Legal Update Article

How Manufacturers Can Prepare for Likely Expansion of Labor Board's Joint-Employer Rule

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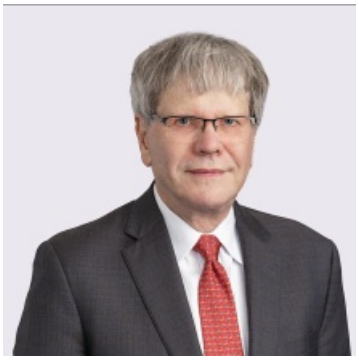
Meet the Authors



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In December 2021, the National Labor Relations Board (NLRB) announced it will issue proposed rulemaking on the standard for determining whether two employers are "joint employers" under the National Labor Relations Act (NLRA) imminently. Now is the time for manufacturers to prepare.

To be considered a joint employer under current law, an employer must have "substantial direct and immediate control" over one or more "essential terms and conditions of employment" of another employer's employees, such that the "entity meaningfully affects matters relating to the employment of those employees." NLRB Rules and Regulations, § 103.40.

The NLRB is expected to revert to its previous*Browning-Ferris* standard or issue a similar rule. Under the *Browning-Ferris* standard, entities were deemed joint employers if they possessed an ability to indirectly control employment terms and conditions of another employer's employee, even if the entity never actually exercised that ability. *Browning-Ferris Industries*, 362 NLRB 1599 (2015).

Restoring the *Browning-Ferris* joint-employer standard, or issuing a similar rule, could significantly affect employers in the manufacturing industry — particularly since many manufacturers are struggling with labor shortages and utilizing third parties, such as staffing agencies, to fulfill staffing needs. Among other results, a joint-employer finding would make both entities liable for each other's unfair labor practices.

There are several steps manufacturers can take now to prepare for the likely return to a more expansive joint-employer standard. First, manufacturers should work together with staffing agencies to address workplace issues and give as much attention to working conditions of temporary employers as is given to regular employees.

Second, and importantly, employers should review any contracts with third parties and procedures associated with staffing arrangements to understand the contractual direct or indirect right to control employment terms and conditions of the temporary employees. In many cases, it may be in the employer's interest to ensure the contractors have as much autonomy as possible in setting the terms and conditions of employment, lest they be found to be joint employers. Employers should also review these contracts and procedures to understand the responsibility for decisions and how liability for workers' claims will be allocated between the parties.

Third, manufacturers should develop or maintain a good working relationship with its staffing agency that includes regular communication between the parties about issues that arise and should create a plan for jointly investigating workers' complaints.

For more information about this topic, please contact a Jackson Lewis attorney.