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Whats the Latest on Joint Employer Liability? The NLRB Issues a Proposed Rule That Would Return to a Narrower Standard

Joint employer liability under the National Labor Relations Act (NLRA) has been a hot topic in recent years, because the NLRA standard has been in flux and joint employer status can be a significant issue for employers. For example, under the NLRA, a joint employer may be required to bargain with a union representing jointly employed workers. In addition, a joint employer can be subject to joint and several liability for an unfair labor practice by the other joint employer and can face labor picketing that would otherwise be unlawful.

In August 2015, the National Labor Relations Board (NLRB) broadened the joint employer standard in its controversial *Browning-Ferris*ruling, departing from longstanding precedent on the joint employer standard. In *Browning-Ferris*, the NLRB held that two entities can be found to be joint employers based on the mere *potential* for control over terms and conditions of employment. In December 2017, the NLRB overruled *Browning-Ferris* in the *Hy-Brand* case. However, in a strange twist, the NLRB invalidated *Hy-Brand*in February 2018 after it found that one of the NLRB members participating in the case should have been disqualified due to a potential conflict of interest. This restored the *Browning-Ferris* standard, although the *Browning-Ferris* case is currently on appeal before the U.S. Court of Appeals for the D.C. Circuit.

With the state of the NLRA joint employer standard in limbo, the NLRB announced in June 2018 that it would participate in rulemaking to set a clear standard. On September 14, 2018, the NLRB published its proposed rule in the Federal Register. In a shift away from *Browning-Ferris*, the proposed rule makes clear that an employer will be considered a joint employer only where that employer possesses and exercises substantial direct and immediate control over the primary terms and conditions of employment of the second companys employees. In circumstances where an employer exercises control over another employers workers, it will not be held to be a joint employer if such control is limited and routine.

In the proposed rule, the NLRB explained that setting the joint employer standard by rulemaking (instead of through adjudicated cases) is desirable, because this allows interested parties with experience in a wide range of complex employment relationships to have input on the proposed rule. In addition, rulemaking allows the NLRB to use hypotheticals to clarify what constitutes joint employer status, and it provides companies more certainty on the law as they structure their businesses.

Three of the four current members of the NLRB have approved the proposed rule. The lone dissenter is the lone Democrat on the NLRB, Lauren McFerran. The proposed rule is open for public comment through November 13, 2018. After the NLRB receives and reviews the submitted comments and any replies, it will issue a final rule regarding the joint employer standard. There is no specific timetable as to when the final rule may be published.

While the proposed NLRB rules narrower joint employer standard is a positive development, employers should remember that the rule is not final and, in the meantime, *Browning-Ferris* is still valid law. Therefore, employers should take heed to carefully structure their relationships with related entities to make clear which entity is responsible for establishing and administering key terms and conditions of employment for workers that interact with both entities.

Doing so will help avoid joint employer liability under the NLRA, as well as under other employment law statutes such as Title VII, the Fair Labor Standards Act, and the Americans with Disabilities Act.