Yesterday, the National Labor Relations Board (NLRB or Board) issued its much anticipated final rule on the joint-employer standard under the National Labor Relations Act (NLRA). Resolving a dispute at the agency that persisted for over four years, the final rule is welcome news for many employers – particularly franchisors and businesses that regularly engage supplemental or contingent workers from third-party agencies – who are less likely to be considered joint employers under the final rule.

The final rule provides the framework by which the Board will determine whether a business is a joint employer of a group of employees that is directly employed by another employer. As expected, the standard established by the final rule sets a relatively higher bar for finding joint employer status compared with the Board’s previous test.

Under the final rule, a business will be deemed a joint employer only if it “shares and codetermines” one or more of the essential terms and conditions of employment of another employer’s employees. The final rule defines an employee’s essential terms and conditions as their “wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.” Such terms and conditions are shared or codetermined by a business if the business possesses and exercises such substantial and direct and immediate control that it warrants a finding that it
“meaningfully affects matters relating to the employment relationship.” Sporadic, isolated, or de minimis control over the terms and conditions, however, is not considered substantial control.

Importantly, the final rule makes clear that evidence of indirect or contractually reserved control over essential employment terms and conditions may be a consideration for finding joint employer status under the final rule, but cannot, by itself, give rise to such status without further evidence that the business actually exercised substantial direct and immediate control over the employees in question. The final rule will take effect on April 27, 2020.

The joint-employer standard is particularly consequential to the business community because it determines whether a business: (a) has an obligation to bargain with labor union(s) representing workers employed by another entity; (b) is subject to union picketing or other labor dispute-related activities involving another entity’s employees; and (c) is jointly and severally liable for any unfair labor practices committed by another entity against its employees (even if those employees are not represented by a union).

The Past is Prologue: A History of the Joint Employer Standard

Despite its significance, the Board’s joint-employer standard has been anything but certain in recent years. In August 2015, a majority of the Board (then fully comprised of Obama administration appointees) overturned decades of precedent in creating a new, expanded test for determining joint employment status. *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015). Under *Browning-Ferris* (*BFI*), an entity could be deemed a joint employers of a particular workforce under the NLRA without actually exercising control over the workers’ terms and conditions of employment. That is, to find joint employer status, *BFI* required only a finding that (1) two or more separate employers were both “employers” in the common law sense, and (2) the same employers shared or co-determined matters governing the essential terms and conditions of employment. Critically, the mere right to control, even if unexercised, was sufficient to deem an entity a joint employer.

Two years later, in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017), the Board (now comprised, in the majority, of President Trump appointees) reversed *BFI* and returned to the previous standard under which businesses are held responsible only for workers directly under their control. Thus, in *Hy-Brand*, the Board ruled that joint employment would be found only where two or more “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.’”

*Hy-Brand*’s return to the historical joint-employment standard was short-lived. Following the Board’s initial decision, the Charging Party filed a motion for reconsideration, recusal, or to strike, arguing that NLRB Member William J. Emanuel should have been disqualified from participating in the decision because his former law firm had represented a party in *BFI*. The Board’s Designated Agency Ethics
Official agreed, opining that Member Emanuel is, and should have been, disqualified from participating in the *Hy-Brand* proceeding. As a result, on February 26, 2018, a three-member panel of the Board (including the two remaining Obama-era dissenters in *Hy-Brand*) vacated the Board’s earlier decision in the case, effectively reinstating the expansive *BFI* joint employer test.

Then, to add to the confusion, on December 28, 2018, the Court of Appeals for the D.C. Circuit issued a decision that, at its core, upheld the Board’s joint employer standard as articulated in *BFI. Browning-Ferris Industries of Cal., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018). However, the D.C. Circuit’s opinion asked as many questions as it answered. The court agreed, as an initial proposition, that the Board properly considered both the putative employer’s reserved right to control and its indirect control as factors for determining joint-employer status. That said, the court opined that indirect control is relevant to the joint-employer analysis only if it relates to essential terms and conditions of employment. On this score, the court found the Board’s application of its test fell short in several respects, so it remanded the case to the Board for further proceedings. Significantly, the D.C. Circuit offered no opinion as to whether indirect or reserved control alone may be sufficient to support a joint-employer finding.

The Board’s final rule now serves as the match point in this contest. As the Board announced, the final rule restores the joint-employer standard that was applied for decades prior to *BFI*, “but with the greater precision, clarity, and detail that rulemaking allows.”

**The Final Rule in Application**

In issuing its final rule, the Board provided several fact patterns to illustrate the circumstances under which it would, or would not, deem a business a joint employer of employees directly employed by another employer. Several of the more instructive examples include the following:

**Example 1:** Company A supplies labor to Company B. The business contract between Company A and Company B is a “cost plus” arrangement that establishes a maximum reimbursable labor expense while leaving Company A free to set the wages and benefits of its employees as it sees fit.

In this scenario, Company B does not possess and has not exercised direct and immediate control over the employees’ wage rates and benefits.

**Example 2:** Company A supplies line workers and first-line supervisors to Company B at B’s manufacturing plant. Company B also employs supervisors on site who regularly require the Company A supervisors to relay detailed supervisory instructions regarding how employees are to perform their work. As required, Company A supervisors relay those instructions to the line workers. Company B possesses and exercises direct and immediate control over Company A’s line workers.

In this example, the fact that Company B conveys its supervisory commands through Company A’s supervisors rather than directly to Company A’s line workers fails to negate the direct and immediate supervisory control.
Example 3: Under the terms of a franchise agreement, Franchisor requires Franchisee to operate Franchisee’s store between the hours of 6:00 a.m. and 11:00 p.m. Franchisor does not participate in individual scheduling assignments or preclude Franchisee from selecting shift durations.

In this scenario, franchisor has not exercised direct and immediate control over essential terms and conditions of employment of Franchisee’s employees.

Example 4: Business contract between Company and Contractor reserves a right to Company to discipline the Contractor’s employees for misconduct or poor performance. The business contract also permits either party to terminate the business contract at any time without cause. Company has never directly disciplined Contractor’s employees. However, Company has with some frequency informed Contractor that particular employees have engaged in misconduct or performed poorly while suggesting that a prudent employer would certainly discipline those employees and remarking upon its rights under the business contract. The record indicates that, but for Company’s input, Contractor would not have imposed discipline or would have imposed lesser discipline.

In this example, the Company has exercised direct and immediate control over Contractor’s employees’ essential terms and conditions.

While the Board’s final rule provides long-sought guidance on this subject, the joint-employer doctrine remains an intensely fact-specific analysis and carries significant consequences.

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