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Labor, Employment, Benefits + Immigration

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NLRB Pursues Rulemaking to Address Joint-Employer Standard

Companies attempting to determine whether they are joint employers of certain workers under the National Labor Relations Act (Act) have been confronted with a shifting landscape during the past few years as the National Labor Relations Board (Board) repeatedly changed its approach to the issue. Recently, however, the Board Chairman confirmed that the Board planned to utilize its rulemaking process to determine the proper standard in order to provide employers clarity and consistency. Rather than addressing the proper standard in a single case limited to the facts presented, rulemaking allows the Board to consider all views, address the issue in a comprehensive manner, and provide certainty to parties. It also makes it more difficult for the standard to be changed without resorting to the rulemaking process.

As we previously reported, in August 2015 the Board majority, appointed by President Barack Obama, drastically changed the then-existing test for determining whether an entity is considered a joint employer for purposes of collective bargaining. *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015). Under the new test, two companies may be joint employers if they "share or codetermine those matters governing the essential terms and conditions of employment." Applying this test, the Board first looks at whether a common-law employment relationship exists with the employees. If so, the Board then examines whether the alleged joint employer possesses sufficient control over the employees' essential terms and conditions of employment to allow for meaningful collective bargaining.

Significantly, in that case the Board stated that it will no longer require that joint employers both possess and exercise authority to control employees' terms and conditions of employment. Instead, reserved authority to do so would be sufficient. The Board also stated that it no longer would require that the employer's control be "direct and immediate." In other words, if a putative employer exercises otherwise sufficient control indirectly, such as through an intermediary, the Board may find joint-employer status.

After President Donald J. Trump took office, the composition of the Board majority shifted. On December 14, 2017, the new Board majority reversed *Browning-Ferris* in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017). That reversal was short-lived, as the Board majority vacated Hy-Brand on February 26, 2018, after the Board's Designated Ethics Official determined that one of the Board's members should have been disqualified from participating in that case. *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 26 (2018).

Recognizing that the determination of whether an entity is a joint employer of another company's employees "is one of the most critical issues in labor law today." Board Chairman John F. Ring informed the Office of Information and Regulatory Affairs on May 9, 2018, that the Board was

considering whether to submit the issue to the rulemaking process to help resolve "[t]he current uncertainty over the standard to be applied in determining joint-employer status" [view press release]. Subsequently, Chairman Ring confirmed that the Board no longer was merely considering the rulemaking procedure, but that the Board majority was committed to the process [view Chairman Ring's letter].

We will provide updates as the issue progresses through the rulemaking process.

For more information, or if you have questions about how the issues raised in this legal update affect your policies, practices, or other compliance efforts, please contact one of the following lawyers in the firm's Labor, Employment, Benefits + Immigration Group:

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