

## NLRB Provides Final Rule Clarifying Joint-Employer Status

---

March 4, 2020

The National Labor Relations Board (NLRB) issued its final rule on joint-employer status after engaging in notice-and-comment rulemaking for more than five months. The rule overturns the NLRB's 2015 decision in *Browning Ferris Industries*, 362 NLRB 1599 (2015) and significantly narrows the circumstances in which two employers will be found to be joint employers of a group of employees.

Being considered a joint employer can open a number of doors that employers would prefer to keep shut. Joint employers may be liable under the National Labor Relations Act (NLRA) for decisions made by other entities that are considered joint employers. Additionally, being considered a joint employer may also create affirmative duties to workers that an employer did not consider to be its employees. The issue most often arises in situations in which a business has contracted out a non-core function to a third-party entity or when multiple corporate affiliates share services. Therefore, particular attention should be paid when setting up or renewing such arrangements.

The rule, which was issued on Feb. 26 and will take effect on April 27, 2020, provides that 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." The rule further states that in order to satisfy this test, each of the putative joint employers must exercise direct and immediate control over essential terms of employment such as wages, benefits, hours of work, discharge, discipline, supervision and direction.

The *Browning-Ferris* decision, which is overturned by this rule, held that a company could be deemed a joint employer even if its control over the essential working conditions of another business's employees was indirect, limited and routine, or even contractually reserved, but never exercised. The recent rule from the NLRB makes clear that none of these forms of control shall give rise to a joint employer relationship and may only be used as support for the argument that the employer possessed and exercised "substantial direct and immediate control." In doing so, the rule returns Board law largely to the state it was in during the Reagan era in the mid-1980s. The inquiry still remains highly fact-specific, so caution going forward is necessary.

Miller Canfield will continue to monitor the decisions of the NLRB for developments. In the interim, employers should examine their service provider contracts and the extent to which they actively control the terms and conditions of employees of third parties with whom they do business. If you have any questions or would like more information about how this NLRB rule might affect you, your employees or your organization, please contact any of the authors or your Miller Canfield attorney.