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DOL Head Slams NLRB's Vague Test For Joint Employment

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According to a recent report by Bloomberg BNA, Department of Labor (DOL) Secretary Alexander Acosta expressed dissatisfaction for the National Labor Relations Board's (NLRB) joint-employment test during remarks to the Federalist Society's National Lawyers' Convention. Specifically, while discussing his view of the DOL's test for joint employment, he brought up and criticized the NLRB's approach to the issue. He described the NLRB's rule as being too vague and potentially infringing on the "freedom to contract." 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 National Labor Relations Act (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 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. Currently, the NLRB's *Browning-Ferris* case is under attack on several fronts: Congress is considering amending the NLRA to undo the *Browning-Ferris* test; the case is being reviewed by a federal court of appeals, which could overturn the NLRB's decision; and the newly constituted NLRB – with new members and a new general counsel – could choose to walk away from the broadened *Browning-Ferris* test. It appears the case may be overturned one way or another in the near future. Stay tuned.

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