

Insights, News & Events

5 THINGS YOU NEED TO KNOW ABOUT THE LABOR BOARD'S NEW JOINT EMPLOYMENT RULE

Insights
Feb 25, 2020

The National Labor Relations Board just published a final rule that will soon fundamentally alter the definition of joint employment, making it more difficult for businesses to be held legally responsible for alleged labor law violations by staffing companies, franchisees, and other related organizations. The rule will also limit the ability of employees from affiliated companies to join together to form unions.

Once it takes effect on April 27, an employer will only be considered a joint employer of a separate employer's employees if the two employers share or co-determine the employees' essential terms and conditions of employment, including wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. As the Board states, a putative joint employer must possess *and actually exercise* substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not sporadic and isolated. Below are the five key things all employers must know about this critical development.

BRIEF HISTORY: STANDARD HAS FLIP-FLOPPED IN LAST SEVERAL YEARS

Before we dive into the new rule, it may be helpful to take a brief detour and examine a summary history of the joint employment rule. The dilemma involving this standard has taken many twists and turns in the recent past. For over 30 years, the National Labor Relations Board (NLRB) had held that two companies would only be considered "joint employers" — equally responsible for certain labor and

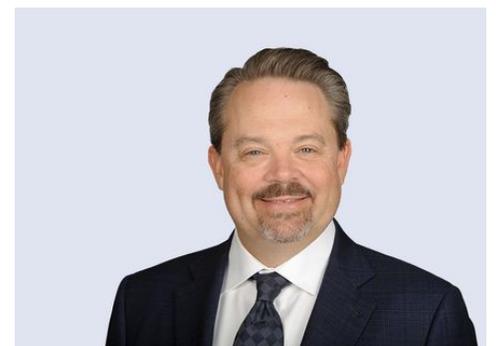
Related People



Steven M. Bernstein

Regional Managing Partner
and Labor Relations Group
Co-Chair

813.769.7513



John M. Polson

Chairman & Managing Partner

employment matters—if they shared or codetermined those matters governing the essential terms and conditions of employment, and *actually exercised* the right to control.

949.798.2130

However, in 2015, the Board renounced this joint-employer test in the controversial *Browning-Ferris* decision, eliminating the requirement that the employer actually exercise control. Instead, the NLRB decided that businesses need only retain the contractual right to control to be considered a joint employer—even if they had never exercised it. Further, the Board held that indirect control (e.g., control through an intermediary) would be sufficient to find joint employment.

Service Focus

Labor Relations

The standard briefly reverted to its previous form in December 2017, when the Board effectively overturned *Browning-Ferris* in *the Hy-Brand Industrial Contractors, Ltd. case*. But just a few months later, the Board was forced to vacate that decision due to allegations that one of the Board members involved had an unacceptable conflict of interest.

Industry Focus

PEO

Perhaps frustrated by the resulting uncertainty from the Board's forced reversal and the seemingly stalled litigation in the *Browning-Ferris* case sitting at the D.C. Circuit, Board Chairman John Ring spearheaded a regulatory solution by releasing a proposed rule addressing the joint employment standard in September 2018. Now, over a year later, that rule is set to be finalized.

JOINT EMPLOYMENT OVERHAUL COMPLETE

Once the rule is in place on April 27, the joint employment standard will be completely overhauled. There are five key considerations employers should be aware of regarding the implementation of the new standard.

NEW STANDARD: SHARE OR CODETERMINE ESSENTIAL TERMS OR CONDITIONS

First and foremost, a business will only be considered a joint employer if it shares or codetermines the essential terms and conditions of employment over the workers of another business. The NLRB defines such terms and conditions as meaning wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

SUBSTANTIAL DIRECT AND IMMEDIATE CONTROL

Moreover, there must exist evidence of “substantial direct and immediate” control of such a term or condition as would warrant a finding that the business meaningfully affects matters relating to the employment relationship with those employees before a joint employer relationship can be found. To be “substantial,” it must have a regular or continuous consequential effect on an essential term or condition of employment of another employer’s employees. The NLRB confirmed that control would not be substantial if only exercised on a “sporadic, isolated, or de minimis basis.”

The NLRB provided a summary of what such substantial control would look like – and what it would not look like – in specific circumstances:

- **Wages:** A business would need to actually determine the wage rates, salary, or other rate of pay that is paid to another employer’s individual employees or job classifications to be found to be levying sufficient control to sustain a joint employment finding. Entering into a cost-plus contract (with or without a maximum reimbursable wage rate) will not suffice.
- **Benefits:** Similarly, a business would need to actually determine the fringe benefits to be provided or offered to another employer’s employees. This includes selecting the benefit plans (such as health insurance plans and pension plans) and/or level of benefits provided to another employer’s employees. Permitting another employer, under an arm’s-length contract, to participate in its benefit plans will not suffice.
- **Hours of work.** A business would need to actually determine work schedules or the work hours, including overtime, of another employer’s employees in order to be found to be exerting sufficient control to sustain a joint employment finding. Establishing an enterprise’s operating hours or when it needs the services provided by another employer will not trigger such a finding.
- **Hiring.** A business would need to actually determine which particular employees will be hired and which will not. Requesting changes in staffing levels to accomplish tasks, or setting minimal hiring standards such as those required by government regulation, will not be enough.

