NLRB Issues Final Joint Employer Rule

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The National Labor Relations Board (NLRB) just issued its long-awaited final joint employer rule. Under the final rule, to be a joint employer, the company must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees. Specifically, the rule provides that an employer:

May be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment. To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, the entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant a finding that the entity meaningfully affects matters relating to the employment relationship with those employees.

Importantly, indirect control or contractually reserved but never exercised authority is only a factor to consider. This is a welcome change from the NLRB's Browning-Ferris Industries, 362 NLRB No. 185 (2015) decision that held employers could be considered a joint employer if they had indirect control or a contractually reserved right to exercise control.

The final rule also provides definitions to give employers more clarity on the issue:

- "Essential Terms and Conditions of Employment" are wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction."Substantial Direct and Immediate Control" is direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees. Such control is not "substantial" if only exercised on a sporadic, isolated, or de minimis basis.
- "Indirect Control" is indirect control over essential terms and conditions of employment of another employer's employees

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but not control or influence over setting the objectives, basic ground rules, or expectations for another entity's performance under a contract.

- "Contractually Reserved Authority Over Essential Terms and Conditions of Employment" is the authority that an entity reserves to itself, under the terms of a contract with another employer, over the essential terms and conditions of employment of that other employer's employees, but that has never been exercised.

The final rule returns to the pre-Browning Ferris standard making it more difficult to find a joint employer relationship. By using the NLRB's rulemaking authority, employers are now provided with greater precision, clarity, and clear guidance on this significant area of the law.

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