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2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

Comments Needed on NLRB's Proposal to Restore Common-Sense "Joint-Employer" Standard

by Michael J. Lotito and James A. Paretti, Jr.

The National Labor Relations Board (NLRB) last month published a proposed rule that would revise the test for determining whether two employers are considered "joint employers" under the National Labor Relations Act. Definition of Joint Employer, 83 Fed. Reg. 46681 (Sept. 14, 2018). The proposed rule would reverse the dramatic expansion of the definition of "joint employer" by the Board in the 2015 Browning Ferris decision, and restore the common-sense "direct control" test that had been settled law for more than thirty years.

Comments must be submitted to the Board on or before **November 13, 2018**. In addition, the Board will permit parties to submit replies to comments on or before November 20, 2018. Reply comments should be limited to replying to comments previously filed by other parties. Comments and replies may be submitted via hard copy or electronically via https://www.regulations.gov/document?D=NLRB_FRDOC_0001-0108.

By way of background, a key priority of organized labor and the plaintiffs' bar in recent years has been to expand the circumstances under which two separate employers (for example, a franchisor and franchisee, or a business and an unrelated contractor) may be considered the "joint employers" of an employee. Joint-employer status can have significant consequences for an employer. A joint employer may be required to bargain with a union representing jointly-employed workers; can be held jointly and severally liable for unfair labor practices committed by the other employer; and may be subject to labor picketing that would otherwise be unlawful. Moreover, as a practical matter, in many instances a "joint employer" will provide plaintiffs' lawyers with a far deeper pocket for recovery than a smaller, stand-alone entity.

The NLRB's proposed rule would make clear that an employer will be considered a "joint employer" of a separate company's employees only where that employer possesses and exercises "substantial direct and immediate control" over the essential terms and conditions of employment (such as hiring, firing, discipline, supervision, and direction) of the second company's employees. Even where an employer exercises direct control over another employer's workers, it will not be held to be a joint employer if such control is "limited and routine."

The proposed rule would reverse the NLRB's 2015 *Browning-Ferris* decision, which upended years of precedent to dramatically expand the definition of "joint employer" and categorize many more independent companies as "joint employers." Under Browning-Ferris, two entities would be deemed joint employers based on the mere existence of reserved joint control, indirect control, or control that is limited and routine. The *Browning-Ferris* decision drastically increased the universe of potential joint employers and was the subject

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Michael J. Lotito is a Shareholder in the San Francisco, CA and Washington, DC offices of Littler Mendelson PC. **James A. Paretti, Jr.** is a Shareholder in the firm's Washington, DC office.

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of intense negative scrutiny, including congressional hearings geared toward overturning the decision. The legality of the *Browning-Ferris* standard is currently being litigated before the U.S. Circuit Court of Appeals for the District of Columbia.

In the proposed rule, the Board explained why setting a standard via a rulemaking (rather than via case-by-case adjudication) is desirable. As the Board explained, a rulemaking allows interested parties with experience in the wide range of complex employment relationships to have input on proposed changes; allows the Board to clarify what constitutes joint-employer status under various hypothetical scenarios; and allows employers, unions, and employees the ability to structure their businesses free of legal uncertainty and the possibility of sudden change through the adjudicative process. In 2017, the Board reversed *Browning-Ferris* in the case of *Hy-Brand Industrial Contractors, Ltd.*, but that decision was subsequently withdrawn for reasons unrelated to the substance of the joint-employer issue.

Counsel are strongly advised to file comments in support of the Board's proposed rule. It may be employers' best chance to restore a fair and balanced definition of "joint employer."

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