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NLRB Issues Joint Employer Final Rule

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Right on the heels of the Department of Labor (DOL) issuing a new joint employer liability test under the Fair Labor Standards Act, the National Labor Relations Board (NLRB) has issued its own employer-friendly final rule for determining joint employer liability under the National Labor Relations Act (NLRA). The NLRB's final rule is scheduled to become effective April 27, 2020.

A determination of joint employer status under the NLRA can have serious consequences, including being required to participate in collective bargaining over the terms and conditions of employment for employees of another employer, or being liable for an unfair labor practice that the employer did not commit. The new NLRB standard should alleviate some of those concerns.

The NLRB's joint employer standard is different from the new DOL standard. Although the NLRB rule is new, its standard represents a return to the NLRB's past interpretation. For more than three decades, NLRB precedent found a joint-employer relationship existed only where two separate employers codetermined matters governing the essential terms and conditions of employment. In meeting that joint employer standard, the NLRB looked for evidence that the putative joint employer had "direct and immediate" control over matters key of the employment relationship.

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However, in its 2015 *Browning-Ferris* decision, the NLRB turned that standard on its head by saying that it would no longer require evidence of direct and immediate control. A joint employer finding could be based on evidence that an employer merely *exercised indirect control or reserved authority to exercise control* over employees of a different employer. *Browning-Ferris* was widely criticized by employer groups for imposing liability on an employer that did not have an active role in making decisions about employees' terms and conditions of employment.

Not surprisingly, in its December 2017 *Hy-Brand* case, the NLRB overruled *Browning-Ferris*, and returned to the prior requirement of "direct and immediate" control. However, the *Hy-Brand* decision was vacated because of a conflict of interest of one of the NLRB members who participated in the decision. Thereafter, the NLRB took a new tack. Instead of creating law by ruling on cases – as the NLRB has long done – in September 2018, the NLRB formally proposed a new rule essentially codifying its standard that existed before *Browning-Ferris*.

Instead of imposing liability under the NLRA on an employer that had indirect control or reserved authority, the final rule again focuses on an employer's "direct and immediate control" (not sporadic, isolated, or *de minimis*) over the "essential terms and conditions of employment" (wages, benefits, hours of work, hiring, discipline, discharge, supervision, and direction).

The NLRB also issued a fact sheet to provide additional guidance regarding the circumstances pursuant to which one company may be considered a joint employer of employees of another company. An employer will be considered a joint employer when:

- The employer shares or codetermines the essential terms and conditions of employment of a different employer's employees;

- The employer possesses and exercises substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees; and
- The employer possesses more than indirect influence or a contractual reservation of a right to control over a different employer's employee. However, evidence of that is probative of joint employer status to the extent that it supplements and reinforces evidence of direct and immediate control.

Employers should reassess whether they may be considered a joint employer under the final rule, and how that may affect their business relationships before it becomes effective on April 27, 2020. This is especially applicable to employers who utilize staffing companies to provide temporary employees, and to employers in the franchise industry. Akerman's Labor & Employment lawyers can assist employers in navigating the implications of the final rule.
