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NLRB Attempts to Clarify Joint-Employer Relationships With Proposed New Rule

Article By:

Peter Lawrence Loh

On September 14, 2018, the National Labor Relations Board (NLRB) issued a Notice of Proposed Rulemaking regarding its standard for determining the existence of joint-employer relationships. The proposed rule has the potential to bring clarity to what is currently an uncertain regulatory landscape due to recent NLRB decisions.

The Board's Proposed New Rule

The Board's proposed rule reads in relevant part:

> An employer, as defined by Section 2(2) of the National Labor Relations Act, . . . may be considered a joint employer of a separate employer's employees 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. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

Recent Litigation Before the NLRB

The proposal presumably seeks to clarify an area of the employment law which has experienced a good deal of uncertainty of late. In 2015, the Board in *Browning-Ferris Industries of California, Inc.*, 362 NLRB 186 (*Browning-Ferris*) jettisoned the standard of "direct control" used since 1984. The Board instead broadened the conditions under which it could find an entity was a joint-employer. Under *Browning-Ferris*, the Board ruled that employer-employee relationships could exist if the alleged employer possessed either indirect *or* direct control over the terms and conditions of the employees' employment — regardless of whether it ever actually exercised such authority.

Then, in December 2017, the Board reversed *Browning-Ferris* and reinstated the previous standard of direct control. A mere two months later, the Board reversed *Browning-Ferris* in another case, *Hy-Brand Industrial Contractors, Ltd*. (*Hy-Brand*). *Hy-Brand's* holding was essentially a precursor to the Board's current proposed rule by requiring proof of a joint employer's direct and immediate control over the terms of employment. *Hy-Brand*, however, was short-lived, as the Board vacated the decision in February 2018, based on a potential conflict of interest on the part of a Board member.

The Impact of the New Rule

The Board's proposed new rule would narrow the standard for determining the existence of a joint-employer relationship to what it was from 1984 through 2015, prior to the *Browning-Ferris* decision. Essentially, the new rule would require a finding that the alleged employer did not just have the theoretical or reserved right to exercise control (whether directly or indirectly) but instead actually used its authority in a substantial, direct, and immediate manner over the employees.

Such a rule could provide greater protections for franchise companies and businesses that use subcontractors which have or are perceived to have interconnected operations. Businesses that utilize staffing agencies for labor would also benefit from this narrowed standard.

Examples of the New Rule in Practice as Compared to the *Browning-Ferris* Standard

Here are a couple examples of how the new proposed rule will work in practice.

Example #1. Company A supplies labor to Company B. The business agreement between Company A and Company B sets the amount of pay Company A must pay its employees doing work for Company B. Company A has no discretion to depart from the established pay rate per the terms of the contract.

Company B would be a joint employer under the new rule (as well as under *Browning-Ferris*) because it possesses actual, immediate authority over an essential term of employment.

Example #2. Under the terms of a franchise agreement, Franchisor and Franchisee agree that 1) Franchisee's store will be operated for a certain number of hours a day; 2) Franchisee will train employees according to particular standards; and 3) Franchisor has the reserved (but never actually exercised) authority to inspect employees' work and reward or discipline them accordingly.

While the Franchisor is arguably exercising indirect control over certain aspects of the Franchisee's operations (opening and closing hours and training) and reserved (but never exercised) authority to reward/discipline employee performance, which could draw the Board's attention under *Browning-Ferris*, it is not exhibiting the direct, immediate control over the essential terms and conditions of employment as articulated in the new rule. Thus, under the new, proposed standard (and the one which existed pre-*Browning-Ferris*), a joint-employer relationship is not likely to exist.

What Happens Next?

The Board will accept comments from the public for a period of 60 days, ending November 13, 2018.

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