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NLRB Proposes Employer-Friendly Rule to Standardize the Joint-Employer Test

Authors: Shayna Giles Roark
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This morning, September 14, 2018, the NLRB published a proposed rule which, if approved, would establish a definitive joint-employer standard and conclude the ongoing battle between the NLRB's *Hy-Brand* and *Browning-Ferris* decisions. The proposed rule would reinstate the employer-friendly standard for the joint-employer test as established in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.* (*Hy-Brand*). If approved, this rule will allow employers to refrain from asserting direct control and accordingly evade liability as a joint employer.

Under *Hy-Brand*, an entity is considered a joint employer if that entity asserts direct control over another entity. More specifically, a finding of joint-employer status requires proof that putative joint employer entities have actually exercised joint control over essential employment terms, as opposed to merely having reserved the right to exercise control. This control must be direct and immediate, and joint-employer status will not result from control that is limited and routine. Hy-Brand overturned the joint employer test set out in *Browning-Ferris Industries* (*Browning-Ferris*) and replaced it with this more employer-friendly standard.

In *Browning-Ferris*, the NLRB put in place an employee-friendly joint employer test, which allowed for a finding of joint-employer status for any potential control. More precisely, under the *Browning-Ferris* standard, two or more entities are joint employers if they are both employers within the meaning of the common law and they share or codetermine the essential terms and conditions of employment. In assessing whether an employer retains sufficient control over employees to qualify as a joint employer, the NLRB, under *Browning-Ferris*, focuses on whether an employer has exercised control over terms and conditions of employment indirectly or through an intermediary, or whether the employer has reserved the authority to do so.

The effect of this proposed rule would be substantial on employers, particularly franchisors, as it would allow employers to take a step back, refrain from asserting direct control, and thus potentially avoid liability as a joint employer. In contrast, under the current standard from *Browning-Ferris*, any potential control, whether indirect or through an intermediary, exposes an employer to potential liability as a joint employer.

Although the NLRB has proposed this rule establishing a conclusive joint-employer test, the rule must survive a 60-day comment period in the Federal Register. Then, based on the comments, the NLRB will either adopt, modify, or abandon the proposed rule. Additionally, even if the rule is eventually adopted, it could be overturned on appeal in federal court.

The NLRB's proposed rule is clearly an attempt to definitively establish the employer-friendly joint-employer standard from the *Hy-Brand* opinion, which the NLRB was forced to vacate in February due to ethical concerns regarding the participation of NLRB Member William Emanuel. Member Emanuel remains an active member of the NLRB but is completely barred from all proceedings involving the *Browning-Ferris* decision and as a result, the *Hy-Brand* decision as well. Notably, however, Member Emanuel joined Chairman John F. Ring and Member Marvin E. Kaplan in proposing this rule regarding the joint-employer standard.