respect to the final disposition of the issues presented here,'' but noted that it rejected the argument of Member McFerran (who, along with Member Pearce, objected to the Notice) that ''the Board must adhere to a policy choice made in a prior decision unless presented with actual evidence of 'significant problems and intractable challenges' created by that decision.'' The period to submit briefs closed on October 5, 2018.

Following the issuance of the Notice, Democratic Senators Elizabeth Warren, Kirsten Gillibrand, Mazie Hirono, Tammy Baldwin and Cory Booker sent a letter to Board Chairman John Ring objecting to Member Emanuel's involvement in the *Caesars Entertainment* case due to his former firm's representation of *Purple Communications* in its appeal of the Board's decision to the Ninth Circuit. The *Purple Communications* appeal was stayed by the Ninth Circuit on September 25 pending the outcome of the *Caesars* case. The letter further urged the Board not to overrule *Purple Communications*. Chairman Ring responded to the lawmakers' letter by emphasizing that all recusal issues are ''handled under the prescribed government ethics rules and procedures—not driven by political considerations.''

IV. Loss of NLRA Protections through Employee Misconduct

An issue that has arisen in numerous cases over the past several years is the extent to which employee ''misconduct,'' such as use of profanity, threats and insults, can deprive otherwise permissible Section 7 activity of the protections of the NLRA. The general legal standard governing such cases has not changed substantially with recent administrations. However, despite the supposedly consistent rule, the manner in which cases have been decided has been anything but consistent. Below is a brief summary of some of the Board's most recent decisions involving the scope of protected speech and conduct by employees.

- *Consolidated Communications*, 367 NLRB No. 7 (Oct. 2, 2018) – In this case, the Board considered whether conduct by a striking employee was of ''sufficient severity to lose the Act's protection.'' During the strike, an employee followed one of the employer's vehicles on the highway to see whether it was going to a work location at which the union could picket in support of its bargaining demands. During the drive, the Board found, the employee maneuvered her vehicle alongside the company truck and traveled side-by-side with the truck at high speed. Ultimately, a majority of the Board panel concluded that the employee's behavior was not protected: ''Nothing in our statute gives a striking employee the right to maneuver a vehicle at a high speed on a public highway in order to impede or block the progress of a vehicle driven by a non-striker, even if the maneuver is executed at or below the speed limit.'' Such action, the Board held, ''would reasonable tend to coerce or intimidate employees in the exercise of Section 7 rights, including the right to refrain from striking,'' and was therefore unprotected and a proper basis for discipline against the employee. Member McFerran dissented, asserting that ''while [the employee's] conduct may have annoyed or frustrated managers, it never posed any genuine danger to them, and it had no reasonable tendency to intimidate or coerce them.''
- *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131 (July 24, 2018) – The Board held that an employee engaged in protected conduct when he wrote ''whore board'' on an employer's overtime signup sheets during a dispute concerning the employer's unilateral change to its overtime policy. In finding that the conduct was protected, the Board reversed the ALJ's determination that the employee engaged in an ''act of vandalism'' that did not constitute an expression of the union's position through lawful means. The Board noted that ''an employee acting alone is engaged in protected, concerted activity where that employee was acting for, or on behalf of, other workers, or was acting alone to initiate group action, such as bringing group complaints to management's attention.'' Applying the Board's Atlantic Steel framework, the Board held that although the employee's statement was ''harsh and arguably vulgar,'' it was not ''mere vandalism,'' but ''reflected his and his coworkers' strong feelings about the ongoing dispute related to the overtime policy.'' Further, the Board noted, the employee generally tolerated profanity in the workplace, which ''undercuts its argument that [the employee's] expression was particularly egregious. Member Emanuel dissented, contending that the Board's ''lax approach to employee defacement of company property'' failed to ''adequately consider employer property rights'' and ''forbid[s] the imposition of even narrowly tailored discipline to deter defacement of company property.''
- *North West Rural Elec. Cooperative*, 366 NLRB No. 132 (July 19, 2018) – A unanimous panel of the Board found that the employer violated the NLRA by enforcing two work rules to discipline an employee for a Facebook post that criticized the employer's training

and staffing practices. The employee's post was made on a Facebook page devoted to workplace safety issues in the electrical industry and referred to the employer's practices as a ''goat bang'' and specifically criticized the practice of using three-man work crews. Approximately one week after the post was made, the employer discharged the employee, allegedly because of his history of disciplinary warnings and the unwillingness of co-workers to work with him. After finding that the employer's explanation was not credible, the ALJ concluded that the employee had engaged in concerted activity because the Facebook post was made on a page frequently viewed by the employee's co-workers and that while the post may have been ''negative,'' it was not so egregious or offensive as to lose the protections of the NLRA. The Board agreed with the ALJ that the employer unlawfully applied its policies to terminate the employee in violation of the NLRA. However, the Board declined to address whether the employee's statements concerning employee safety were ''inherently concerted,'' as the ALJ found. Member Emanuel, for his part, suggested that ''the Board's 'inherently concerted' line of cases should be reconsidered.'' Emanuel further disagreed with the Board's decision to order that the policy that the employer relied on to discharge be rescinded, stating that ''a facially neutral rule remains facially neutral even if it is unlawfully applied, and ordering that the Respondent rescind a lawful rule is not an appropriate remedy.''

