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National Labor Relations Board Publishes Final Rule Significantly Expanding Definition of Joint Employer

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Executive Summary

The National Labor Relations Board adopts a joint-employer rule that expressly incorporates *reserved* and *indirect* control over essential terms and conditions of employment, as factors to be analyzed when determining if two or more entities are joint employers.

Analysis

On October 26, 2023, the National Labor Relations Board ("NLRB") released its final rule regarding the determination of joint employer status under the National Labor Relations Act ("NLRA"). The rule's summary provides the following:

The National Labor Relations Board has decided to issue this final rule for the purpose of carrying out the National Labor Relations Act (NLRA or Act) by rescinding and replacing the final rule entitled "Joint Employer Status Under the National Labor Relations Act," which was published on February 26, 2020, and took effect on April 27, 2020. The final rule establishes a new standard for determining whether two employers, as defined in the Act, are joint employers of particular employees within the meaning of the Act. The Board believes that this rule will more explicitly ground the joint-employer standard in established common-law agency principles and provide guidance to parties covered by the Act regarding their rights and responsibilities when more than one statutory employer possesses the authority to control or exercises the power to control particular employees' essential terms and conditions of employment. Under the final rule, an entity may be considered a joint employer of another employer's employees if the two share or codetermine the employees' essential terms and conditions of employment.

The rule will take effect on December 26, 2023.

The Board's Fact Sheet for the new rule further clarifies that "essential terms and conditions of employment" are defined 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; and
7. working conditions related to the safety and health of employees.

“The joint-employer standard is only implicated if an entity employs the workers at issue and has authority to control at least one of these terms or conditions. Authority over other matters is not sufficient.”

Looking Forward

The new rule rescinds the Board’s February 25, 2020, rule, which was implemented under the prior administration to “foster predictability and consistency regarding determinations of joint-employer status” by focusing on whether an entity had “substantial direct and immediate control” of essential terms and conditions of employment. The new rule’s broad expansion to include reserved and indirect control was to be expected in light of the current administration’s consistent pro-labor stance and recent common law trends and developments. Specifically, the Board contends the new rule effectively codifies the 2015 standard established by the Board’s *Browning-Ferris* decision.

While this is a negative development for the remainder of a Democrat administration, the last two decades have demonstrated that the joint-employer analysis has swung with the political pendulum of each new administration both at the federal and state levels. Based thereon, we predict employer friendly states, employer organizations, and employers will challenge the rule in court and increase their funding for the 2024 national races so that Congress can pass legislation negating this new rule.

In the meantime, businesses should revisit their policies and maintain a conservative approach to avoid potential joint-employer status by ensuring policies and agreements do not reserve control or allow indirect influence over the terms and conditions of employment identified above. Failure to do so may have significant consequences in light of the new rule, as joint employer status carries with it bargaining obligations, and may subject businesses to liability for unfair labor practices committed by joint employers.



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