JOINT EMPLOYER RULE

NMHC/NAA Viewpoint

The National Labor Relations Board should swiftly finalize proposed regulations to overturn the Obama-era joint employer rule.

Many multifamily firms today use contractors and subcontractors to execute various business functions. Depending on how employment relationships are structured and defined, one firm could be considered a joint employer of another entity's employees.

Until 2015, entities were designated joint employers when both had "direct and immediate" control over "essential terms and conditions of employment." This changed when the National Labor Relations Board (NLRB) in its Browning-Ferris Industries of California, Inc. decision significantly expanded the definition of joint employer. Specifically, the NLRB ruled that it could impose joint employer liability when an entity has "indirect" control and "unexercised potential" of control over another entity's employees.

In September 2018, the NLRB proposed regulations to restore the rule in effect prior to its holding in Browning-Ferris. NMHC/NAA strongly support this proposed rule.

The apartment industry remains extremely concerned about allowing the Browning-Ferris ruling to stand.

The industry opposes the Obama-era joint employer rule because it could hold multifamily firms liable for fines if their subcontractors, suppliers, vendors and temporary staff violated Federal labor laws.

First, the decision could force multifamily firms to negotiate employment terms with employees of subcontractors, suppliers, vendors and temporary staff it does not itself employ. Moreover, the holding is difficult to administer given that it can be challenging to both ascertain when joint employment is triggered and subsequently negotiate with multiple employers.

Second, the decision could potentially and inappropriately make apartment firms liable for the actions of their subcontractors, suppliers, vendors and temporary staff. Apartment firms should not, for example, be left liable for fines for employees of suppliers who violate Federal labor laws.

To avoid these negative consequences, the apartment industry strongly supports the NLRB's proposed regulation to reverse its holding in Browning-Ferris and to clarify that "to be deemed a joint employer under the proposed regulation, an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine." In so doing, the proposed rule would restore an appropriate, commonsense, and workable definition of an employer and provide certainty to the nation's job-creating owners, operators and developers of multifamily housing.

NMHC/NAA Joint Legislative Program
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