MILLER CANFIELD

NLRB Proposes Rule To Relax Joint Employer Standard

September 17, 2018

The National Labor Relations Board (NLRB) has issued a proposed new rule designed to overturn the broad standard for finding joint employer status previously announced in *Browning Ferris Industries of Cal.,* 362 NLRB No. 186 (2015) and return to pre-*Browning Ferris* law.

Joint employer status carries with it the possibility of expanded union organizing and unfair labor practice liability for employers found to be joint employers. Because the new proposed rule, which was issued September 14, 2018, would make it more difficult for unions and employees to prove joint employer status, it is expected to assist entities that use or provide contract labor services; use or provide management services; who engage in franchise operations; or who otherwise utilize the services of persons employed by a different company.

The proposed rule prohibits a finding of joint employer status in the absence of evidence that the alleged joint employer "possess[es] and actually exercise[s] substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine." The language is intended to overturn the Board's decision in *Browning Ferris,* which held that one employer's contractually reserved right to control the wages, discipline or other terms and conditions of employment of a second employer's employees could make the two entities joint employers even if the powers were never exercised. *Browning Ferris* made it more likely that the kinds of terms typically found in contracts establishing staffing, third party management, and franchise arrangement (e.g. "cost-plus" pricing, ability to reject/remove specific contractor employees) would lead to joint employer status, even if the clauses were never or rarely exercised. The proposed rule would eliminate that danger. In addition, the commentary accompanying the proposed rule suggests that the Board would apply the joint employer doctrine narrowly.

While the proposed rule would greatly reduce the risk of joint employer status, it does not eliminate it altogether. The examples provided along with the rule provide some immediate guidance on how employers should address issues raised by the behavior, union status and bargaining demands of the employees of a second employer with whom it deals. The proposed rule, the examples and the prior case law that is revived by the new rule suggest that the following fact patterns would be important:

- Cost-plus contracts are no longer evidence of a joint employer relationship, but contracts specifying the wage rate or benefit levels to be paid to a contractor's employees are. (The Board did not take a position on how a using employer's specification of prevailing or "living wages" might affect this analysis.)
- Complaints about quality of work product or services from a contractor or specific employees of a contractor will not trigger joint employer status so long as the using employer addresses the matter with management of the contractor, rather than directly with the contractor's employees, and does not pressure the contractor to impose a particular level of discipline or consequence.
- Active participation in the process by which a contractor hires employees for your particular work will be evidence of joint employer status.
- Refusal or agreement to adjust pricing of the agreement with your contractor to accommodate union bargaining demands made on the contractor is not evidence of joint employer status.

- Requiring removal of a contractor employee who has engaged in sexual harassment or other serious misconduct will not be evidence of joint employer status, provided the employer does not require the contractor to impose discipline beyond removal from the site/account.

What does this mean for employers?

The proposed rule leaves many unanswered questions. Chief among them is whether a finding of joint employer status based on the exercise of some direct control (e.g. requiring a contractor employee be fired) will make the two entities joint employers for all purposes under the Act, or merely as to the matter over which direct control was exercised. It is also important to note that the proposed rule will govern only cases arising under the National Labor Relations Act. The EEOC and Department of Labor each have their own tests for joint employer status that are unlikely to be affected by the Board's action.

We will provide an update when the Board issues its final rule. Please contact your Miller Canfield attorney or the authors of this alert if you have questions about this rule.