LEGAL UPDATES PUBLISHED: OCTOBER 27, 2023

NLRB Issues Final Rule on Joint-Employer Status

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On October 27, 2023, the National Labor Relations Board (NLRB) published its final rule on the standard for determining joint-employer status under the National Labor Relations Act, effective December 26, 2023. The new rule rescinds the Board's 2020 rule and hearkens back to a more common law approach promulgated in *Browning-Ferris*, 362 NLRB 1599 (2015). The rule has been classified as a major rule and is subject to Congressional review.

The rule

Under the new final rule, an entity may be considered a joint-employer of another employer's employees if they share or co-determine employees' essential terms and conditions of employment.

What are the essential terms and conditions in determining whether employers are joint-employers?

The seven essential terms and conditions to consider in determining whether employers are joint-employers, which are rooted in common-law agency principles, are enumerated in the final rule as:

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

7. Working conditions related to the safety and health of employees.

If an organization has the authority to control *at least one o*f the above, whether or not it exercises the authority, the NLRB will find the employers to have met the joint-employer standard. Indirect control alone may prove joint employer status, even if such control has not been exercised. The rule further requires joint-employers to negotiate over those terms "it possesses the authority to control or exercises the power to control."

Key differences from prior rules

The 2020 rule, issued under the Trump administration, made it easier to avoid a finding of joint-employer status because it set a high threshold. Under that rule, joint-employer status could be demonstrated by an employer having "substantial direct and immediate control" over an employee's essential terms and conditions of employment.

Under the new rule, joint-employer status may be found if an organization merely has the authority to control a single essential terms or condition of employment. This low threshold may be met whether or not such control is exercised and regardless of whether the exercise of control is direct or indirect. For example, a manufacturer contracting with a temporary staffing agency for temporary workers may be considered a joint-employer with the staffing agency if the contract reserves the right to supervise the performances of the temporary workers, even the right is never exercised

The new rule is similar to the 2015 Obama administration standard found in *Browning-Ferris*. In *Browning-Ferris* the NLRB held the right to exercise minimal or "indirect" control over essential terms and conditions of employment, even if not actually exercised, created a joint-employer relationship.

The Department of Labor standard

The NLRB's final rule is separate and distinct from the Department of Labor (DOL) rule. The two agencies have independently set joint-employer standards, according to their respective and distinct governing statutes. The NLRB's rule has its foundation within the National Labor Relations Act and common law principles regarding agency. The DOL applies a standard grounded in the Federal Labor Standards Act, using an "economic-realities test" to determine an "employer." The NLRB does not apply this test.

The effect on labor relations

For the purposes of labor relations, particularly collective bargaining, once an entity is deemed a joint-employer by virtue of its control over one or more essential terms and conditions of employment, the entity will be required to bargain over the terms and conditions over which they

have authority. The entity will also be bound to bargain over any other mandatory subjects of bargaining it possesses or exercises the authority to control. Essentially, the joint-employer relationship makes any company using outsourced labor a target of union organizing drives.

The new standard affects workers employed in industries where there is high reliance on subcontracting, temporary work, and other alternative work arrangements, even franchisees.

What this means to you

The new standard governing joint-employers lowers the bar for establishing a joint-employer relationship, for example, with staffing agencies and franchisees, even where one entity has minimal or indirect control over employees. This change will undoubtedly increase legal risks: If one employer is found to have engaged in an unfair labor practice, the other joint-employer may be liable for those violations and any potential remedy or litigation. Additionally, either entity may be subjected to joint liability for collective bargaining obligations and contractual breaches. Employers at risk, including those with temporary employees employed by a staffing or outside agency should consider their extent of control over their temporary workforce to ensure they are not joint-employers under the new rule. To the extent a joint-employer relationship cannot be avoided, employers should consider the potential legal risks created by such a relationship.

Contact us

If you have questions about the new final rule, determining joint-employer status, or would like assistance to ensure compliance with the existing rules and plan for the changes ahead, contact Trecia Moore, Delia Berrigan, or your Husch Blackwell attorney.