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NLRB ISSUES PROPOSED RULE TO CHANGE JOINT EMPLOYER STANDARD

On September 13, 2018, the National Labor Relations Board ("NLRB") filed a proposed rule to change the test applied by the Board to determine whether two business entities are considered joint employers. This continues the efforts by the Trump Board to overturn the decision in *Browning-Ferris Industries*. That decision, entered by the Obama Board in August 2015, had made it easier for employees to prove that two companies are both acting jointly as an individual's employer. Under the *Browning-Ferris* standard, joint employer status can be shown based on the actual or *potential* authority to exercise control, directly or indirectly, over another company's employees, regardless of whether the putative joint employer ever actually exercised that authority. Thus, a company which reserved the right to hire, fire, discipline, or otherwise controls another company's employees in a contract – such as a franchise agreement or a staffing contract – could be liable for unfair labor practices by the other company and could be required to participate, to some extent, in collective bargaining with the employees' representative. *Browning-Ferris* was an important step toward holding employers responsible for their labor policies and practices in a modern economy that involves franchise agreements and other relationships through which one company indirectly controls another company's workers.

The Trump Board reversed *Browning-Ferris* on December 14, 2017, through its decision in *Hy-Brand Industrial Contractors*, and returned to a more demanding joint employer test. However, the *Hy-Brand* decision was vacated in February 2018 due to concerns that Board Member William J. Emanuel had violated ethics rules by participating in *Hy-Brand.* Member Emanuel participated in that case despite conflict-of-interest concerns based on his previous law firm Littler Mendelson's representation of one of the employers in *Browning-Ferris*, which *Hy-Brand* overruled. After *Hy-Brand* was vacated, the *Browning-Ferris* standard was reinstated, and it remains in effect today.

The NLRB's new proposed rule, which was published in the Federal Register on September 14, 2018, would once again undo *Browning-Ferris* and return to a more business-friendly standard. As the Board explained in its press release, under the proposed rule "an employer may be found to be a joint-employer of another employer's employees only if it 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." The proposed rule goes on to note that the NLRB is "presently inclined to find, consistent with prior Board cases, that even a putative joint employer's 'direct and immediate' control over employment terms may not give rise to a joint-employer relationship where that control is too limited in scope."

Board Member Lauren McFerran, the only remaining Democrat appointee on the NLRB, dissented from the proposed rule, arguing that a return to the pre-*Browning-Ferris* joint employer standard would only lead to more uncertainty. She also stated that the Board's notice "specifically solicits empirical evidence from the public: information about real-world experiences, not desk-chair hypothesizing. And so the question now is whether the record in this rulemaking ultimately will support the assertions made about *Browning-Ferris* and its supposed consequences – or, instead, will reveal them to be empty rhetoric."

The proposed rule is currently available to review online at the following website: https://www.federalregister.gov/documents/2018/09/14/2018-19930/the-standard-for-determining-joint-employer-status. The Board will receive public comments on the proposed rule for 60 days, or until November 13, 2018. Public comments may be submitted through the Federal Register's website, listed above. Labor organizations and workers who believe that employers should be held accountable for their labor practices and policies are strongly encouraged to submit comments opposing the proposed rule and supporting the current joint employer standard.

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