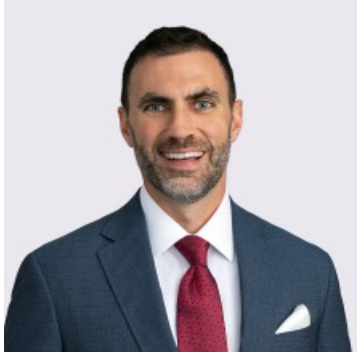
Legal Update Article

Labor Board Seeks Public Comments on Proposed Rule for Determining Joint-Employer Status

By James P. Verdi &

September 26, 2018

Meet the Authors



James P. Verdi
Principal
James.Verdi@jacksonlewis.com

Related Services

Construction
Energy and Utilities
Entertainment and Media
Government Contractors
Healthcare
Hospitality
Labor Relations
Life Sciences
Manufacturing
Retail
Staffing and Independent Workforce
Technology
Transportation and Logistics

The National Labor Relations Board has published a proposed rule outlining a new standard for determining joint-employer status under the National Labor Relations Act. The Board's decision to use its rulemaking authority — rather than fact-specific decisional law — could provide employers the clarity and predictability needed to avoid unwanted joint-employer relationships.

The proposed rule was published in the *Federal Register* on September 14, 2018, and is open for public comment through November 13, 2018. Companies that use or provide temporary or supplemental staffing services are strongly encouraged to submit comments to the Board for consideration. Companies that regularly work with franchisors and franchisees or with subcontractors also may want to comment, as the proposed changes may affect them directly. Giving the Board your views will increase the possibility of a well-informed, comprehensive final rule that would provide clear guidance to and limit the risk of litigation for employers.

Proposed (Traditional) Standard

Under the proposed rule, joint-employer status is found only where at least two entities *actually* share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. An employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another party's employees in a manner that is not limited and routine.

If implemented, the proposed rule would essentially reinstate the traditional joint-employer standard that was abandoned by the Board in its *Browning-Ferris* decision in 2015. (For details of *Browning-Ferris,* see our article, Labor Board Sets New Standard for Determining Joint Employer Status.) In that decision, the Board maintained the traditional "direct and immediate control" requirement, but added that indirect control, or even the unexercised right to control, may be sufficient to establish a joint-employer relationship. In doing so, the Board held that a fact-intensive evaluation must be done on a case-by-case basis to determine whether a joint-employer relationship exists.

Browning-Ferris has had the potential to cause two or more entities with attenuated relationships to be found "joint employers." It created uncertainty for businesses, drawing them into another entity's collective bargaining relationships, or exposing them to joint and several liability for unfair labor practice arising out of decisions in which they did not actively participate. The implications of the decision also had extended beyond labor law, influencing courts and other agencies in broadening the application of joint-employer standards in other contexts.

(Although the Board previously reversed *Browning-Ferris* in its 2017 decision in *Hy-Brand Industrial Contractors, Ltd.,* the decision was later withdrawn. See our article, Top Five

Labor Law Developments for March 2018.)

Rulemaking Process

In its Notice of Proposed Rulemaking, the Board explained that rulemaking in this area of the law, in contrast to a case-by-case analysis, would foster predictability, consistency, and stability in the determination of joint-employer status. By seeking and incorporating public comments into the final rule, the Board believes companies will be better equipped to understand the legal implications of their business arrangements and relationships, thereby promoting labor-management stability, one of the principal purposes of the Act.

To accomplish this objective, the Board included several hypothetical scenarios in the proposed rule to help parties understand how the standard may be applied in certain circumstances. The scenarios include some, but not all, areas of particular concern, such as franchisor-franchisee relationships, the use of temporary staffing agency workers, and the impact of contract language reserving the right to control.

The Board seeks additional input from the public on all aspects of the proposed rule. The Board is particularly interested in how legal requirements and standards affect business practices and arrangements in workplaces where more than one employer has some authority over the employees. Once the comment period has closed, the Board will review the submissions and promulgate a final rule it believes will clarify the joint-employer standard in a way that promotes meaningful collective bargaining and advances the purposes of the Act.

This public-comment period is an important opportunity for companies to submit input and concerns. If you have questions, would like to discuss the implications of this rulemaking in greater details, or need assistance with the preparation or submission of a comment on your behalf, please contact the Jackson Lewis labor lawyer with whom you regularly work.