Published on *The National Law Review* https://natlawreview.com

The Trump NLRB Finally Issues Its Much Awaited "Joint Employer" Rule

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Today, the National Labor Relations Board (NLRB or Board) followed through on its earlier promise and issued its Joint Employer Final Rule, officially reversing the Board's 2015 Browning-Ferris Industries *(BFI)* decision[1] and conclusively establishing the legal ground rules under which otherwise separate business entities may be legally joined and determined to be joint employers for the purposes of the National Labor Relations Act (NLRA or Act). Prospective only in effect, this new rule will be published in the Federal Register and go into effect on April 27, 2020.

BACKGROUND:

The Obama Board's *BFI* decision upended the law in this critical area by reversing prior Board case law and holding that a company could be found to jointly employ the workers of another company if it merely possessed *limited, indirect and routine* control over the essential working conditions of another employer's employees or if it contractually reserved the right to exercise such control. This change in the Board's controlling case law nullified the *status quo* by forcing otherwise non-employing companies into another employer's collective bargaining, by rendering separate businesses liable for the unfair labor practices of the other non-employing businesses, and by making what would otherwise be illegal secondary boycotts lawful.

The Trump NLRB could easily have reversed *BFI* by issuing a new decision returning the law to where it had been. However, instead, it elected to do so by formal rulemaking, noting that the rulemaking process allowed for a more predictable, thorough, clear and public treatment of this important and nuanced issue. Another, albeit unstated reason for this rulemaking was the permanence that it brings to this subject because under the Administrative Procedures Act, an agency cannot overturn or disregard a formal rule by issuing a new and contrary case decision. Instead, rulemaking may only be overturned by judicial invalidation or superseding rulemaking. Thus, by the passage of these final formal rules, the Trump Board locked in the law, at least unless and until subsequent and presumably Democratic controlled Board goes through another rulemaking process.

WHAT DOES THE NEW FINAL RULE SAY/DO?

1. The new final rule, found here, specifies that otherwise separate employers will not be deemed joint employers of a single work force unless they actually share/codetermine employees' essential terms and conditions of employment, i.e. they each possess and exercise such substantial direct and immediate control over one or more essential employment terms in a manner that is not limited and routine as would warrant a finding that [an] entity meaningfully affects matters relating to the employment relationship of employees;

2. The new final rule attempts to define and list the essential terms and conditions of employment that must be codetermined in order to render otherwise separate companies joint employers, i.e. wages, benefits, hours of work, hiring, firing, discipline, supervision and direction;

3. The new final rule states that proof of indirect control or contractually reserved but never exercised control over essential employment terms or control over nonessential employment terms, standing alone, will not be sufficient to establish joint employer status, but that such evidence may be used as background evidence supplementing evidence of a putative joint employer's direct and immediate control; and

4. The new final rule defines key terms including what constitutes "substantial direct and immediate" control of essential employment terms, i.e. that direct and immediate control that has a regular or continuous consequential effect on an essential employment condition/term as opposed to such control that is exercised on a sporadic, isolated or de minimis basis.

TAKEAWAYS:

1. The joint employer debate is over — for now and at least insofar as it pertains to the NLRA. However, that debate is likely to continue as to other laws and in other forums.

2. The Board's new final rules re-calibrate and raise the evidentiary threshold needed to qualify separate companies as joint employers of a single workforce. Those who do not possess and exercise substantial direct and immediate control over another's essential working conditions, i.e. wages, benefits, work hours, etc., will not be deemed joint employers.

3. Because of that re-elevated evidentiary burden, employers who may occasionally indirectly or incidentally affect the essential working conditions of employees of another employer need no longer fear being treated as one and the same with the other, direct hiring-entity employer for NLRA purposes.

[1] *Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599 (2015), affd. In part, reversed in part and remanded 911 F.3d 1195 (D.C. Cir. 2018)

National Law Review, Volumess X, Number 56