SULLIVAN & CROMWELL LLP

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National Labor Relations Board Issues Rule Defining Joint-Employer Standard

Board Provides More Certainty as to When Franchisors or Users of Contracted Services Would Be Considered Joint Employers Along with the Actual Employers of Those Providing the Services

SUMMARY

On February 25, 2020, the National Labor Relations Board ("NLRB" or "Board") announced a final rule modifying an earlier test, developed in Board decisions, to determine when a franchisor or a user of contracted services will be considered a joint employer along with the actual employer and, thus, subject to labor law obligations, including the requirement to bargain with the employees' union. Under the rule, a person or entity will be considered a joint employer only if the person or entity "possess[es] and exercise[s] such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." This test scales back the Board's 2015 decision in *Browning-Ferris Industries of California* ("*Browning-Ferris*"), under which a person or entity would be considered a joint employer merely based on the right to control the terms and conditions of employment, irrespective of whether such control is directly exercised or exercised at all. The revised test provides much-needed clarity and flexibility to entities that use the services of vendors with employees and for franchisors that want to have some oversight of the operations of their franchisees' operations without becoming joint employers.

BACKGROUND

Prior to 2015, the Board found that "two or more entities are joint employers of a single work force . . . if they share or codetermine those matters governing the essential terms of employment," provided that the joint employers "not only possess the authority to control employees' terms and conditions of employment, but [] also exercise that authority, and do so directly, immediately, and not in a limited and routine matter."[1]

In *Browning-Ferris*, the NLRB during the Obama administration changed the standard, holding that it "may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." The Board rejected the requirement that the joint employer must exercise that authority "directly, immediately, and not in a limited and routine matter." Instead, the "right to control" any matter governing the "essential terms and conditions of employment" in and of itself is "probative of joint-employer status." Thus, the right to control did not need to be exercised at all or be exercised in any particular matter.[2]

The Board in *Browning-Ferris* justified its departure from the prior joint-employer standard by asserting that the revised standard: (i) better accords with the common law definition of employer; (ii) better reflects the "diversity of workplace arrangements in today's economy," in which "the procurement of employees through staffing and subcontracting arrangements, or contingent employment, has increased steadily"; and (iii) better fulfills the goals of the National Labor Relations Act, to encourage "the practice and procedure of collective bargaining."[3] Our memorandum on the *Browning-Ferris* decision is here.

The *Browning-Ferris* test was criticized by franchisors and franchisees, as well as those using contractors with separate workforces, as creating uncertainty as to when they might be held responsible for the employment practices of separate entities.

In December 2017, in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.* ("*Hy-Brand*"), the NLRB during the first year of the Trump administration reversed the *Browning-Ferris* decision and by decision reinstated the joint-employer standard that was in place prior to 2015.[4] In February 2018, however, the NLRB vacated its decision in *Hy-Brand*, with a less than fully constituted Board finding that one of the board members who voted with the 3-2 majority in *Hy-Brand* should not have participated, on the ground that his former law firm had represented one of the unsuccessful litigants in the earlier *Browning-Ferris* case. Without his vote, the *Hy-Brand* decision would have been a split 2-2 decision without a majority.[5]

In the fall of 2018, the NLRB commenced a rule-making process to address the issue. It proposed a revised joint-employer standard, which would find a joint-employment relationship only if a person or entity "possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship."[6] The comment period for the NLRB's proposed rule closed in February 2019. The NLRB received approximately 29,000 comments.

THE FINAL RULE

On February 25, 2020, the Board announced its final rule, which largely adopts its 2018 proposal. Under the final rule, a person or entity "may be considered a joint employer of a separate employer's employees

only if the two employers share or codetermine the employees' essential terms and conditions of employment," which may be established only if the putative employer "possess[es] and exercise[s] such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees."[7] The Board explained that the rule "will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby enhancing labor-management stability, the promotion of which is one of the principal purposes of the Act."[8]

The Board defined "substantial and immediate control" to mean control "that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees." Control "exercised on a sporadic, isolated, or de minimis basis" does not quality as "substantial and immediate."[9]

"Essential terms or conditions of employment" are defined as "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction," which are each separately defined.[10]

The rule provides helpful guidance as to how the standard would apply in the context of certain enumerated essential terms or conditions of employment:

