SEYFARTH SHAW

Management Alert

National Labor Relations Board Proposed New Joint-Employer Rule

By Joshua Ditelberg and Stuart Newman

Seyfarth Synopsis: *The National Labor Relations Board (NLRB or Board) announced today that it will publish a Notice of Proposed Rulemaking tomorrow in the Federal Register regarding its standard for assessing whether a joint-employer relationship exists.*

Under the NLRB's joint-employer doctrine, the Board analyzes whether two separate business entities (*e.g.*, service provider and client, franchisor and franchisee) share sufficient control over key employment terms such that both enterprises may have joint collective bargaining obligations, or may be jointly liable for certain unfair labor practices. The reach of the NLRB's joint-employer doctrine determines whether a business relationship intended by the parties that only one of them is to be an employer (*i.e.,* an independent contractor relationship) will be recognized as such under the National Labor Relations Act.

In August 2015, in a 3-2 decision, the NLRB overruled 30 years of its precedent to dramatically expand its joint-employer standard. (*Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015)) ("*BFI*"). In *BFI*, the Board majority held that it no longer would require proof that a putative joint employer has exercised any "direct and immediate" control over the essential working conditions of another company's workers. Under the Board's *BFI* standard, 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 contractually reserved but never exercised.

The NLRB's *BFI* decision currently is on appeal to the United States Court of Appeals for the District of Columbia Circuit. Seyfarth Shaw represents the appellant, Browning-Ferris Industries of California, Inc., in that case.

Under the NLRB's new proposed rule—set forth below with accompanying examples—an employer may be found to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority no longer would be sufficient to establish a joint-employer relationship.

In announcing the new proposed joint-employer standard, NLRB Chairman John Ring was joined by Board Members Marvin Kaplan, and William Emanuel. Board Member Lauren McFerran dissented from the proposed rule. Employers and others who are interested in submitting comments to the Board regarding the proposed rule are being provided 60 days to do so. If you potentially would like to submit a comment or have one drafted and submitted on your behalf, please do not hesitate to contact your Seyfarth Shaw attorney.

Proposed Rule and Examples

§ 103.40: Joint employers

An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), 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, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

EXAMPLE *1 to § 103.40.* Company A supplies labor to Company B. The business contract between Company A and Company B is a "cost plus" arrangement that establishes a maximum reimbursable labor expense while leaving Company A free to set the wages and benefits of its employees as it sees fit. Company B does not possess and has not exercised direct and immediate control over the employees' wage rates and benefits.

EXAMPLE *2 to § 103.40.* Company A supplies labor to Company B. The business contract between Company A and Company B establishes the wage rate that Company A must pay to its employees, leaving A without discretion to depart from the contractual rate. Company B has possessed and exercised direct and immediate control over the employees' wage rates.

EXAMPLE *3 to § 103.40.* Company A supplies line workers and first-line supervisors to Company B at B's manufacturing plant. On-site managers employed by Company B regularly complain to A's supervisors about defective products coming off the assembly line. In response to those complaints and to remedy the deficiencies, Company A's supervisors decide to reassign employees and switch the order in which several tasks are performed. Company B has not exercised direct and immediate control over Company A's lineworkers' essential terms and conditions of employment.

EXAMPLE *4 to § 103.40.* Company A supplies line workers and first-line supervisors to Company B at B's manufacturing plant. Company B also employs supervisors on site who regularly require the Company A supervisors to relay detailed supervisory instructions regarding how employees are to perform their work. As required, Company A supervisors relay those instructions to the line workers. Company B possesses and exercises direct and immediate control over Company A's line workers. The fact that Company B conveys its supervisory commands through Company A's supervisors rather than directly to Company A's line workers fails to negate the direct and immediate supervisory control.

EXAMPLE *5 to § 103.40.* Under the terms of a franchise agreement, Franchisor requires Franchisee to operate Franchisee's store between the hours of 6:00 a.m. and 11:00 p.m. Franchisor does not participate in individual scheduling assignments or preclude Franchisee from selecting shift durations. Franchisor has not exercised direct and immediate control over essential terms and conditions of employment of Franchisee's employees.

EXAMPLE *6 to § 103.40.* Under the terms of a franchise agreement, Franchisor and Franchisee agree to the particular health insurance plan and 401(k) plan that the Franchisee must make available to its workers. Franchisor has exercised direct and immediate control over essential employment terms and conditions of Franchisee's employees.

EXAMPLE *7 to § 103.40.* Temporary Staffing Agency supplies 8 nurses to Hospital to cover during temporary shortfall in staffing. Over time, Hospital hires other nurses as its own permanent employees. Each time Hospital hires its own permanent employee, it correspondingly requests fewer Agency-supplied temporary nurses. Hospital has not exercised direct and immediate control over temporary nurses' essential terms and conditions of employment.

EXAMPLE *8 to § 103.40.* Temporary Staffing Agency supplies 8 nurses to Hospital to cover for temporary shortfall in staffing. Hospital manager reviewed resumes submitted by 12 candidates identified by Agency, participated in interviews of those candidates, and together with Agency manager selected for hire the best 8 candidates based on their experience and skills. Hospital has exercised direct and immediate control over temporary nurses' essential terms and conditions of employment.

EXAMPLE *9 to § 103.40.* Manufacturing Company contracts with Independent Trucking Company ("ITC") to haul products from its assembly plants to distribution facilities. Manufacturing Company is the only customer of ITC. Unionized drivers—who are employees of ITC—seek increased wages during collective bargaining with ITC. In response, ITC asserts that it is unable to increase drivers' wages based on its current contract with Manufacturing Company. Manufacturing Company refuses ITC's request to increase its contract payments. Manufacturing Company has not exercised direct and immediate control over the drivers' terms and conditions of employment.

EXAMPLE *10 to § 103.40.* Business contract between Company and a Contractor reserves a right to Company to discipline the Contractor's employees for misconduct or poor performance. Company has never actually exercised its authority under this provision. Company has not exercised direct and immediate control over the Contractor's employees' terms and conditions of employment.

EXAMPLE *11 to § 103.40*. Business contract between Company and Contractor reserves a right to Company to discipline the Contractor's employees for misconduct or poor performance. The business contract also permits either party to terminate the business contract at any time without cause. Company has never directly disciplined Contractor's employees. However, Company has with some frequency informed Contractor that particular employees have engaged in misconduct or performed poorly while suggesting that a prudent employer would certainly discipline those employees and remarking upon its rights under the business contract. The record indicates that, but for Company's input, Contractor would not have imposed discipline or would have imposed lesser discipline. Company has exercised direct and immediate control over Contractor's employees' essential terms and conditions.

EXAMPLE *12 to § 103.40.* Business contract between Company and Contractor reserves a right to Company to discipline Contractor's employees for misconduct or poor performance. User has not exercised this authority with the following exception. Contractor's employee engages in serious misconduct on Company's property, committing severe sexual harassment of a coworker. Company informs Contractor that offending employee will no longer be permitted on its premises. Company has not exercised direct and immediate control over offending employee's terms and conditions of employment in a manner that is not limited and routine.

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