CLIENT ALERTS & INSIGHTS

NLRB Rule Vastly Expanding Joint Employer Risk Under the National Labor Relations Act is Vacated Before Taking Effect (Updated July 24, 2024)

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Update: Since the alert below was issued on March 13, 2024, the National Labor Relations Board (the "Board") appealed the lower court's decision to the Fifth Circuit Court of Appeals. On July 19, 2024, the Board filed an unopposed motion to dismiss its appeal voluntarily. In its motion, the Board reiterated its position that "its 2023 Rule meets the procedural and substantive requirements of the Administrative Procedure Act and the National Labor Relations Act." The Board noted, however, that it seeks "the opportunity to further consider the issues identified in the district court's opinion," including by addressing "several rulemaking petitions on [the Board's] docket regarding the joint employer issue raising similar issues."

While the current appeal is expected to be dismissed at the Board's request, the Board has signaled that it is still considering avenues to revive the 2023 Rule or to promulgate a new rule that it believes will pass muster.

We will continue to provide updates as the Board evaluates its options to expand joint-employer status under the National Labor Relations Act.

A Board rule set to take effect on Monday, March 11, and slated to significantly expand the circumstances in which a company would be deemed a joint employer under the National Labor Relations Act ("NLRA") was vacated by the U.S. District Court for the Eastern District of Texas. The court stated that the would-be new rule was arbitrary and capricious.

Joint Employer Status Under the NLRA - the 2020 and 2023 Rules

The test for joint employer status under the NLRA has undergone a series of evolutions focusing primarily on the degree to which a company controls (or has a right to control) a worker to be deemed their joint employer. The Board issued a rule in Feb. 2020 (the "2020 Rule"), under which a company "must possess and exercise such substantial direct 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."

However, the Board rejected the 2020 Rule. It issued a new rule in Oct. 2023 (the "2023 Rule"), which required only (1) that the company have "an employment relationship with those employees under common-law agency principles" and (2) that the company "share or codetermine" matters governing employees' essential terms and conditions of employment with the employees' W-2

employer. Contrary to the 2020 Rule, under the 2023 Rule, a company would not need to exercise control over the conditions of employment; it would be enough to possess the ability to exert that control.

March 8, 2024 Ruling Vacates the 2023 Rule

Days before the 2023 Rule took effect, the Eastern District of Texas vacated the 2023 Rule and reverted to the 2020 Rule. The Court reasoned that the 2023 Rule's two-element test was truly a one-element test, as "the second test is always met if the first test is met." In fact, the Court observed, "the Board has not been able to come up with an example of an entity satisfying step one but not step two."

The Court further rejected the Board's request that should the 2023 Rule be vacated, the Court revert not to the 2020 Rule but to the rule predating the 2020 Rule. This earlier rule favored organized labor more than the 2020 Rule but not as much as the 2023 Rule. The Court reasoned that the Board "did not articulate a good reason (or any reason at all)" why the common-law rule preceding the 2020 Rule was preferable to the 2020 Rule.

Key Takeaways From the Ruling and the Board's Likely Course of Action

Friday's ruling is a significant victory for employers, specifically general contractors, companies that secure workers through staffing arrangements, and corporate franchisers, which would have found themselves susceptible to joint employer allegations under the 2023 Rule. For now, the more favorable 2020 Rule remains in effect unless and until the Board again acts to overturn it.

That said, in addition to appealing Friday's decision, the Board will likely use this ruling to promulgate a new rule to correct why the 2023 Rule was vacated. Employers should continue to observe the Board's next steps carefully.

To learn how these developments can affect your business, contact a member of Benesch's Labor & Employment Practice Group.

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