Labor Board Issues Final Rule for Determining Joint-Employer Status

By Jonathan J. Spitz, Richard F. Vitarelli, Howard M. Bloom and Linda R. Carlozzi

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The National Labor Relations Board (NLRB) has published its final rule governing determination of joint-employer status under the National Labor Relations Act (NLRA), restoring the standard that was applied for several decades before the NLRB's decision in *Browning-Ferris,* 362 NLRB No. 186 (2015). The final rule will become effective April 27, 2020.

Under the final rule, to be found a joint employer, a business must possess and exercise substantial direct and immediate control over at least one essential term and condition of employment of another employer's employees. These essential terms and conditions of employment are:

1. Wages
2. Benefits
3. Hours of work
4. Hiring
5. Discharge
6. Discipline
7. Supervision
8. Direction

The final rule defines "substantial" direct control as actions that have "a regular or continuous consequential effect" on one of the eight core aspects of a worker's job listed above.

Further, the final rule provides that even where an employer exercises direct control over another employer's workers, it will not be held to be a joint employer if such control is exercised on a sporadic, isolated, or de minimis basis.

In addition, the Board noted that various common elements of third-party contracts would not be enough to substantiate a finding of joint-employer status. These include, for example, a business "setting minimal standards for hiring, performance, or conduct" for a contractor, a business requiring that a contractor maintain workplace safety or sexual-harassment policies, and a franchisor taking steps to protect its trademark.

Significantly, evidence of indirect or contractually reserved control over essential employment terms may be a consideration for finding joint-employer status under the final rule. However, it cannot give rise to joint-employer status without substantial direct and immediate control. Thus, the mere reservation of control over essential employment terms cannot *per se* establish joint-employer status without evidence of substantial direct and immediate control. (This is contrary to the NLRB's finding in *Browning-Ferris*.) The final rule also makes clear that the routine elements of an arm's-length contract cannot turn a contractor into a joint employer.

History of Joint-Employer Standard

For more than 30 years, the Board consistently maintained that a joint-employer relationship existed only where "two separate entities share or codetermine those matters governing the essential terms and conditions of employment." To support a joint-employer finding, the Board required evidence that a putative joint employer "meaningfully affect[ed]" matters relating to the employment relationship and that its control over such matters was "direct and immediate."

In 2015, the Board expressly overruled this extensive precedent, articulating a new, two-factor test for determining joint-employer status. The Board's *Browning-Ferris* standard evaluated:

1. Whether a common-law employment relationship exists; and
2. Whether the putative joint employer "possesses sufficient control over employees' essential terms

Meet the Authors

Jonathan J. Spitz

Principal
Atlanta 404-586-1835
Email

Richard F. Vitarelli

Principal
Hartford 860-522-0404
Email

Howard M. Bloom

Principal
Boston 617-367-0025
Email

Linda R. Carlozzi

Principal
New York Metro
New York City 212-545-4040
Email

and conditions of employment to permit meaningful bargaining."

In applying both prongs of the test, the Board announced it would no longer require "direct and immediate" control over workers to establish a joint-employer relationship. Instead, it would consider both reserved and indirect control, such as through an intermediary or through contractual provisions that reserve the right to control, as potentially sufficient evidence to establish a joint-employer relationship, regardless of whether the right to control is ever exercised.

In December 2017, in *Hy-Brand,* the Board overruled *Browning-Ferris* and reinstated the previous joint-employer standard, which included the "direct and immediate" control requirement. 365 NLRB No. 156. However, *Hy-Brand* was quickly vacated. The Board's Inspector General had determined that Board Member William Emanuel should not have participated in the decision because of a conflict-of-interest based on his prior law firm's representation of one of the parties in that case. Thus, the *Browning-Ferris* joint-employer standard was revived.

Thereafter, on September 2018, the Board shifted course. Instead of following its traditional approach of addressing such issues through its decisions on a case-by-case basis, it formally proposed a rule that would reinstate the pre-*Browning-Ferris* standard. (For more, see our article, Labor Board Seeks Public Comments on Proposed Rule for Determining Joint-Employer Status.)

Meanwhile, and at the Board's request, the U.S. Court of Appeal for the D.C. Circuit issued its *Browning-Ferris* decision, which had been pending for several years.

D.C. Circuit's *Browning-Ferris* Decision

On appeal, the D.C. Circuit approved, as consistent with common law, the Board's *Browning-Ferris* two-factor test. The Court also determined that the Board properly considered both the putative employer's reserved right to control and its indirect control as factors for determining whether businesses should be considered joint employers.

The Court noted, however, that indirect control is relevant to the joint-employer analysis only if it relates to the essential terms and conditions of employment. Here, the Court said, the Board failed to apply the "indirect control" factor within the relevant boundaries of the common law because it did not differentiate between relevant forms of indirect control (*i.e.,* related to the essential terms and conditions of employment) and those inherent to contractual business relationships (*e.g.,* objectives, basic ground rules, and expectations of a third-party contractor). To that end, the Court stated, "[t]he Board's analysis of the factual record in this case failed to differentiate between those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third-party contract relationships."

Consequently, the Court remanded the case to the Board to identify which specific facts supported its joint-employer finding and to further articulate a "legal scaffolding" for application of the indirect control factor that "keeps the inquiry within traditional common-law bounds and recognizes that '[s]ome such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees.'"

Additionally, the D.C. Circuit held the Board did not meaningfully apply the second step of the new standard — that is, whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. The Court said the Board failed to identify what terms and conditions are "essential" to make collective bargaining meaningful or to clarify what "meaningful collective bargaining" might require. The Court suggested that, if the Board once again finds *Browning-Ferris* a joint employer on remand, the Board should "(i) apply the second half of its announced test, (ii) explain which terms and conditions are 'essential' to permit 'meaningful collective bargaining,' and (iii) clarify what 'meaningful collective bargaining' entails and how it works in this setting."

Implications and Potential Legal Challenges

The Board, mindful of the Court's analysis in the *Browning-Ferris* decision, appears to have addressed the Court's concerns in its final rule. The Court told the Board, "The policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary." Thus, wholly disregarding reserved or indirect control as a relevant common-law factor in the Board's final rule may violate aspects of the D.C. Circuit's holding.

It appears the Board heeded the Court's guidance in its final rule. For example, it addresses what terms and conditions of employment it considers essential to meaningful collective bargaining could lead to bargaining obligations.

The Court's *Browning-Ferris* opinion is nuanced. There is no guarantee or assurance the final rule will

withstand judicial scrutiny as it certainly will be challenged in the courts. In addition, several lawmakers have voiced opposition to the final rule.

While noting that it does not typically engage in rulemaking, the NLRB said that rulemaking was the right course here, and that it has received helpful comments from the public. NLRB also said that rulemaking allowed it to address the joint-employer issue more broadly and with greater stability than through case-by-case adjudication. NLRB Chairman John Ring said in a press release, "This final rule gives our joint-employer standard the clarity, stability, and predictability that is essential to any successful labor-management relationship and vital to our national economy."

Please contact a Jackson Lewis attorney with any questions about the final rule, labor relations, or the NLRB.