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MARCH 3, 2020

NLRB publishes new rule on joint employer test under the NLRA

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On February 26, 2020, the National Labor Relations Board (the "Board") published its final rule on joint employer status under the National Labor Relations Act (the "Act") in the *Federal Register*. The Board's new rule shifts back to the pre-2015 standard, narrowing the circumstances in which two employers can both be required to bargain with the same group of workers or be responsible for unfair labor practices under the Act concerning those workers.

In pertinent part, the Board's new rule reads as follows:

> An employer [as defined in the Act] may be considered a joint employer of a separate employer's employees only if the two employers *share or codetermine the employees' essential terms and conditions of employment*. To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, the entity must *possess and exercise such substantial direct and immediate control* over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees.

29 C.F.R. § 103.40(a) (emphasis added). The Board's rule defines the phrase "substantial direct and immediate control," to "mean[] direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees." The Board further explained that "[s]uch control is not 'substantial' if it is only exercised on a sporadic, isolated, or de minimis basis."

The Board's rule defines "essential terms and conditions of employment" to mean, exclusively, "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction." For each of these essential terms, the Board's rule outlines what it means for an employer to possess and exercise direct and immediate control. For example, for wages, the Board's rule states that:

> An entity exercises direct and immediate control over wages if it actually determines the wage rates, salary[,] or other rate of pay that is paid to another employer's individual employees or job classifications. An entity does not exercise direct and immediate control

over wages by entering into a cost-plus contract (with or without a maximum reimbursable wage rate).

The Act does not contain the term "joint employer" and the standard has been set through Board decisions. For over 30 years, the Board held that evidence of indirect control was generally insufficient to support joint employer status. In 2015, a prior Board majority overruled that precedent in *Browning-Ferris Industries of California, Inc.*, 2015 NLRB LEXIS 672 (N.L.R.B. Aug. 27, 2015). The *Browning-Ferris* test provided that "[t]he right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect." This relaxed standard meant that evidence that an entity actually exercised direct and immediate control over the terms and conditions of a separate employer's employees was not required for the entity to be deemed a joint employer of those workers.

In explaining its departure from the *Browning-Ferris* test, the current Board stated that "[w]ith this final rule, the Board has endeavored to provide greater clarity, guided by the many comments received, as to how it will determine joint-employer status." The Board, however, also clarified that the joint employer analysis will remain a fact-intensive inquiry, even under its new rule: "Joint-employer determinations have always been fact-intensive, and they will continue to be so. The Board is confident, however, that a more precise definition of the key terms and analytical points will facilitate consistent application of the standard across a broad spectrum of industries and business-to-business relationships."

This was the Board's second effort to return to the prior standard. In December 2017, in *Hy-Brand Industrial Contractors*, the NLRB's newly constituted Republican majority overturned *Browning-Ferris*. However, the Board later vacated the decision after NLRB Inspector General David Berry reached a controversial conclusion that one of the Board members should have recused himself. In 2018, the Board decided to proceed with rulemaking through the notice and comment process rather than case adjudication. In the final rule, the Board explained its decision to effectuate the change through rulemaking, acknowledging that the Board has historically made most substantive policy determinations through case adjudication. Among those reasons, the Board emphasized that rulemaking would "respect the reasonable expectations of regulated parties by ensuring that further changes to the law in this area would only be made prospectively in a new rulemaking proceeding, whereas with case adjudication, changes in the law may be made retroactively."

The regulation, which may be challenged in court, is set to go into effect April 27, 2020.

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