CLIENT ALERTS & INSIGHTS

NLRB Finalizes Joint Employer Rule to Take Effect on April 27, 2020

FEBRUARY 25, 2020

Authors: Adam Primm

The National Labor Relations Board ("NLRB") announced this morning that its final rule outlining the legal test for determining a joint employer will be published in the federal register tomorrow, February 26, 2020, and become effective April 27, 2020. This is the latest, and possibly final, chapter in an ongoing five-year process to reinstate the long-standing "direct and immediate control" test that was overturned in the controversial *Browning-Ferris Industries* decision in 2015, which substantially expanded the scope of the test when it found an entity could be a joint employer by merely possessing indirect control or reserved authority to exert such control, even if it never exercised that reserved control. 362 NLRB No. 185.

The final rule reads as follows:

> An employer […] 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. To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, the entity must possess and exercise 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.

Indirect control or contractually reserved but never exercised authority is only supportive of finding joint employer status where it supplements and reinforces evidence of direct and immediate control over an essential term and condition of employment. Essential terms and conditions include wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

Beginning with the election of President Trump, the NLRB began efforts to return to the "direct and immediate control" standard. In December 2017, the NLRB overruled *Browning-Ferris* in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017), returning to the direct and immediate control requirement (see alert here). However, just two months later, the NLRB vacated the *Hy-Brand* decision and reinstated *Browning-Ferris* after determining that Board member William Emanuel should have recused himself from the *Hy-Brand* decision (see alert here).

The NLRB then shifted its focus to rule-making and released a proposed rule in September 2018 to reverse *Browning-Ferris* (see alert here). The Department of Labor ("DOL") followed suit and proposed a rule similarly revising its joint employer test in April 2019 (see alert here), which was finalized last month (see alert here).

All three members of the NLRB voted in favor of the rule. The other two seats are currently vacant.

For more information on the final rule, contact a member of Benesch's Labor & Employment Practice Group.

Adam Primm at 216.363.4451 or aprimm@beneschlaw.com.