- ***Wages***: Setting "the wage rates, salary or other rate of pay that is paid to another employer's individual employees or job classifications" constitutes "direct and immediate control," but "entering into a cost-plus contract (with or without a maximum reimbursable wage rate)" does not.
- ***Benefits***: Determining "the fringe benefits to be provided or offered to another employer's employees," such as "selecting the benefit plans (such as health insurance plans and pension plans) and/or level of benefits provided to another employer's employees," constitutes "direct and immediate control," but "permitting another employer, under an arm's-length contract, to participate in its benefit plans" does not.
- ***Hours of work***: Setting "work schedules or the work hours, including overtime, of another employer's employees" constitutes "direct and immediate control," but "establishing an enterprise's operating hours or when it needs the services provided by another employer" does not.
- ***Hiring***: Determining "which particular employees will be hired and which employees will not" constitutes "direct and immediate control," but "requesting changes in staffing levels to accomplish tasks or by setting minimal hiring standards such as those required by government regulation" does not.
- ***Discharge***: Deciding "to terminate the employment of another employer's employee" constitutes "direct and immediate control," but "bringing misconduct or poor performance to the attention of another employer that makes the actual discharge decision," "expressing a negative opinion of another employer's employee," "refusing to allow another employer's employee to continue performing work under a contract," and "setting minimal standards of performance conduct, such as those required by government regulation," do not.
- ***Discipline***: Deciding "to suspend or otherwise discipline another employer's employees" constitutes "direct and immediate control," but "bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision," "expressing a negative opinion of another employer's employee," and "refusing to allow another employer's employee to continue performing work under a contract" do not.

- ***Supervision***: "[I]nstructing another employer's employees how to perform their work" or "issuing employee performance appraisals" constitutes "direct and immediate control," but "providing instructions which are limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it" does not.
- ***Direction***: "[A]ssigning particular employees their individual work schedules, positions, and tasks" constitutes "direct and immediate control," but "setting schedules for completion of a project or by describing the work to be accomplished on a project" does not.[11]

The Board did note that indirect control over essential terms and conditions of employment, unexercised authority over essential terms and conditions of employment and control over other mandatory subjects of bargaining could be "probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the entity's possession of direct and immediate control over a particular essential term and condition of employment."[12]

The rule makes clear that "[j]oint-employer status must be determined on the totality of the relevant facts in each particular employment setting."[13] The rule is scheduled to take effect on April 27, 2020.

IMPLICATIONS

Entities may wish to review their contracts with vendors and service providers in light of the revised joint-employer standard. Those contracts—particularly those negotiated since the *Browning-Ferris* decision was announced in 2015—may have been drafted to limit an entity's input on the way in which a vendor uses its employees to perform the services. The new standard of "substantial direct and immediate control" over one or more of a specified list of "essential terms or conditions of employment," may provide more latitude for entities to contract to have a greater say in how the work is done while avoiding the risk of being found to be a joint employer of the vendor's employees.

The rule may well be subject to a legal challenge.

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ENDNOTES

[1] *Browning-Ferris Indus. of Cal.*, 362 NLRB 1599, 1600 (2015).

[2] *Id.* at 1613–14.

[3] *Id.* at 1609–10.

[4] 365 NLRB No. 156 (2017).

[5] 366 NLRB No. 26 (2018).

[6] The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46,681, 46,683 (to be codified at 29 C.F.R. ch. 1).

[7] Joint Employer Status Under the National Labor Relations Act, NLRB (Feb. 25, 2010) (to be codified at 29 C.F.R. pt. 103), http://www.federalregister.gov/d/2020-03373, at 191.

[8] *Id.* at 1.

[9] *Id.* at 14.

[10] *Id.* at 192–94.

[11] *Id.*

[12] *Id.* at 191.

[13] *Id.* at 191.

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CONTACTS

New York		
Tracy Richelle High	+1-212-558-4728	hight@sullcrom.com
Ann-Elizabeth Ostrager	+1-212-558-7357	ostragerae@sullcrom.com
Theodore O. Rogers Jr.	+1-212-558-3467	rogersto@sullcrom.com
Washington, D.C.		
Julia M. Jordan	+1-202-956-7535	jordanjm@sullcrom.com