NLRB Reverses Obama-Era Joint Employer Test

Tuesday, December 26, 2017

Over the course of one afternoon, the National Labor Relations Board (NLRB) issued two significant decisions that together overturned several of the Obama administration’s most polemic legal positions under the National Labor Relations Act (NLRA). Here we discuss the NLRB’s decision to overturn the 2015 Browning-Ferris Industries case. In Browning-Ferris, the NLRB adopted an expansive standard for determining when two separate legal entities are deemed to be joint employers of a group of employees. Overruling longstanding precedent, the Board’s Browning-Ferris decision held that two entities can be considered joint employers for purposes of the NLRA based on the existence of “indirect control” over the essential terms and conditions of employment.

While the Browning-Ferris decision was widely criticized by employers, business groups, legal commentators and legislators, perhaps the most difficult aspect of the decision for employers was its general ambiguity. Specifically, the Browning-Ferris decision failed to provide any meaningful insight that would allow a business to make a reasonable judgment about whether its business structure and relationships would engender a claim that the business jointly employed another company’s workers.

On December 15, 2017, the Board reversed course with its decision in Hy-Brand Industrial Contractors. The Hy-Brand Industrial decision serves as an outright repudiation of Browning-Ferris and returns the NLRB’s position to the pre-Browning-Ferris standard governing joint employer liability. It also offers a scathing rebuke of the Obama-era Board’s much-maligned 2015 decision:

“We find that the Browning-Ferris standard is a distortion of common law as interpreted by the Board and the courts; it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations. Accordingly, we overrule Browning-Ferris and return to the principles governing joint-employer status that existed prior to that decision.

“Thus, a finding of joint-employer status requires proof that the alleged joint-employer entities have actually 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.’”

The Hy-Brand Industries decision serves as an early holiday present for all employers, and adds much-needed stability to an area of labor law that was consumed by uncertainty in the wake of Browning-Ferris. In addition, it marks yet another significant rollback of Obama-era administrative jurisprudence by an NLRB that has brought and is expected to continue to bring a more employer-friendly approach to its interpretation of the NLRA

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