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Joint Employer Standard Relaxed - For Now

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Business owners, franchisors, contractors, and staffing agencies can breathe a little easier – for the moment – following the National Labor Relations Board's reversal last month of a controversial Obama-era standard that broadly defined "joint employer."

In the 2015 *Browning v. Ferris* decision, the NLRB overturned decades of precedent and created an expansive definition of joint employer. Joint employers included not only those that exercised direct or indirect control over workers, but also those who had "reserved authority" to do, even if they never exercised it. That "reserved authority" could include something as basic as reserving the right to set opening and closing hours. In broadening the joint employer concept so dramatically, the NLRB essentially eradicated many of the advantages of using staffing agencies or franchise models. Also, in issuing the *Browning-Ferris* decision, the NLRB basically required entities that control the terms and conditions of employment, such as staffing agencies and corporate users of workers supplied by staffing agencies, to collectively bargain with the workers. After the *Browning-Ferris* case, the DOL followed suit and reaffirmed the broader concept of joint employment, and a federal appellate court adopted an even broader definition of joint employer in a wage and hour case, noting that two entities are joint

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employers unless they can show that they are "completely disassociated" from one another.

However, the recent NLRB decision of Hy-Brand Industrial Contractors, Ltd. successfully revived the much narrower pre-*Browning-Ferris* NLRB joint employer standard, more commonly known as the "direct and immediate control" test. Specifically, the NLRB clarified that "a finding of joint-employer status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'" For instance, merely telling employees what work to perform, or where and when to work, would generally not satisfy this narrower requirement. Rather, to create a joint a joint employer relationship, the putative employer must have also directed the employees on *how* to perform the job. The NLRB also was swift to note that the *Browning-Ferris* standard was a "distortion of common law" and contrary to the National Labor Relations Act.

The NLRB's *Hy-Brand* decision could well sway more NLRB and court rulings in favor of business entities in joint employment claims. Indeed, just a few days after its *Hy-Brand* decision, in an expected move, the NLRB requested the D.C. federal appellate court to send the *Browning-Ferris* case back to the NLRB, as the *Browning-Ferris* appeal was filed in an effort to reinstate the "direct and immediate" control test. However, there is still no guarantee the narrower "direct control" standard will be permanent. Meantime, the House of Representatives has passed the "Save Local Business Act," to create an even narrower joint employment test focused on whether an entity has "actual, direct, and immediate" control over employees. If it becomes law, businesses can expect fewer joint employment claims will survive.

In light of the above critical developments, the different joint employer standards should keep business entities—particularly those with multi-state operations—on their toes, as the analysis for potential joint employer liability depends upon the context in which it arose and the applicable law. Akerman's Labor & Employment lawyers can assist employers in navigating these challenges as the need arises.