CLIENT ALERTS & INSIGHTS

NLRB Proposes Reversing Trump-Era Joint-Employer Standard

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On September 6, 2022, the National Labor Relations Board (the "Board") issued a draft rule replacing and significantly altering the Trump-era 2020 joint-employer standard. Standard for Determining Joint-Employer Status (to be codified at 29 C.F.R. pt. 103). This is the latest example of the Board attempting to reverse Trump-era policies. (see NLRB Overturns a Trump-Era Precedent; Employers Cannot Ban Union Insignia).

The proposed rule reverses the employer-friendly 2020 Rule by expanding the factors that can establish a joint-employer relationship to include evidence of reserved and indirect control over employees' essential terms and conditions of employment. In reviving the standard previously propounded in *Browning-Ferris Industrials of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015), the Board stipulates that joint-employer liability exists if the employer has an employment relationship under "established common-law agency principles and the employer shares or codetermines those matters governing at least one of the employees' essential terms and conditions of employment."

The Board defines "shares or codetermines" to mean "for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment." Such "essential terms and conditions" will include, *but are not limited to*, wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance. The Board asserts that "evidence of indirect and reserved forms of control" will suffice in establishing joint-employer status. Further, the Board notes that the above inclusive definition of "essential terms and conditions" provides for unforeseen circumstances and leaves flexibility for the Board in future adjudications.

Prior to this proposed rule, the Trump-era 2020 rule specified that to prove the "shares or codetermines" standard the "the entity **must possess and exercise** such **substantial** and **immediate control** over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." *Joint Employer Status Under the National Labor Relations Act*, 85 FR 11184, 11186 and 11236 (Feb. 26, 2020) (emphasis added) (see prior alert here). In essence, the Board replaces actual possession and exercise of substantial control with a much more passive indirect or unexercised contractual reservation of a right to control, which previously fell far short of satisfying the "shares or codetermines" standard.

This proposed rule significantly alters the standard for finding joint-employer status, essentially determining that any potential-even unused-influence of any aspect of the employment relationship confers joint employer status and liability, regardless of how limited the control the third party may use, possess, or reserve. This new standard would have a profound impact on staffing companies, construction contractors and subcontractors, and - especially - franchisors and franchisees (see prior alert on McDonald's). The extremely low bar set by the proposed rule would make virtually all entities in any of those relationships joint employers. Employers should review any independent contractor agreement, consulting agreement, or service agreement for any contractual reservation of right to control-whether indirect control of or influence over-a single term or condition of employment deemed "essential." A minor clause, even a never-exercised contractual reservation, could create a joint-employer liability issue.

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