- **Discharge.** A business would need to actually decide to terminate the employment of another employer's employee. Simply bringing misconduct or poor performance to the attention of another employer that makes the actual discharge decision by expressing a negative opinion of another employer's employee, refusing to allow another employer's employee to continue performing work under a contract, or setting minimal standards of performance or conduct such as those required by government regulation, will not suffice.
- **Discipline.** A business would need to actually decide to suspend or otherwise discipline another employer's employee. Bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision by expressing a negative opinion of another employer's employee or by refusing to allow another employer's employee to access its premises or perform work under a contract, would not cut it.
- **Supervision.** A business would need to actually instruct another employer's employees how to perform their work or actually issue employee performance appraisals in order to be found to be levying sufficient control to sustain a joint employment finding. If its instructions 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, it will not be considered sufficient control.
- **Direction.** Finally, a business would need to assign particular employees their individual work schedules, positions, and tasks. Simply setting schedules for completion of a project, or describing the work to be accomplished on a project, will not be considered sufficient control.

TOTALITY OF CIRCUMSTANCES

Next, the NLRB stated that joint employer status will be determined based on the "totality of the relevant facts" in each particular employment setting.

CERTAIN PRACTICES "PROBATIVE" BUT NOT NECESSARILY DETERMINATIVE

Certain common business practices will be considered “probative” of joint employer status, but only if they supplement and reinforce evidence of the business’s exercise of direct and immediate control over a particular essential term and condition of employment. They include:

- evidence of “indirect control” over essential terms and conditions of employment of another employer’s employees;
- the contractually reserved but never-exercised authority over the essential terms and conditions of employment of another employer’s employees; and
- control over mandatory subjects of bargaining other than the essential terms and conditions of employment.

BURDEN OF PROOF

Finally, in a welcome bit of news, the NLRB confirmed that the party alleging that a certain business is a joint employer has the burden of proof of making such a claim in any legal proceeding.

WHAT’S NEXT?

“This final rule gives our joint employer standard the clarity, stability, and predictability that is essential to any successful labor-management relationship and vital to our national economy,” said Chairman Ring in an announcement coupled with the final rule’s release. “With the completion of today’s rule, employers will now have certainty in structuring their business relationships, employees will have a better understanding of their employment circumstances, and unions will have clarity regarding with whom they have a collective-bargaining relationship.”

The impact of this new rule is obvious: fewer businesses will be found to be a joint employer by a court or agency when it comes to matters relating to labor relations. It will reduce the number of labor charges brought against businesses, and should limit the success of broad-based union organizing efforts. You should immediately consult with your labor counsel to determine whether you should adjust any of your business practices to conform to this new standard. There may be opportunities for you to reformulate your model and revisit your interactions with staffing companies and other

businesses – let alone their workers – in a way that would now pass muster under the NLRB’s new rule.

Note, however, that any changes you adopt must be coordinated in concert with the other [new joint employment standard that was recently unveiled](#) by the U.S. Department of Labor (USDOL). That test, released in January and slated to take effect on March 16, will soon be applied to wage and hour matters under the federal Fair Labor Standards Act (FLSA). While similar in nature, it does not exactly mirror the NLRB’s test. Further, the Equal Employment Opportunity Commission (EEOC) will soon release [its own joint employment rule](#) to govern civil rights law liability, and you will want to take that into consideration as well.

Today’s development is the next step in the transformation of the NLRB that has been well underway for the past several years. The current administration has ensured that the legal standards are once again balanced to take into account the interests of management as well as labor, whether it is related to [confidentiality in workplace investigations](#), [the use of company electronic equipment for union purposes](#), [union election procedures](#), the termination of [union dues collections](#), or any number of other developments. We can expect further movement in this direction [on other topics over the rest of 2020](#) as we head toward pivotal federal elections.

There is a chance that critics of the NLRB’s rule could seek to block or delay it through the court system, taking aim at the notice-and-comment process or the regulatory procedure that spawned the rule. Moreover, [the PRO Act](#) – a wish list of progressive labor causes that would once again install the *Browning-Ferris* standard – has passed the House and would become law if passed by the Senate and signed by the president. While either of these outcomes is uncertain (especially the legislative option given the current political makeup of the Senate and White House), employers need to be aware of the potential roadblocks that this new standard may soon face.

If you have any questions about this development and how it may affect your business, or if you would like guidance in submitting comments in support of the proposed rule, please contact any member of the [Labor Relations Practice Group](#) or the [Staffing and Contingent Workers Practice Group](#) or your Fisher Phillips attorney.

*This Legal Alert provides an overview of federal rulemaking.
It is not intended to be, and should not be construed as,
legal advice for any particular fact situation.*

Copyright ©2020 Fisher Phillips LLP. All rights reserved.