Blog Post

Joint Employer Standard: Whiplash!

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In a surprising move, the National Labor Relations Board has overturned its recent decision that had overruled an expansive joint employer standard set forth by the previous Obama-era Board. So, at least for the time being, where an entity has reserved the right to control employees with another entity – even if that control was never exercised – the Board will continue to find a joint employment relationship under the National Labor Relations Act.

The "joint employer" concept is of vital importance in two major areas regulated by the Board: The first concerns unfair labor practice charges: Who may be held jointly liable for engaging in unfair labor practices? The second concerns collective bargaining/economic activity obligations: Who has the duty to bargain? Who is bound by the collective-bargaining agreement? Who may be subject to strikes, boycotts and picketing?

Historically, the Board employed a "direct and immediate control" test to decide whether entities shared or co-determined matters governing terms and conditions of employment. Under this test, if one employer reserved authority but did not exercise that authority, it was not sufficient; rather, the putative joint employer must actually have both possessed *and* utilized direct and immediate control over essential terms and conditions of employment in a manner that was *not* limited and routine.

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In *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), the Board overturned that historical precedent and created a broad definition of joint employer: "We will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately and not in a 'limited and routine' manner... The 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." Thus, joint employers included not only those that exercised direct control over workers but also those that had reserved the authority to do so, even if they never actually exercised it. In addition, indirect control or control that was "limited and routine" was sufficient for a joint employer finding. That was a very broad standard, causing particular concern among those in franchising and staffing relationships.

All that changed in late 2017. In *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017), issued on December 14, 2017, the Board overruled *Browning-Ferris* to return to the original joint employer standard under the Act. However, on February 26, 2018, the Board issued an order vacating that decision, based on the determination by the "Board's Designated Agency Ethics Official that Member Emanuel is, and should have been, disqualified from participating in that proceeding."

Because the Board's Decision and Order in *Hy-Brand* has been vacated, the overruling of the Board's decision in *Browning-Ferris* is of no force or effect. Accordingly, all employers are cautioned that the expansive definition of joint employment set forth in *Browning- Ferris* continues to govern. This is especially important for those employers in staffing agency or franchise relationships. Of course, when presented with the right opportunity, it is likely that the current Board will again overturn *Browning-Ferris* and return to a standard

requiring exercise of control, not just reservation. Akerman will continue to provide updates on this ever-changing issue.