Legal Update Article

Browning Ferris Returns: NLRB Again Proposes New Broader Rule for Determining Joint Employer Status

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September 7, 2022

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The National Labor Relations Board ("NLRB" or "the Board") has proposed a new rule for determining joint employer status under the National Labor Relations Act ("NLRA"). The proposed rule comes after nearly a decade of the Board changing positions as to what could render two independent companies joint employers. Most changes have involved the degree to which one employer must retain the right to control another company's employees' terms and conditions of employment to make them joint employers. Courts have also gotten involved, especially the District of Columbia Federal Court of Appeals. Federal administrative agencies, such as the Department of Labor and the EEOC have also tended to follow the NLRB's twists and turns on the issue.

In a statement issued September 6, 2022, Board Chair Lauren McFerran explained the Board majority's goal to implement "a clear standard for defining joint employment that is consistent with controlling law" after years of "uncertainty and litigation." While the proposed rule is not yet final and is subject to public comment, it is likely to impact labor relations and business relationships of many business relationships.

Background

For at least 30 years prior to 2015, the Board's standard for determining whether a joint employer relationship existed was based on whether "two separate entities share or codetermine those matters governing the essential terms and conditions of employment." To be considered a joint employer, an employer had to "meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of the employees of another employer. *TLI, Inc.*, 271 NLRB 798, 798 (1984); *Laerco Transportation*, 269 NLRB 324, 325 (1984). The essential element was "whether a putative joint employer's control over employment matters is direct and immediate." *Airborne Express*, 338 NLRB 597, 597, n.1 (2002). After three decades of applying this consistent standard, however, the Obama NLRB broadened the scope of joint employment in 2015's seminal *Browning-Ferris Industries of California, Inc.* to include employers (1) who *indirectly* affect employees' terms and conditions of employment or (2) who reserve the right to control but do not exercise that right, thereby placing many more employers under the Board's "joint employer" umbrella. 362 NLRB No. 186 (Aug. 27, 2015).

The Trump-majority Board overruled *Browning-Ferris* in 2017 and reinstated the traditional "direct and immediate control" standard. *Hy-Brand*, 365 NLRB No. 156. For reasons unrelated to the substance of the case, however, the *Hy-Brand* decision was vacated, and the broader *Browning-Ferris* joint employer standard was revived and continued to serve as the Board's controlling precedent.

Meanwhile, in December 2018, the D.C. Circuit Court of Appeals partially affirmed the

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Obama Board's holding in *Browning-Ferris* and found that indirect control and reserved authority can establish a joint-employer relationship, and the NLRB must apply common law to assess joint employer relationships. The D.C. Circuit found, however, that the NLRB failed to distinguish between the amount of indirect control and reserved authority necessary to differentiate between normal third-party relationships and joint employers. The D.C. Circuit remanded the matter back to the NLRB to address the amount of indirect control and reserved authority necessary to create a joint employer relationship. As a result, the Trump-era Board held that the broader standard adopted in *Browning-Ferris* should not have been applied retroactively, as doing so was "manifestly unjust." *Browning-Ferris Industries of California, Inc.*, 369 NLRB No. 139 (July 29, 2020) (B-F II).

The Trump-majority Board then used its rule-making authority to issue a Final Rule on April 27, 2020, which "reinstated and clarified the joint-employer standard in place prior to" *Browning-Ferris* (since 1984), again requiring proof of "direct and immediate" control over workers. Any indirect and/or reserved control would only be considered to the extent such evidence "supplemented and reinforced" one entity's direct and immediate control over essential terms and conditions of employment of another entity.

The Proposed Rule

The current Board's proposed rule would rescind the April 27, 2020 Final Rule, and return to the *Browning-Ferris* standard. In issuing the new rule, the current Board explained that the proposed changes are "intended to explicitly ground the joint-employer standard in established common-law agency principles, consistent with Board precedent and guidance that the Board has received from the U.S. Court of Appeals for the DC Circuit." Specifically, the Board claims that the proposed rule would align joint employer principles with agency law governing employer/employee relationships, and the reserved "right to control," rather than the actual exercise of control, is determinative. The current Board also articulated its position that this standard reinstates the standard in effect before 1984, which it urged, despite its inapplicability for three decades, is the appropriate standard.

