



Pennsylvania Conference of Teamsters

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William Hamilton, President & Eastern PA Legislative Coordinator – Joseph Molinero, Sec.-Treasurer & Western PA Legislative Coordinator – Tim O'Neill, Consultant – Dan Grace, Trustee & Legislative Advisor – Robert Baptiste, Esq. Legal Advisor

LEGISLATIVE ACTION ALERT



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Contact: publicinfo@nlrb.gov

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NLRB Overrules *Browning-Ferris Industries* and Reinstates Prior Joint-Employer Standard

Washington, D.C.—In a 3-2 [decision](#), the National Labor Relations Board today overruled the Board's 2015 decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015) ("*Browning-Ferris*"), and returned to the pre-*Browning Ferris* standard that governed joint-employer liability.

In all future and pending cases, two or more entities will be deemed joint employers under the National Labor Relations Act (NLRA) if there is proof that one entity has *exercised* control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so *directly and immediately* (rather than indirectly) in a manner that is not limited and routine. Accordingly, under the pre-*Browning Ferris* standard restored today, proof of indirect control, contractually-reserved control that has never been exercised, or control that is limited and routine will not be sufficient to establish a joint-employer relationship. The Board majority concluded that the reinstated standard adheres to the common law and is supported by the NLRA's policy of promoting stability and predictability in bargaining relationships.

Applying the reinstated pre-*Browning Ferris* standard, the Board agreed with an administrative law judge's determination that Hy-Brand Industrial Contractors, Ltd. (Hy-Brand) and Brandt Construction Co. (Brandt) were joint employers and therefore jointly and severally liable for the unlawful discharges of seven striking employees.

Chairman Philip A. Miscimarra was joined by Members Marvin E. Kaplan and William J. Emanuel in the majority opinion. Members Mark Gaston Pearce and Lauren McFerran dissented in the case.

NLRB Establishes New Standard Governing Workplace Policies, and Upholds No-Camera Policy in Boeing

Washington, D.C.—In a 3-2 [decision](#) involving The Boeing Company, the National Labor Relations Board overruled *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which articulated the Board's previous standard governing whether facially neutral workplace rules, policies and employee handbook provisions unlawfully interfere with the exercise of rights protected by the National Labor Relations Act (NLRA).

Under the prior *Lutheran Heritage* standard, the Board found that employers violated the NLRA by maintaining workplace rules that do not explicitly prohibit protected activities, were not adopted in response to such activities, and were not applied to restrict such activities, if the rules would be “reasonably construed” by an employee to prohibit the exercise of NLRA rights.

In place of the *Lutheran Heritage* “reasonably construe” standard, the Board established a new test: when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. The Board also announced that, prospectively, three categories of rules will be delineated to provide greater clarity and certainty to employees, employers, and unions.

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement maintained by Boeing, and rules requiring employees to abide by basic standards of civility. Thus, the Board overruled past cases in which the Board held that employers violated the NLRA by maintaining rules requiring employees to foster “harmonious interactions and relationships” or to maintain basic standards of civility in the workplace.
- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.

Although the *maintenance* of particular rules may be lawful, the Board held that the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act, depending on the particular circumstances presented in a given case.

Applying the new standard, the Board concluded that Boeing lawfully maintained a no-camera rule that prohibited employees from using camera-enabled devices to capture images or video without a valid business need and an approved camera permit. The Board majority reasoned that the rule potentially affected the exercise of NLRA rights, but that the impact was comparatively slight and outweighed by important justifications, including national security concerns.

Board Chairman Philip A. Miscimarra was joined by Board Members Marvin E. Kaplan and William J. Emanuel in the majority opinion. Members Mark Gaston Pearce and Lauren McFerran dissented in the case.

Additional information on this case can be found [here](#).

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