The National Labor Relations Board Vacates Its Recent Joint Employment Ruling

By Robert N. Dare, Thomas P. Brady / Mar 01, 2018

The National Labor Relations Board recently vacated its December 2017 decision in *Hy-Brand Industrial Contractors, Ltd.*, which limited joint employer liability for affiliated businesses. By vacating the *Hy-Brand* decision, the broader joint employer analysis announced in *Browning-Ferris* may now apply. Although the NLRB will likely revisit this issue once a fifth member of the Board is confirmed by the Senate this spring, employers should continue to seek legal counsel to analyze potential joint employer relationships while the legal standard remains in flux.

Across the country, many companies use contract employees to fill positions. Depending on the facts, this can create a joint employer relationship where the Company, *a user employer*, and a contract labor company, *supplier employer*, are both considered the employer of the contract employee under the law. If a joint employer relationship exists, the NLRB may require both the *supplier* and *user* employers to bargain the wages, hours and conditions of employment with the union representing the *supplier* employees. The Board may also hold the *supplier* and the *user* employers liable for any unfair labor practices.

To determine whether a joint employer relationship exists, the courts and the Board examine who has control over the employee. They consider several factors that indicate control over the employee including:

1. Who hires employees?
2. Who discharges the employee?
3. Who disciplines the employee?
4. Who set the essential terms of the employment including wages and hours?
5. Who determines the number of workers to be supplied?
6. Who controls the employees scheduling?
7. Who sets the seniority of employees?
8. Who determines overtime?
9. Who assigning work and determining the manner and method of work performed?
10. Who supervises the employee?
11. Who gives directions to the employee?

As we reported in 2015, in *Browning Ferris*, the Obama-era Board ruled that two companies could be joint employers if a company maintained indirect or potential control over workers who were formally employed by another entity. Under *Browning Ferris*, a company could be deemed a joint employer if its exhibits "indirect control" or control that is "limited or routine" or has the ability to exert such control. This represented a dramatic shift in the applicable standard for joint employment under the National Labor Relations Act.

In *Hy-Brand Industrial Contractors, Ltd.*, the Trump Board returned to the traditional joint employment test, which requires that a company exercise actual and "direct and immediate" control over terms and conditions of employment. The *Hy-Brand decision* was considered important to a wide range of businesses in staffing, franchise, and other contract relationships.

While it is expected that the NLRB will return to its decision in *Hy-Brand* once it is given the opportunity to do so, the applicable legal standard for determining joint employment continues to be the subject of significant litigation, with varying results in the courts and administrative agencies. While the standard remains in flux, we recommend that employers who use contract employees consult with counsel to carefully examine the relationship to determine if it would meet the more exacting *Browning-Ferris* test and to determine if the parties should amend the contract to avoid possible joint employer issues.

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