PUBLICATION

Joint Employer Joint Responsibility: NLRB Issues Final Joint Employer Rule

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This morning, the National Labor Relations Board (NLRB or the Board) published its long-awaited final joint-employer Rule, after initially publishing the revised Rule for public comment in September 2022. The Rule takes effect on December 26, 2023, and governs how the Board will determine whether two or more employers are considered joint employers under the National Labor Relations Act (NLRA). Under the new rule, which replaces regulations the agency issued in 2020, the Board in its analysis will consider evidence not only of direct control that is exercised, but *indirect* control that is merely *reserved* to an employer.

This rule is of immediate concern to businesses that are party to agreements giving one party the right to manage or "step-in" to manage a workplace under certain conditions, or engage staffing or other agencies to provide them with workers for tasks usually assigned to the workplace owners' employees. Under this employee- and union-friendly rule, a company now risks being found to be the employer of workers over whom it does not actually, but theoretically and contractually could, exercise direct control, and will be forced into collective bargaining if those employees unionize. A joint employer also may be found liable for unfair labor practices committed by another business entity. In this alert, we explain the Rule and what it might mean for your business and the potential obligation to negotiate with a union representing another employer's workers.

Summary of the History of the Board's Joint-Employer Standard

Over the years, the Board has changed its view on what qualifies as a joint employer relationship, and the question has historically hinged on the type and level of control an employer has over another company's workforce, and whether that control is exercised or reserved. For example, in *Greyhound Corp.*, 153 NLRB 1488 (1965), the employer, Greyhound, retained a contractor to provide janitorial services at the employer's terminals. The employer's employees filed a representation petition with the Board naming both the employer and the contractor as respondents. After the union won the election, the Board (upheld by the U.S. Court of Appeals for the Fifth Circuit) found that both companies had to negotiate with the union because Greyhound had reserved to itself the right to control "essential" terms and conditions of employment of the contractor's employees.

Later, in *Browning-Ferris Industries of Pennsylvania, Inc.*, 259 NLRB 148 (1981), the NLRB shifted gears and found that the employer was not a joint employer and held that a joint-employer finding would result only where both employers "possess and actually exercise substantial direct and immediate control over the employees' terms and conditions of employment in a manner that is not limited and routine." The U.S. Court of Appeals for the Third Circuit endorsed this rule, upholding the case.

Then in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery,* 362 NLRB 1599 (2015), the Board largely reverted to the rule it had announced in *Greyhound.* There, the employer retained a contractor to provide workers to assist with its sorting process. A union petitioned to represent the workers and named Browning-Ferris and the contractor as joint employers. In ruling that the two employers were joint employers (and therefore that Browning-Ferris also had to negotiate with the union concerning the contractor's employees), the Board issued a new standard that it would consider an employer's reserved and indirect right to control the workforce in its analysis. The Board provided a non-exhaustive list in its definition of the essential terms and conditions of employment.

Most recently, in 2020 the Board issued regulations changing – yet again – its joint-employer rule. Swinging the pendulum back, the 2020 regulations spelled out that joint-employer status would exist only when an employer "possessed and exercised such substantial direct and immediate control" over the essential terms or conditions of another employer's workforce. The regulations outlined an "exhaustive" list of essential terms and conditions of employment that included wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. That rule currently is in place, and under these regulations a business must exert direct control over these key working conditions; if it does not, then the Board cannot find that a joint-employer relationship exists.

The 2020 formulation of the joint employment standard has been important to businesses in the current economy, where they may be party to a business relationship or a staffing arrangement where another company provides workers. In this circumstance, the other business may have theoretical (but unexercised) control over employees' terms and conditions of employment. Under the regulations that will remain in place until December 26, if a business does not actually control employees' working conditions, a joint-employer finding will not result.

The Revised Joint-Employer Rule

The new rule announced today returns to the Board's Obama-era "Browning Ferris" rule. Now, when analyzing joint-employer status, the Board will consider *both* direct evidence of control and evidence of reserved and/or indirect control as evidence of joint-employer status if the control bears on employees' essential terms and conditions of employment. The Rule differs from the 2015 Browning Ferris rule in that it does provide an exhaustive list of seven categories of workplace terms and conditions of employment that will trigger the rule, making the employer a party that does *or could* exercise the right to control and set any of the following. They are:

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. hiring and discharge; and
7. working conditions related to the safety and health of employees.

Because *indirect* control and the mere *right to* control (rather than exercised) these important working conditions is enough for the NLRB to find that two companies are joint employers, the Rule is expected to have a wide-ranging impact on employers. For example, if you have engaged a temporary staffing agency to provide you with employees and your agreement with that company says that you have the right to reject one of their employees, there is a higher likelihood that the NLRB will find that you are a joint employer under this new rule. And if that happens, then you will be compelled to negotiate with a union that organizes the other company's employees, with respect to any working condition that is within your control (or potential control).

What Should You Do Now?

All businesses that contract with other companies in connection with a staffing agreement or another business arrangement in which one party has rights to assert over the employees of the other party should immediately have experienced labor counsel review the agreement. If possible, you might want to consider revising the agreement for the benefit of both companies to minimize the risk of a Board joint-employer finding. Sometimes, this may be sufficient to alleviate the legal risk. But, in some cases it simply will not be possible for one company to relinquish sufficient control (or the right to control) over the other company's employees to avoid a joint-employer finding. In those cases, given that union organizing is at historic highs and because of NLRB

developments making it much easier for unions to be certified without having to win an election, it will be key for you to work with counsel to enact proactive employee relations measures to ensure that your employees (meaning those employed by you, and also potentially jointly employed by you and the other company) are satisfied with their working conditions and environment and do not "sign up" with a union.

Employers have exactly two months from today before the new Rule becomes effective in order to plan for its implementation. If you have questions about these recent developments, contact Cassandra L. Horton or any member of Baker Donelson's Labor & Employment Team.