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Will Congress Act To Stave Off The Broadening Definition Of Joint Employment?

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Congressional efforts to potentially undo the National Labor Relations Board's (NLRB) *Browning-Ferris* decision took a step forward on Oct. 4. The House Committee on Education and the Workforce passed legislation that would redefine "joint employer" under the National Labor Relations Act (NLRA) to only cover instances when two or more companies have direct control (as opposed to merely indirect or potential control) over a group of workers. In other words, if ultimately signed into law, the bill would revert to the NLRB's prior, more employer-friendly joint employer standard.

The "joint employment" doctrine often is used by federal agencies to impose liability on two or more companies with respect to a group of employees, such as a staffing company and its client or a franchisor and franchisee. For example, the NLRB can use the doctrine to impose liability for violations of the NLRA on multiple companies, and the agency has been at the forefront of changes to how joint employment is evaluated. The board's now infamous *Browning-Ferris* decision in August 2015 significantly altered its standard for evaluating joint employment. In that case, the NLRB stated that it will no longer require that a company actually exercise control over a workforce's terms and conditions of employment in order to be deemed a joint employer; rather, "reserved" or "indirect" (i.e., potential) control is sufficient.

This caused much concern among employers using contingent workforces and those under franchise business models, as it has made it easier for the NLRB to find companies in those contexts to be joint-employers. Accordingly, Congress has been evaluating whether to act to reverse that NLRB finding. A finding of joint employment can have significant consequences for companies under the NLRA. From a practical perspective, each company found to be a joint employer by the NLRB may have an obligation to bargain with a union over terms and conditions of employment of the employees at issue and also may be held liable for the unfair labor practices of their co-employers. That is, companies not only need to account for their own compliance with the NLRA, they must also attempt to ensure compliance by any company with whom they are determined to be a joint employer. We'll see if Congress is able to push the bill through and have the pendulum swing back in employers' favor on this front.

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