COMPLIANCE BULLETIN

NLRB Reintroduces Indirect Joint Employer Standard

HIGHLIGHTS

- The Browning-Ferris Industries indirect control test has again become the standard for joint employer status.
- However, the Department of Labor has relaxed its joint employer determination guidance in favor of direct control.
- Joint employers are equally responsible for compliance with the NLRA.

IMPORTANT DATES

December 14, 2017
The NLRB overruled its 2015 indirect control (Browning-Ferris) joint employer standard.

February 26, 2018
The NLRB doubled back on its 2017 decision and reintroduces the indirect control standard.

Provided By:
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OVERVIEW

On **Feb. 26, 2018**, the National Labor Relations Board (NLRB) overruled the "direct control" joint employer standard adopted with the Hy-Brand decision and reintroduced the "indirect control" standard set out by the Browning-Ferris case.

The indirect control standard was adopted in 2015 and established joint employer status for employers that had "sufficient" control over a worker's essential terms and conditions of employment, regardless of whether the employer actually exercised its right of control.

ACTION STEPS

The reintroduced standard may have a large impact on National Labor Relations Act (NLRA) compliance across many industries. Because there is not a clear limit as to where liability ends based on this standard, the list of potential joint employers for any given operation may be increased and can noticeably change the way franchises, staffing agencies and seasonal employers operate.

Employers should review their partnerships with other entities with which they share employees to determine whether they are affected by this NLRB decision.

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The NLRA and Joint Employment

The NLRA applies to workplaces with labor unions. However, certain provisions of the NLRA also apply to non-unionized workplaces. Joint employer situations can present a complicated scenario when evaluating compliance with the NLRA.

Among other things, the NLRA protects workers from employer retaliation when workers engage in protected concerted activities. Workers engage in protected concerted activities when they join together to improve their wages and working conditions. The key to determining whether an employee has engaged in a protected concerted activity is whether the worker was acting for the benefit, or on behalf, of others and not solely for his or her personal interest. Workers do not need to formally agree to act as a group or designate a representative to participate in concerted activities.

Concerted activities can include spontaneous, uneventful actions such as a discussion of working conditions and wages or questioning a supervisor on a company policy. In that sense, the NLRA protects any employee who:

- ✓ Addresses group concerns with an employer;
- ✓ Forms, joins or helps a labor organization;
- ✓ Initiates, induces or prepares for group action; or
- ✓ Speaks on behalf of or represents other employees.