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# Employee Benefit Plan Review

## Déjà Vu – The NLRB Looks to Implement Prior Joint Employer Standard

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The National Labor Relations Board ("NLRB") has issued a notice of proposed rulemaking[1] seeking to replace the Trump-era final joint employer rule,[2] which provided that an employer would be considered a joint employer under the National Labor Relations Act ("NLRA") only where it exercised "substantial direct and immediate control" over the essential terms and conditions of another company's employee.

The NLRB's newly proposed rule drastically expands the joint employer standard to encompass relationships where a company holds indirect and unexercised control over the terms and conditions of another company's employee.

Employers would be wise to begin thinking now how this will impact their business.

### Background

The NLRA does not expressly address situations where employees are employed jointly by two or more companies. As a result, the NLRB and courts have typically applied common-law agency principles to determine when one or more entities jointly employ a particular group of employees.

In an Obama-era decision, *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*,[3] the NLRB held that the "right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect."[4] Essentially, the *BFI* majority found that a company could be deemed a joint employer even where its control over the essential working conditions of another company's employees was indirect, or in circumstances where it was contractually reserved, but not exercised.[5]

In February 2020, in an effort to roll back *BFI*, the Trump-era Board published a final rule that narrowed the joint-employer test to include only those situations where the two employers "share or codetermine" the essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. The employer-friendly final rule defined "share or codetermine" as the possession and exercise of "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."

The final rule also considered indirect control over essential terms or conditions of employment, contractually reserved control over essential terms or conditions of employment, and control over mandatory subjects of bargaining other than essential

terms and conditions of employment into the joint-employer analysis, "but only to the extent [they] supplement[] and reinforce[] evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment."

The final rule went into effect on April 27, 2020.

## The Proposed Joint-Employer Standard (Revisited)

The NLRB's new proposed rule rejects the 2020 rule's narrow focus on "direct and immediate control" and returns to the rationale in the *BFI* decision, stating that "a party asserting a joint-employment relationship may establish joint-employer status with evidence of indirect and reserved forms of control, so long as those forms of control bear on employees' essential terms and conditions of employment."

The proposed rule would also expand the definition of "essential terms and conditions of employment," to include "work rules and directions governing the manner, means, or methods of work performance."

The proposed rule reflects the Board's view that the NLRA's purpose of promoting collective bargaining and stabilizing labor relations "are best served when two or more statutory employers that each possess some authority to control or exercise the power to control employees' essential terms and conditions of employment are parties to bargaining over those employees' working conditions."

Members of the public may file comments on the Board's proposal on or before November 7, 2022 and replies to comments filed during the initial comment period must be filed on or before November 21, 2022.

## Thinking Ahead

Employers should begin to consider how the new joint employer standard will impact their existing business structure. Under the proposed rule, a company would be considered a joint employer if they co-determine not just scheduling, wages, and benefits, but also the direction of the manner and means of performance, even where they do not retain any direct and immediate control over those terms and conditions.

This means that companies that currently outsource staffing, employee management, and/or human resources may no longer use those attenuated relationships to act as a shield for compliance with the NLRA, including potential bargaining obligations.

Thinking ahead, employers should begin look at their staffing and other third party agreements to determine whether they contain reserved control provisions. Even if never exercised, under the propose rule, such provisions are likely probative of joint-employer status. Companies should also consider whether it is now necessary to retrain managers who oversee employees of another entity, such as a staffing agency.

## Notes

1. Standard for Determining Joint-Employer Status, 87 FR 54641-02 (Sept. 7, 2022) (to be codified at 29 C.F.R. pt. 103).
2. Joint Employer Status Under the National Labor Relations Act, 85 FR 11184 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103).
3. *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015).
4. *Id.* at 1614.
5. *Id.* at 1613-14.

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