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Employment Law Note

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NLRB Signals Relaxation of Joint Employer Definition

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On September 13, 2018, the National Labor Relations Board (NLRB) announced that it will be proposing a new regulation that will make it more challenging to establish a joint employer relationship under the National Labor Relations Act (NLRA).

Joint employment status can have a significant impact on an entity. A joint employer can be required to bargain with a union representing the jointly employed individuals, it can be subject to liability for unfair labor practices even if committed by the other employer, and it may be subject to labor picketing that it would otherwise not be subject to.

History of the Joint Employment Status

Prior to 2015, joint employment status could only be established if the putative joint employers both exercised actual, direct and immediate, control over the essential terms of the employees' employment.

Then in 2015, the Obama administration NLRB dramatically relaxed the standard for proving that two entities are joint employers. In the *Browning-Ferris Industries of California Inc. d/b/a BFI Newby Island Recyclery* decision, the NLRB held that two entities may be joint employers if the entities reserve joint control, have indirect control, or have control that is limited and routine. Thus, the definition was met if one entity had potential control over another entity—whether that control was ever exercised or not. This ruling increased the number of potential joint employers and was the subject of intense scrutiny and concern by franchisors, construction contractors and other employers who had an oversight relationship with other entities. The *Browning-Ferris* case is now on appeal before the U.S. Circuit Court of Appeals for the District of Columbia.

Last year, the Trump administration NLRB reversed the *Browning Ferris* decision in the *Hy-Brand Industrial Contractors, Ltd*. decision. The *Hy-Brand* decision reverted the joint employer test back to the pre-2015 definition by requiring the actual exercise of direct and immediate control over employees of another entity to be deemed joint employers. However, this decision was withdrawn due to an apparent conflict of interest of one of the deciding NLRB members.

To avoid the risk of changing case law and to establish a more permanent and stricter joint employer standard, the Trump administration recently proposed a new rule.

Proposed New Joint Employer Status Rule

Under the NLRB's proposed new rule, entities may be considered joint employers only if the two employers "share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision and direction." The joint employers must "possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine."

The NLRB even provided examples to help clarify what constitutes "direct and immediate control" over the essential terms and conditions of employment. Thus, if a company supplies labor to another company and they have a contract between them by which the company receiving the labor is required to pay a particular wage rate, only the company supplying the labor is deemed to be exercising direct and immediate control over wage rates. As another example, if a franchisor only requires a franchisee to operate its store between specified hours, it is not deemed to exercise the requisite direct and immediate control over the essential terms and conditions of the employees of the franchisee because there is no involvement on the franchisor's part in scheduling the employees or establishing the shift durations.

The NLRB proposed rule was published in the Federal Register on September 14, 2018, and is open for public comment through November 13, 2018. It remains to be seen whether the rule will be adopted and whether any changes will be made to the proposed rule. In the meantime, to minimize the risk of being deemed a joint employer, employers should avoid being involved in any decisions regarding another entities' employees, such as pay, their hiring, their firing, their scheduling, or their discipline. Stay tuned for future developments in this important area.

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