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NLRB Plans to Revise Joint Employer Standard Once Again

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On Friday, December 10, 2021, the Board announced in its regulatory agenda that it plans to engage in rulemaking on the standard for determining whether two employers are "joint employers" under the NLRA. It remains to be seen exactly what the contours of the new joint-employer rule would be, although it has been widely predicted that the Board will revert to the standard that previously existed, which does not require the purported joint employer to actually exercise control over employment conditions, as long as the company possesses such authority.

Relevant Background

Under the National Labor Relations Act ("NLRA"), "joint employment" refers to a situation where two or more separate entities "share or codetermine" essential terms and conditions of employment, such as decisions about hiring, firing, disciplining, supervision, and direction of employees. This issue typically arises in the context of contractor/subcontractor relationships, entities that engage temporary staff, professional employment organizations, parents/subsidiaries and franchisor/franchisee situations.

The impact of a joint-employer finding is that a joint employer may have a duty to participate in collective bargaining for the other entity's employees; may jointly or independently be responsible for unfair labor practices committed by either employer; may be subject to accretion (*i.e.*, the process by which a union is permitted to add individuals to a bargaining unit without holding an election); and may face a greater likelihood that picketing by the employees in question would be held lawful.

Although joint employment requires that two or more separate entities "share or codetermine" essential terms and conditions of employment, the devil is in the details—and the details have been revised several times over the past decade. The key detail that has vacillated over the years is whether the purported joint employer actually exercised authority over employees' terms and conditions of employment, or whether possession of such authority is enough.

The History of the Joint Employment Standard

The recent evolution of the joint-employment standard began in 2015, when the Board's decision in *Browning-Ferris Industries*, 362 NLRB 1599 (2015), expanded the scope of whether an entity is deemed a joint employer under the NLRA. Prior to *Browning-Ferris*, an entity could be held a joint employer under the NLRA only if it exercised "direct and immediate" control over employment terms and conditions in more than a limited and routine manner. The Board, in *Browning-Ferris*, relaxed that standard so as to extend joint employer status even to entities possessing an ability to control employment terms and conditions indirectly (*e.g.*, by using an intermediary), and even if the entity never actually exercised that ability.

In late 2017, the Board, in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017), overruled the *Browning-Ferris* decision and reinstated the earlier, more exacting joint employment standard that governed prior to 2015. We discussed that reversal here and here.

Just two months later, however, the Board vacated that 2017 *Hy-Brand* decision due to extensive political pressure related to alleged conflicts of interest by one of the Board members who participated in the decision, thereby effectively reinstating *Browning-Ferris* . *See Hy-Brand Indus. Contractors, Ltd.*, 366 NLRB No. 26 (Feb. 26, 2018). We discussed that turn of events here.

Three months later, in May 2018, the Board announced that it would consider revising the joint employer standard by means of rule-making, and in September 2018 the Board published a Notice of Proposed Rulemaking. We discussed those communications here and here. Essentially, the Board proposed to revert to the pre-*Browning-Ferris* standard of joint employment. The proposed rule attracted considerable attention, to the extent that the Board received approximately 29,000 comments on the proposed rule during the notice and comment period.

In February 2020, the Board confirmed that it would replace the *Browning-Ferris* standard with a new rule, effective April 27, 2020. We discussed that announcement here. That new rule, codified at 29 C.F.R. § 103.40, provides that a joint employer relationship requires that the purported joint employer "possess and exercise . . . substantial direct and immediate control" over one or more "essential terms and conditions of employment" of another employer's employees, such that the "entity meaningfully affects matters relating to the employment of those employees."

When announcing the enactment of that new final rule in 2020, then-Chairman of the NLRB John Ring stated that "[w]ith the completion of today's rule, employers will now have certainty in structuring their business relationships, employees will have a better understanding of their employment circumstances, and unions will have clarity regarding with whom they have a collective-bargaining relationship." Thus, the uncertainty generated by *Browning-Ferris* surrounding the joint employment standard finally resolved—or, so it seemed.

NLRB's Rulemaking Agenda Signifies Potential Reversion to *Browning-Ferris* Standard

The current Board's announcement that it plans to reopen the question of what constitutes joint employment was not surprising. Given that the existing standard was established by means of the Board's rule-making powers, the Board cannot overrule that standard merely by issuing a decision on a case. Rather, the Board can revise the existing standard only by exercising its rule-making powers once again.

Specifically, the Board could either use those powers to fashion a new rule to replace the April 2020 rule, or use those powers to simply rescind the April 2020 rule without offering any replacement. Under the latter scenario, the joint employment standard would once more be subject to adjudicative determination, in which case the law would immediately revert to the *Browning-Ferris* standard that prevailed prior to the April 2020 rule. That *Browning-Ferris* standard would control unless and until it is replaced once more by some future Board decision or rule.

We will continue to monitor and keep you updated on developments regarding these and related questions.

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- **Mark Theodore**
  Partner
- **Joshua S. Fox**
  Senior Counsel