Top Five Labor Law Developments for February 2018

By Jonathan J. Spitz, Philip B. Rosen, Richard I. Greenberg, Howard M. Bloom, Chad P. Richter and Christopher M. Repole

March 9, 2018

1. The National Labor Relations Board has vacated its decision in *Hy-Brand Industrial Contractors, Ltd.,* 365 NLRB No. 156 (Feb. 26, 2018), and restored the Board's union-friendly joint employer test set forth in *Browning-Ferris Industries,* 362 NLRB No. 186 (2015), which *Hy-Brand* overruled.

   The vacated decision came after the Board's Inspector General released a report stating that Member William Emanuel should have recused himself from participating in the *Hy-Brand* decision. Emanuel's former law firm represented one of the joint employers involved in the *Browning-Ferris* decision.

   Under the reinstated *Browning-Ferris* standard, the Board will find two entities are joint employers where one exercises indirect control over the other's employees, or where one entity has reserved rights of control over the other's employees, even if unexercised.

   Many expect that the Board will, once again, reverse *Browning-Ferris* when the opportunity arises. Meanwhile, the Board has asked the U.S. Court of Appeals for the D.C. Circuit to recall the *Browning-Ferris* case, which was pending on appeal at the D.C. Circuit before it was remanded to the Board after the *Hy-Brand* decision.

2. An employer's food delivery drivers were misclassified as independent contractors, the NLRB Division of Advice stated in a memo. *Postmates, Inc.,* 12-CA-163079 (Div. of Advice, Feb. 13, 2018). In the underlying dispute, drivers filed unfair labor practice charges against the company, alleging: (1) they were employees, not independent contractors as the company alleged; and (2) the company violated the National Labor Relations Act by requiring them, as a condition of continued service, to waive the right to bring class or collective actions against the company.

   While the company rescinded its class/collective action policy before release of the Advice Division's memo, the misclassification issue remained. The Division of Advice agreed that the drivers were more like employees than contractors, because the company controlled their work hours and provided them with the web application necessary to accept deliveries, and because the payments for deliveries were more like wages than independent contractor payments.

3. According to a memo released by the NLRB Division of Advice, President Donald Trump's 2016 election campaign organization was not liable for claims that it forced its employees to adhere to unlawful confidentiality policies. *Trump Corp.,* Case 02-CA-183801 (Div. of Advice, Feb. 12, 2018).

   The Committee to Preserve the Religious Right to Organize had filed two unfair labor practice charges against the Trump election campaign, claiming it violated the NLRA by requiring employees to sign confidentiality agreements. The Division of Advice found the agreements' provisions were lawful, since the "non-public information" to which they referred did not restrict employees from discussing or disclosing terms and conditions of employment. The Division also found the Trump campaign no longer had any statutory employees by the time the memo was written and, therefore, the question before the Division was moot.

4. An employer violated the NLRA by refusing to hire union "salts" because of their union affiliation, the U.S. Court of Appeals for the Eighth Circuit, in St. Louis, has found. *Aerotek Inc. v. NLRB,* Nos. 16-4520 and 17-1206 (8th Cir. Feb. 21, 2018).

Meet the Authors

Jonathan J. Spitz

Principal
Atlanta 404-586-1835
Email

Philip B. Rosen

Principal
New York Metro
New York City 212-545-4001
Email

Richard I. Greenberg

Principal
New York Metro
New York City 212-545-4080
Email

Howard M. Bloom

Principal
Boston 617-367-0025
Email

The NLRB ruled that the company did not prove a valid nondiscriminatory reason for choosing not to hire three applicants for several openings. The lack of a valid reason supported the union's argument, the Board held, that the failure to hire was based on the individuals' backgrounds as union activists. On appeal, the Eighth Circuit affirmed the Board's finding that the company violated the NLRA by failing to hire the three individuals. The Court found there was "substantial evidence" that anti-union animus contributed to the failure to hire. While the Court generally affirmed the Board's remedy (requiring the employees to be hired with backpay), it remanded as to the remedy for one of the three applicants, based on evidence the individual may have inappropriately contacted company clients during the pendency of the dispute.

5. In a case involving misclassification of employees as independent contractors, the NLRB has invited interested parties to file amicus briefs to address whether the act of misclassification is a violation of the NLRA. In this case, a Board Administrative Law Judge had ruled that Velox, a courier service, violated the NLRA by misclassifying one of its couriers as an independent contractor. *Velox Express, Inc.,* 2017 NLRB LEXIS 486 (Sept. 25, 2017). The ALJ reasoned that misclassification denies the misclassified individual the protections of the NLRA, since the NLRA applies only to "employees." Velox appealed the ALJ's decision to the NLRB, which has announced that amicus briefs must be submitted on or before April 16, 2018.

Please contact your Jackson Lewis attorney if you have any questions about these developments.

Chad P. Richter

Office Managing Principal
Omaha 402-827-4233
Email

Christopher M. Repole

Associate
New York Metro
New York City 212-545-4019
Email

Practices

Labor Relations

Industries

Chemicals
Construction
Energy and Utilities
Financial Services
Government Contractors
Healthcare
Higher Education
Hospitality
Insurance
Life Sciences
Manufacturing
Media
Professional Services
Real Estate
Retail
Technology
Transportation