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NLRB Moves to Change its Joint-Employer Standard

Until 2015, the NLRB required a business to have and exercise direct and significant control over the essential terms and conditions of another entity's workers in order to be deemed a joint employer for collective bargaining, unfair labor practices, and other purposes. In *Browning-Ferris Industries of California, Inc.*, the Obama board adopted a new standard finding joint-employer status when a company has only indirect control over another entity's employees. Today, the NLRB published a proposed rule that would overturn that test. Comments on the proposed rule may be submitted on or before November 13.

Background

From 1984 until 2015, the National Labor Relations Board (NLRB) applied a standard that required a business to exercise actual, direct, and immediate control over another entity's workers to be deemed a joint employer under the National Labor Relations Act (NLRA). Then, in *Browning-Ferris Industries of California, Inc.*, the Obama board established a new legal standard for determining whether two employers are joint employers. Under *Browning-Ferris*, an employer could be found to be a joint employer even if it had only indirect control (or a contractual reservation of authority) over the essential terms and conditions of another entity's employees. (See our September 25, 2015 *For Your Information*.) The decision is on appeal to the U.S. Court of Appeals for the D.C. Circuit.

Last December, the board overruled *Browning-Ferris* in its *Hy-Brand Industrial Contractors* decision. Once again, joint-employer status rested on one entity's exercise of actual, direct, and immediate control over one or more essential employment terms and conditions of another entity's employees. Earlier this year, the board vacated the *Hy-Brand* decision based on a determination by its Designated Agency Ethics Official that Member Emanuel should have been disqualified from participating in the proceeding, and effectively reverted to the *Browning-Ferris* standard. On May 9, the NLRB announced that it was considering rulemaking to address the standard for determining joint-employer status under the NLRA and would work toward a proposed rule as soon as possible. (See our May 10, 2018 *For Your Information*.)

Proposed Joint-Employer Standard

Today, the board published a proposed rule intended to change its joint-employer standard and provide greater clarity for determining whether two separate businesses are joint employers for collective bargaining, unfair labor

practices, and other purposes. NLRB Chairman John Ring was joined by Members Marvin Kaplan and William Emanuel in proposing the new standard; Member Lauren McFerran dissented.

Under the proposed rule, the board would find joint employment "only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." To be deemed a joint employer under this proposal, an employer "must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another entity's employees in a manner that is not limited and routine." No longer would indirect influence and contractual reservations of authority be sufficient to establish joint-employer status. To help clarify what would constitute direct and immediate control over essential terms and conditions of employment for joint-employer determinations, the proposed rule provides twelve examples that deal with a variety of business relationships.

In Closing

The NLRB has initiated the rulemaking process to change the board's standard on joint employment. Comments on the proposed rule must be received by the board on or before November 13.

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