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NATIONAL LABOR RELATIONS BOARD ANNOUNCES FINAL RULE GOVERNING JOINT-EMPLOYER STATUS UNDER THE NATIONAL LABOR RELATIONS ACT

To Our Clients and Friends:

Increasingly, companies face challenges in answering what might seem like a basic question—is a particular worker the "employee" of that company? In many industries, the answer turns on whether a worker is properly classified as an "independent contractor." But often, even if the worker is an employee, the next question is, whose? On February 25, 2020, the National Labor Relations Board ("NLRB" or the "Board") issued a final rule that will help companies find the answer; the final rule will guide the NLRB in determining whether a business is a joint employer of employees directly employed by another employer for purposes of the National Labor Relations Act ("NLRA"). It rolls back the more expansive test for determining joint employer liability that the NLRB adopted in the 2015 *Browning-Ferris* decision, and restores the standard the Board applied for several decades prior to that decision.

The final rule is an important development for companies covered by the NLRA who use sub-contractors, staffing agencies, franchise models, and other arrangements that have historically faced litigation over their alleged joint employer status. The NLRB's rule also follows shortly behind a similar final rule governing joint employer status under the Fair Labor Standards Act ("FLSA"), announced by the Department of Labor ("DOL") on January 12, 2020.

Below, we provide a summary of the NLRB's final rule. The full text of the rule, which spans almost 200 pages, is available here. It will be formally published in the Federal Register on February 26, and will take effect on April 27 of this year.

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On February 25, 2020, the NLRB issued its final rule on the standard for determining joint-employer status under the NLRA. The rule rolls back the more expansive test that the Board adopted in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599, 1600 (2015), which made it possible for a business to be deemed a joint employer if it exhibited "indirect control" over another employer's employees or reserved the ability to exert such control. The rule reinstates the standard that the NLRB applied for several decades prior to the *Browning-Ferris* decision. This standard provides that a company is only a joint employer if it exercises "substantial direct and immediate" control over one or more essential terms and conditions of employment of another employer's employees.

Under the final rule, 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 defines essential terms and conditions of employment to include eight core aspects of a worker's job: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. To share or codetermine the essential terms and conditions of employment, the rule provides that an employer must possess *and* exercise "such substantial direct and immediate control" over one or more of those eight core aspects of employment as would warrant a finding that the business "meaningfully affects matters relating to the employment relationship" with those employees.

The rule defines "substantial" direct control as actions that have "a regular or continuous consequential effect on an essential term or condition of employment." And it explicitly notes that any direct control that is "sporadic, isolated or de minimis" will *not* be enough to warrant a finding of joint employment. The rule makes clear that joint-employer status must be determined on the totality of the relevant facts in each particular employment setting.

Further, the rule provides that evidence of indirect or contractually reserved control over essential employment terms—which could have led to a joint employer finding under the *Browning-Ferris* test—can be considered as part of the Board's joint employer analysis only to the extent it supports evidence of direct and immediate control. In other words, this evidence cannot, by itself, give rise to joint employer status without substantial direct control. Evidence of control over mandatory subjects of bargaining other than essential terms and conditions may also be considered but is not dispositive. Additionally, the rule provides that routine elements of an arms-length contract, such as permitting another employer to participate in its benefit plans or requiring compliance with certain regulations or codes, are not probative of joint-employer status.

What does this mean for employers covered by the NLRA?

The legal standard used by the NLRB has significant implications for businesses that rely on franchisees and subcontracted workers. The NLRB's final and more narrow rule restricts the circumstances in which businesses that use employees hired by third parties will be considered joint employers, and therefore reduces the risk of litigation for unfair labor practices, and reduces many companies' obligations to bargain with franchisee or subcontracted workers. For instance, if a company is found to be a joint employer, it must participate in collective bargaining with employees and the unions that represent them over their terms and conditions of employment. Additionally, picketing directed at a joint employer that would otherwise be secondary and unlawful is primary and lawful. Further, companies found to be joint employers may be held jointly and severally liable for unfair labor practices committed by the other employer.

The NLRB's final rule follows closely behind the DOL's final rule for determining joint-employer status under the FLSA—issued on January 12, 2020. The NLRB's rule is consistent with the DOL's rule, which also looks to an employer's actual control over workers. In making the factual determination of actual control, the DOL's rule considers the employer's hiring or firing, supervision and control of schedule and conditions of employment, determination of employee's rate and method of payment, and maintenance of the employee's employment records. Both rules require that the employer actually exercise control over terms and conditions of the employee's work, and make clear that mere contractual

right of control alone is insufficient to establish joint-employer status. These new rules reduce the risk of joint employer liability and recognize the practical realities of many tiered business relationships.

Gibson Dunn lawyers regularly counsel clients on the complex question of employment status and frequently litigate these issues across the country. Please contact the Gibson Dunn attorney with whom you work in the Labor and Employment Group, or the following authors or practice group leaders:

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