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NLRB Reinstates Prior Joint Employer Standard

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Highlights:

- The Browning-Ferris Industries indirect control test no longer applies for joint employer status.
- The U.S. Department of Labor also relaxed its joint employer determination guidance in favor of direct control on June 7, 2017.
- Joint employers are equally responsible for compliance with the NLRA.

Important Dates:

December 14, 2017

- The NLRB overruled its 2015 indirect control joint employer standard.

OVERVIEW

On **Dec. 14, 2017**, the National Labor Relations Board (NLRB) overruled its "indirect control" joint employer standard and reverted to the previous "direct control" standard.

Under the newly adopted direct control standard, two or more entities are joint employers regarding a worker only if:

- They have actually exercised control over essential employment terms and conditions for that worker; and
- Control over terms and conditions of employment was direct and immediate.

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

This NLRB decision does not require immediate action from employers. However, employers should review their current business practices and identify whether they are at risk of being considered a joint employer under the new standard.

The NLRB and Joint Employment

The National Labor Relations Act (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.