■ *Google, Inc.*, Case No. 32-CA-205351 (Div. of Advice Memo. Jan. 16, 2018) – In connection with a charge filed in the highly publicized case of a Google employee discharged for circulating a memorandum criticizing the company's diversity and inclusion programs, the Division of Advice concluded that the employee was properly discharged because portions of the memorandum violated Google's policies on harassment and discrimination. The Division wrote that ''an employer's good-faith efforts to enforce its lawful anti-discrimination or anti-harassment policies must be afforded particular deference in light of the employer's duty to comply with state and federal EEO laws.'' The employee's ''statements about immutable traits linked to sex— such as woman's heightened neuroticism and men's prevalence at the top of the IQ distribution—were discriminatory and constituted sexual harassment. Thus, while much of [the employee's] memorandum was likely protected, the statements regarding biological differences between the sexes were so harmful, discriminatory, and disruptive as to be unprotected.'' Further, the Board held, Google ''demonstrated that the [employee] was discharged only because of unprotected discriminatory statements and not for expressing a dissenting view on matters affecting working conditions or offering critical feedback of its policies and programs, which were likely protected.''

V. Dialing Back the ''Ambush Election'' Regulations and Other Changes to Election Processes

A. Changes to 2015 Election Regulations

In April 2015, the Board adopted wide-ranging rules concerning the conduct of union elections that were designed to speed up the process of conducting union elections. See 79 Fed. Reg. 74308 (Dec. 15, 2014); 29 C.F.R. 102.60, et seq. Among other changes, the rules eliminated the prior 25 day delay between the ordering and conduct of an election, postponed consideration of most voter eligibility challenges until after an election, and allowed exchange of information electronically. The rules have had a significant effect, reducing the average time between the filing of a petition and the conduct of an election from 33 to 23 days.

While the rules have been upheld by the Fifth Circuit and the district court in Washington, D.C., employers have been frustrated by their impact, claiming that the rules allow ''ambush'' elections that prevent employers from appropriately responding to petitions and deny employees a meaningful opportunity to consider the costs and benefits of unionization. Under the new rules, however, unions continue to win elections at roughly the same rate as they did prior to the adoption of the rules.

On December 14, 2017, the Board issued a request for information concerning possible changes to the election regulations. The request asked interested parties to comment on whether the rules should be retained in their current form, retained with modifications or rescinded and either replaced with the same regulations that existed prior to the change or newly drafted regulations. The period for submission of information ended in April 2018 and, all told, more than 6,000 individuals and groups responded to the Board's request. To date, the Board has not indicated whether or when it plans to propose new rules.

B. The Ongoing Fight Over ''Micro Units''

In December 2017, Board issued its decision in *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), overruling the controversial decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011), in which it was held that a union-defined bargaining unit was presumed appropriate unless an employer could demonstrate that the employees excluded from the unit share ''an overwhelming community of interest with the petitioned-for employees.''

In *PCC Structurals*, the Board returned to the ''traditional'' community-of-interest test, pursuant to which ''the Board will determine whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit.'' In conducting this inquiry, the *PCC Structurals* Board held, ''the Board may find that the exclusion of certain employees renders the petitioned-for unit inappropriate even when the excluded employees do not share an 'overwhelming' community of interest with employees in the petitioned-for unit.''

Despite the decision in *PCC Structurals*, disputes over the attempted use of so-called ''micro-units'' persist. One such case is a fight over the appropriate bargaining unit at Boeing's manufacturing facility in North Charleston, South Carolina. In May 2018, the Regional Director for Region 10 issues a Decision and Direction of Election with respect to a proposed bargaining unit comprised of 180 ''Flight Line'' technicians at the facility. In the decision, the Regional Director rejected Boeing's argument that the proposed unit was inappropriate under *PCC Structurals* because Boeing's production employees work in a ''functionally integrated process from beginning to end, and that the only appropriate unit was a ''wall to wall'' unit of approximately 2,700 employees.

Following the decision, an election was conducted and the union prevailed. This stands in contrast to two prior unsuccessful attempts by the union to represent

all of the approximately 7,000 total employees at the facility. Following certification of the unit, Boeing refused to bargain with the union, a necessary step in the process of appealing the Regional Director's decision. The Board's eventual decision on the appropriateness of the certified unit will be closely-watched and may provide critical guidance on the application of *PCC Structurals* to future cases.

C. Elimination of Blocking Charges

One of the most effective (and for employers, frustrating) procedural weapons available to unions, particularly during the decertification process, is the filing of ''blocking charges.''

Blocking charges are unfair labor practice charges that allege that employees' rights to free choice during an election have been interfered with, and that seek to postpone an election while the charge is investigated and decided. In the context of a decertification vote, the filing of a blocking charge may have the effect of preserving a union's representative status even where it no longer has majority support.

In a footnote in an Order issued on May 9, 2018, Board Members Kaplan and Emanuel indicated their support for reconsidering the Board's rules concerning blocking charges in an ''appropriate case.'' *Apple Bus Company*, Case 19-RD-216636 (May 9, 2018). The footnote indicated that Emanuel ''believes that an employee's petition for an election should generally not be dismissed or held in abeyance based on contested and unproven allegations of unfair labor practices.''

It is, of course, not clear how the Board might revise the blocking charge rule in the event it were to do so. General Counsel Peter Robb has indicated that it is his view the Board should still conduct an election even where an unfair labor practice charge is filed, but only certify the result if the charged party is cleared of the alleged violations. On the other hand, numerous business groups have, in their comments to the Board's request for information concerning election rules, advocated eliminating the practice of permitting blocking charges altogether.

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