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Labor Board Moves to Clear the Confusion on Joint Employment

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On Friday, September 14, 2018, the National Labor Relations Board (NLRB) issued its Notice of Proposed Rulemaking in the latest attempt to address the "joint employer" standard under the National Labor Relations Act. The proposed rule states that a separate entity will be considered a joint employer "only if the two employers share or codetermine the employee's essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." In sum, this proposed rule would return the joint employer standard to longtime precedent.

The NLRB seeks to use the rulemaking process to address the recent upheaval in its standard for joint employment. Specifically, in its 2015 *Browning-Ferris Industries of California, Inc.* decision, a split Board overturned decades of precedent and announced that a proposed joint employer would no longer need to be shown to have "direct and immediate control" over the employment of the workers.

With *Browning-Ferris,* the NLRB reflected a belief that a company's business partner with potential impact on the partner's employees should be included in the bargaining process. Put another way, under the *Browning-Ferris* standard, the focus was not on whether a putative joint employer *actually* exercises sufficient control over terms and conditions of employment. Instead, the mere fact that the putative joint employer *could* exercise such control would be enough to establish a joint employment relationship.

Then, in December 2017, in its *Hy-Brand Industrial Contractors, Ltd.* decision, the NLRB overruled *Browning-Ferris*, despite the fact that the decision was on appeal, and returned the standard to direct and immediate control. However, just a few months later, the Board further added to employers' confusion, announcing that it had vacated the *Hy-Brand* decision, meaning that the overruling of *Browning-Ferris* was no longer in effect.

With its recent move, the Board is now attempting to provide clarity on the joint employer standard. Acknowledging that *Browning-Ferris* remains on appeal, the NLRB decided that the back and forth of recent Board decisions meant that public comments on a proposed rule would provide its constituents a voice in the process. The NLRB has included several examples and specifically solicits input from unions and employers alike to give voice to whether they agree with this proposed rule. The remaining Democrat on the Board dissents from this proposed rulemaking.

Anyone wishing to provide comments on the proposed rule must submit the comments so that they are received by November 13, 2018. Continue to watch this space for further updates on the proposed rule.

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