Under the proposed rule, entities may again be deemed joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment." These terms and conditions include wages, benefits and other compensation, work and scheduling, hiring and discharge, discipline, workplace health and safety, supervision, assignment, and work rules. See Board Public Statement (September 7, 2022).

The rule specifically states that "Possessing the authority to control is sufficient to establish status as a joint employer **regardless of whether control is exercised**." Thus, any reserved control is sufficient to establish a joint employer relationship.

Additionally, the proposed rule provides that "exercising the power to control indirectly is sufficient to establish status as joint employers, **regardless of whether the power is exercised directly." Further, "control exercised through an intermediary person or entity is sufficient to establish status as a joint employer." The proposed rule eliminates any of the quantifiable guidance that the Trump Board's rule sought to address.**

The Board will now take into consideration evidence of "reserved" or "indirect" control, provided the elements of control relate to an employees' essential terms and conditions of employment. As a result, employers could be held as joint employers under the new rule

if they "possess the authority to control (whether directly, indirectly, or both), or exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment." However, an "employer's control over matters immaterial to the employment relationship" or that "do not bear on the employees' essential terms and conditions of employment" may not independently establish joint employer status. Likewise, in its comments to the new rule, the Board agreed that "routine components of a company-to-company contract, like a 'very generalized cap on contract costs,' or an 'advance description of the tasks to be performed under the contract,' will generally not be material to the existence of an employment relationship under common-law agency principles." Still, the proposed rule's lack of detailed guidance opens the door to a case-by-case analysis of general contract terms with very little guidance on what constitutes indirect control.

The Board acknowledged that its initial list of "essential terms and conditions of employment" may not be exhaustive and will likely change (and expand) over time. It anticipates public comment will help it refine the list, but will not adopt a comprehensive list to preserve the Board's flexibility in applying the rule in contested cases.

Dissent

In a 25-page dissent, Board Members Marvin Kaplan and John Ring, both of whom were members of the Board that issued the 2020 rule, stated the proposed rule will not only rescind the 2020 Rule's detailed guidance regarding the type of conduct that constitutes direct and immediate control, but will fail to provide a clear, comprehensive standard. They further assert that the proposed rule's failure to provide clear and adequate guidance will lead to case-by-case decisions concerning the types of contractual provisions that reserve the right to control or evidence indirect control.

Implications

The joint employer standard has been one of the most contentious labor issues in the past decade. This proposed rule once again changes the standard. If two entities are joint employers under the NLRA, both must participate in bargaining with a union representing workers under the rule's expanded definition of common control, and both are potentially liable for any unfair labor practices committed by the other. In some circumstances, a union may argue that a user employer's collective bargaining agreement must be applied to contractor employees.

There is also a significant risk that the new broader rule will likewise be adopted or applied by other federal agencies, labor-friendly courts, and other agencies. Broader application of the rule raises concerns among franchisors/franchisees, contractors/subcontractors and staffing agencies/user employers, and companies entering into similar commercial arrangements. Employers will need to closely review their commercial agreements with other companies that contain terms or rights (whether exercised) requiring these companies to ensure that their employees maintain levels of quality, efficiency, safety or performance. The proposed rule creates a risk that even benign commercial terms can be interpreted to create the potential of direct or even indirect control over employment terms and conditions.

While the proposed rule still must undergo public comment before it is final, employers should speak with legal counsel to discuss how the proposed rule will affect them. In some instances, advance planning and a proactive review of commercial arrangements that

may pose an elevated risk of a joint employer finding, may position employers to avoid unintended and (until now) unanticipated consequences of these arrangements. Indeed, in view of the instability of the law, many companies have continued to evaluate their arrangements since the 2015 *Browning-Ferris* decision.

Public Comments on this proposed rule must be received by the NLRB on or before November 7, 2022. It is possible that public comment by employers and industry groups may temper some aspects of the final rule. The Board specifically "invite[d] comment regarding which contractual controls reserved by the joint employer over another entity's employees should establish the putative joint employer is also a common-law employer of the other entity's employees." So, that door is open, at least a crack.

Members of the Jackson Lewis Labor Relations practice group work with clients daily to keep them updated on these and related issues.