Special Report

Labor Board (Again) Returns to Broader Rule for Determining Joint-Employer Status

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The National Labor Relations Board once again issued a newFinal Rule for determining joint-employer status under the National Labor Relations Act. The joint-employer analysis has significant implications for employers, as it determines when one entity can be held liable for the other's unfair labor practices.

The Final Rule comes after nearly a decade of the Board changing positions as to what could make two independent companies joint employers. It also comes more than a year after the Board initially issued its Notice of Proposed Rulemaking on the issue.

The Final Rule largely centers on the degree to which one employer must retain the right to control another company's employees' essential terms and conditions of employment to make them joint employers. The Final Rule provides that an entity's "reserved" authority or "indirect" control over the employees of another with respect to an essential term and condition, regardless of whether that control is actually exercised, can establish joint-employer status.

In a press release, Board Chairman Lauren McFerran noted the Final Rule's return to common-law principles as interpreted by the Board and explained that the new standard is "a practical approach to ensuring that entities effectively exercising control over workers' critical terms of employment respect their bargaining obligations under the [Act]." McFerran also affirmed the Board will still conduct a fact-specific analysis when assessing joint-employer status. Despite McFerran's statement that common-law principles will prevail, the Final Rule significantly expands what kind of conduct creates a joint-employment relationship depending on the presence of indirect control or reserved authority.

The effective date of the new standard is December 26, 2023.

Background

For at least 30 years prior to 2015, the existence of a joint-employer relationship 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 Board broadened the scope of joint employment. In 2015's seminal *Browning-Ferris*

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Industries of California, Inc., 362 NLRB No. 186, the Board placed many more employers under the "joint employer" umbrella, explaining that such employers include those (1) who indirectly affect employees' terms and conditions of employment or (2) who reserve the right to control but do not exercise that right.

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 as the Board's controlling precedent.

Meanwhile, in December 2018, the D.C. Circuit Court of Appeals partially affirmed the Obama Board's holding in *Browning-Ferris.* It found that indirect control and reserved authority can establish a joint-employer relationship and directed the Board to apply common law to assess joint-employer relationships. The D.C. Circuit found, though, that the Board failed to distinguish between the amount of indirect control and reserved authority necessary to differentiate between normal third-party relationships and joint employers. It remanded the matter back to the Board 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 (2020).

The Trump-majority Board then 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 or reserved control would be considered only 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 New Rule

The Final Rule rescinds the 2020 Rule and returns to a modified*Browning-Ferris* standard. In issuing the new Final Rule, the Board stated that it believes the changes "will more explicitly ground the joint-employer standard in established common-law agency principals" and provide guidance to parties regarding their rights and obligations under the Act. The Board claims the Final Rule "aligns employers' responsibilities with respect to their employees with their authority to control those employees' essential terms and conditions of employment," and thus protects employees' rights to organize and collectively bargain over those aspects of employment. The Board also explained that a joint employer's "authority to control essential terms and conditions of employment, whether or not such control is exercised, and without regard to whether any such exercise or control is direct or indirect" should be given *determinative* weight in the joint-employer analysis. Such determinative weight to a joint-employer analysis once again implements Obama-era standards with no such basis in common law.

In a departure from both the proposed rule and*Browning-Ferris,* the Final Rule incorporates the following exhaustive list of the essential terms and conditions of employment the Board will review to provide clarity and predictability for employers:

1. Wages, benefits, and other compensation;
2. Hours of work and scheduling;
3. The assignment of duties to be performed;
4. The supervision of the performance of duties;
5. Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
6. The tenure of employment, including hiring and discharge; and
7. Working conditions related to the safety and health of employees.

The Final Rule, however, reiterates language in the proposed rule that "possessing the authority to control is sufficient to establish status as a joint employer regardless of whether control is exercised." Reserved control, therefore, is sufficient to establish a joint-employer relationship. The Board also highlighted indirect control, such as through intermediaries like staffing or temporary agencies, and confirmed that "control exercised through an intermediary person or entity is sufficient to establish status as a joint employer."

Accordingly, the Board will 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."

Importantly, an "entity's control over matters immaterial to the existence of an employment relationship" and "do not bear on the employees' essential terms and conditions of employment" are not relevant to the joint-employer determination. However, the Board provides little guidance on what matters are immaterial to the existence of an employment relationship.

Likewise, following comments to the proposed rule, the Board acknowledged that "routine components of a company-to-company contract will generally not be material to the existence of an employment relationship under common-law agency principles." The Board cited examples from its proposed rule, including a "very generalized cap on contract costs" or "an advance description of the tasks to be performed under the contract." The Board declined to provide any further detail or guidance on other business arrangements that might create an employment relationship. Indeed, the Final Rule opens the door to a "case-by-case" assessment for determining joint-employer status.

Dissent

In a scathing dissent, Board Member Marvin Kaplan, who was a member of the Board that issued the 2020 rule, stated the new standard "is potentially even more catastrophic to the statutory goal of facilitating effective collective bargaining, as well as more potentially harmful to our economy, than the Board's previous standard in *Browning-Ferris Industries."* Kaplan further opined that the Final Rule goes beyond *Browning-Ferris* and extends to make such factors *dispositive* of joint-employer status. The Final Rule, Kaplan stated, eliminates the requirement that the Board determine the *extent* of a putative joint employer's control over the terms and

conditions of another entity's employment and whether that is sufficient "to permit meaningful collective bargaining." Thus, the Final Rule is an "unprecedented and unwarranted" expansion of the joint-employer standard and "exceeds the limits of the common law," according to Kaplan.

Implications

The joint-employer standard has been one of the most contentious labor issues in the past decade. If two entities are joint employers under the Act, both are potentially liable for any unfair labor practices committed by the other. The Board also noted that a joint employer:

> must bargain collectively with the representative of those employees with respect to any term or condition of employment that it possesses the authority to control or exercises the power to control (regardless of whether that term or condition is deemed to be an essential term or condition of employment under the rule).

While the Board confirmed an entity found to be a joint employer is not required to bargain over a term or condition that "it does not possess the authority to control or exercise the power to control," the Final Rule nonetheless substantially broadens the joint-employer analysis.

There is also a high risk that this new broader rule will be adopted in large part or applied by other federal agencies, such as the Department of Labor, the Equal Employment Opportunity Commission, other agencies, and labor-friendly courts, as was the case with *Browning-Ferris* standard. As a result, companies that are unrelated through ownership that, for whatever reason, do not operate at arm-length as to terms and conditions of either one or another's employees may find themselves co-defendants in claims or demands.

Broader application of the Final Rule raises concerns among entities in commercial arrangements such as franchisors-franchisees, contractors-subcontractors, and staffing agencies-user employers. Employers will need to closely review their commercial agreements with other companies that contain terms or rights (whether exercised) requiring these companies to ensure their employees maintain levels of quality, efficiency, safety, or performance. The Final Rule creates a risk that even relatively routine commercial terms, if touching indirectly or remotely employment terms and conditions, can be interpreted to create the potential of direct or even indirect control over employment terms and conditions.

Employers must analyze how the Final 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 unanticipated consequences of these arrangements.

Please contact a Jackson Lewis attorney with questions on the Final Rule and how it may impact your organization.

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