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MEMORANDUM

To:	ES&A Clients and Friends
From:	Anna Elento-Sneed, Esq. Trisha Gibo, Esq.
Date:	12/19/2017
Subject:	**Changes in National Labor Relations Board Policy**

The National Labor Relations Board ("NLRB" or the "Board"), and its recent Republican majority, has begun the long-anticipated overturning of Obama-era rulings and decisions. For employers, this means a return to more employer-friendly Board policies with respect to joint employer status, legality of employer policies and the employer's duty to bargain.

Joint Employment Test. *Hy-Brand*[1] is the first of the NLRB cases that overturns the controversial *Browning-Ferris* decision,[2] which notoriously expanded the test for determining joint employer status. In *Browning-Ferris*, the Board held that employers and staffing agencies could be joint employers based on indirect control over employment and a mere reservation of right to exercise such control. Under *Hy-Brand,* the joint employer test returns to the "direct and immediate" control standard which requires *actual* joint exercise of *direct and immediate* control over the essential terms of employment to find joint employer status.

Employee Handbook Policies. *The Boeing Company*[3] case overturns the Board's recent and liberal interpretation of the standard regarding legality of company policies set forth in *Lutheran Heritage.*[4] Under *Lutheran Heritage*, a Company policy was illegal if employees could "reasonably construe" the policy to interfere with the employee's right to engage in protected, concerted activity. In the Obama-era, *Lutheran Heritage* standard was interpreted to invalidate various neutral employer policies – most notably as it related to constraints on employee use of social media and electronic communications in the workplace.

In contrast, the decision in *The Boeing Company* takes a real-world approach to analysis of company policies, in which the NLRB considers and balances the impact of a rule on employees' rights to engage in protected, concerted activity and the employer's legitimate business interest in having such a rule.

Employer's Duty to Bargain with Union. Similarly, the Board issued its decision in *Raytheon*,[5] which reverses a 2016 Obama-era decision which required employers to bargain over unilateral changes to any

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1 *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., as a single employer and/or joint employers and Dakota Upshaw and David Newcomb and Ron Senteras and Austin Hovendon and Nicole Pinnick.* Cases 25–CA–163189, 25–CA–163208, 25–CA–163297, 25–CA–163317, 25–CA–163373, 25–CA–163376, 25–CA–163398, 25–CA–163414, 25–CA–164941, and 25–CA–164945 (December 14, 2017).

2 *Browning-Ferris Industries of California, Inc. v. Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters*, Case No. 32-RC-10968 (August 27, 2015).

3 *The Boeing Company and Society of Professional Engineering Employees in Aerospace*, IFPTE Local 2001; Cases 19–CA–090932, 19–CA–090948, and 19–CA–095926 (December 14, 2017).

4 343 NLRB 646 (2004) (Lutheran Heritage).

5 *Raytheon Network Centric Systems and United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO*, Case No. 25-CA-092145 (December 15, 2017).

employment conditions, as a mandatory subject of bargaining, even if similar changes were made in the past. At the time, *DuPont*[6] was widely criticized for overturning 50-year-old Board precedent. In *Raytheon*, the Board reinstates long standing policy which eliminates the employer's duty to bargain over unilateral changes to employment conditions, if the "change" is consistent with the company's past practice.

The Board has already taken additional steps to overturn other Obama-era decisions and rulings and will no doubt continue to do so through 2018. The changes provide some needed stability for employers and will continue to change the landscape of labor law.

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[6] *E.I. Du Pont de Nemours, Louisville Works and Paper, Allied-Industrial, Chemical and Energy Workers International Union and its Local 5-2002; E.I. Du Pont de Nemours and Company and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) and its Local 4-786*; Case Nos. 04–CA–033620, 09–CA–040777, and 09–CA–041634 (August 26, 2016).