NLRB Publishes Final Rule on Determining Joint-Employer Status

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Publications

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On October 27, 2023, the National Labor Relations Board (NLRB or "Board") published its anticipated Final Rule on the Standard for Determining Joint Employer Status ("Final Rule"). It establishes a new standard that radically broadens the scope for who can be considered a joint employer under the National Labor Relations Act (NLRA).

Background

The new Final Rule rescinds the prior standard that was adopted by the Board in 2020 ("2020 Rule"), which had embodied common-sense flexibility for modern corporate relationships. However, the current Board has taken the position that the 2020 Rule made it too easy for employers to avoid a finding of joint-employer status and that the standard was not grounded in common law. After consideration of comments, the 2023 Board characterized the new standard to be more in line with common law agency principles and concluded that it "has no statutory authority to adopt" the actual exercise of control requirement in the 2020 Rule.

The 2020 Rule limited joint-employer status to situations where an entity exercises "substantial direct and immediate control" over the essential terms and conditions of another entity's employees. Specifically, a separate business could be a joint employer only if the two employers "share or codetermine the employees' essential terms and conditions of employment." To establish this "share or codetermine" standard, a putative joint employer's control over employment must have been direct and immediate such that the putative joint employer meaningfully affects matters relating to the employment relationship with those employees. Indirect control, or an unexercised contractual reservation of a right of control, was insufficient. However, now, merely a *right* of control may very well open the door to joint employer obligations and liability under the NLRA.

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The New NLRB Joint Employer Standard

Under the new Final Rule, multiple businesses may be considered joint employers if each has an employment relationship with the employees, and if they share or codetermine one or more of the employees' essential terms and conditions of employment. "Essential terms and conditions of employment" are defined exclusively as follows: (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees.

The new standard considers the authority to control the terms and conditions of employment regardless of whether such control is actually exercised and regardless of whether any such exercise of control is direct or indirect. The NLRB notes that consideration of indirect control is proper because Section 2(2) of the National Labor Relations Act defines "employer" to include "any person acting as an agent of an employer, directly or indirectly," and the Board believes that by "including indirect control in the joint-employer standard, the final rule accounts for control exercised through an intermediary or controlled third parties." Furthermore, the Board opines that its incorporation of the "reserved control" concept in this standard is rooted in common law principles, taking the position that even if an entity remains passive, its mere presence can loom over the decision-making process of the other employer in relation to these terms.

The new rule also provides extensive guidance to parties regarding their rights and responsibilities in situations where joint-employer status applies.

Practical Implications

The new Final Rule goes into effect on December 26, 2023, and will apply only to cases filed pursuant to the NLRA after that date. It is

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important to note that the NLRB's Final Rule is entirely separate from the Department of Labor rule, which applies an economic-realities test to interpret "employer" under the Federal Labor Standards Act (and not the NLRA). The "economic realities" test has no application to this NLRB Final Rule on joint-employer status.

Overall, the new standard will lead to increased shared responsibility for labor law violations and the legal duties related to union negotiations among multiple businesses. Even if an entity has a reserved right to control certain terms that it does not exercise, it will be required to bargain over those essential terms and conditions *and* other mandatory subjects of bargaining that it possesses or exercises the authority to control. Additionally, a joint employer may be jointly and severally liable for unfair labor practices committed by the other employer and could be a target of labor picketing that otherwise would be illegal.

Among those most significantly affected by this rule are franchisors and businesses that rely on employees acquired through staffing agencies and other business-to-business agreements. However, the Board's Fact Sheet observes that "not all franchisors and their franchisees will be joint employers. Nor will all staffing or temporary agencies and their client employers." NLRB Chairman Lauren McFerran released a statement noting, "While the final rule establishes a uniform joint-employer standard, the Board will still conduct a fact-specific analysis on a case-by-case basis to determine whether two or more employers meet the standard."

For impacted employers, it is imperative that you utilize the next two months to review and assess the risks of any third-party relationships to determine where your business may be considered a joint employer under the expansive new Final Rule. Such review should include a careful analysis of your third-party commercial contracts that require the third-party entity's employees to maintain certain levels of quality, quantity, productivity, and/or safety, or reserve the right to set terms and conditions such as pay, scheduling, and work rules.

For more information, please contact the authors or any attorney in our Labor & Employment practice group.

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