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Client Alert

The NLRB Reverses Course, Yet Again, Regarding the Appropriate Joint Employer Standard

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On September 6, 2022, the National Labor Relations Board ("NLRB" or "Board") announced its intention to rescind the existing NLRB rule regarding the joint employer standard, which took effect on April 27, 2020, and replace it with a broader, more union-friendly rule, which, the Board asserts, will be more closely aligned with what it calls "established common law agency principles." In its Notice of Proposed Rulemaking, the NLRB claims that the existing rule created by the Trump Board less than three years ago "repeats the errors" that the NLRB corrected in *Browning-Ferris Industries*, an Obama-era decision that broadened the definition of "joint employer" under the National Labor Relations Act ("NLRA") to include those employers that have "indirect control" over workers. Public comments relating to the proposed rule can be submitted until November 7, 2022, with reply comments due November 21, 2022.

A finding of joint employer status is significant because if two entities are found to be joint employers under the NLRA, then both entities must bargain with the union that represents their jointly employed workers, both can be subject to lawful union picketing and strikes and both are potentially liable for unfair labor practices committed by the other entity.

Background

The NLRB's joint employer standard has vacillated significantly in recent years, as the composition of the Board has changed. In 2015, the Obama Board issued its *Browning-Ferris* decision, which upended 30 years of labor law precedent by ruling that an entity may be considered a "joint employer" even if the entity has only "indirect control" over the terms and conditions of another employer's workforce. In fact, pursuant to *Browning-Ferris*, an entity could be deemed a joint employer based solely on a *contractual right* to control another entity's employees – even if that right is never exercised. Prior to *Browning-Ferris,* joint employer status typically would not be found unless one entity exercised actual, direct control over another entity's employees.

Following a change in both presidential administration and the Board's composition, the Trump Board overruled *Browning-Ferris* via rulemaking, issuing a new rule that largely returned to the pre-*Browning-Ferris* standard requiring that entities must have direct and immediate control over the essential terms and conditions of employment of another entity's employees to be considered a joint employer.

After another change in presidential administration and change in the Board's makeup, the NLRB issued the current proposed rule, which, if codified, would loosen the joint employer standard to align more closely with the *Browning-Ferris* standard. Specifically, the NLRB's proposed rule would rescind the 2020 rule and would expand the factors that can establish a joint employment relationship to include indirect and unexercised

control over meaningful terms and conditions of employment, such as wages, benefits, scheduling, and assignment of work, among others.

If the proposed rule becomes final in its current form, it will expand considerably the potential legal exposure of companies that have actual *or potential* control over employees of other, independent employers, such as companies that use workers supplied by temporary employment agencies, companies that operate using a franchise model, and companies that work with subcontractors.

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