Updates
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National Labor Relations Board Reverses Course on Joint Employer Test

The National Labor Relations Board (NLRB) issued a decision relating to the test for joint employment under the National Labor Relations Act (NLRA). The decision upheld the Administrative Law Judge's ruling that two entities were joint employers, but applied a different test to reach that conclusion. The NLRB overruled its Obama-era 2015 decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), and returned to the prior standard for joint-employer liability. Notably, the NLRB found that the *Browning-Ferris* test expanded the common law definition of "employer" beyond that which Congress had adopted in the NLRA. The NLRB cited as its "fundamental disagreement" with the *Browning-Ferris* test its belief that "evidence of indirect control or contractually-reserved authority is probative only to the extent that it supplements and reinforces evidence of direct control." 365 NLRB No. 156 (2017) at *4.

In all future and pending cases, "a finding of joint-employer status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having reserved the right to exercise control), the control must be direct and immediate (rather than indirect), and joint-employer status will not result from control that is limited and routine." Id. at *5. Accordingly, under the restored pre–*Browning Ferris* standard, proof of indirect control, contractually reserved control that has never been exercised, or control that is limited and routine will not be sufficient to establish a joint-employer relationship. The NLRB concluded that "the reinstated standard adheres to the common law and is supported by the NLRA's policy of promoting stability and predictability in bargaining relationships."

Four days after the NLRB issued its decision, Browning-Ferris Industries filed a letter with the U.S. Court of Appeals for the D.C. Circuit, where the NLRB's decision is pending review, requesting retroactive application of the NLRB decision. The next day, NLRB's Deputy Associate General Counsel Linda Dreeben moved to remand the *Browning-Ferris* case to the NLRB to reconsider its prior ruling in light of newly established precedent.

The NLRB's 2015 decision in *Browning-Ferris Industries* caused widespread concern, especially in franchise industries that maintain close control over their brands and the uniformity of the products that franchisees offer to the public. The return to common law joint employer principles will alleviate much of that concern. Nevertheless, businesses with relationships that could be considered "joint employment" should carefully review their relationships to be sure that they will not be considered joint employers, and they should continue to monitor developments in the law concerning joint employer criteria.

Authors

Bruce Michael Cross

Of Counsel
BCross@perkinscoie.com 206.359.8453

Jill L. Ripke

Senior Counsel
JRipke@perkinscoie.com 310.788.3260

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