What Employers Should Know About the NLRB's New Joint Employer Rule

Legal Alert
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March 13, 2024, Update: On Friday, March 8, 2024, a federal district court vacated the NLRB's Joint Employer Rule discussed in this Legal Alert. At this time, the new rule has not gone into effect, and the existing 2020 joint employer rule remains in effect. The outcome of a likely appeal of the district court decision is unknown.

The following article originally published on November 28, 2023.

The National Labor Relations Board ("NLRB") recently issued a new joint employment rule that employers should review to avoid incurring or mitigate the responsibilities and potential liability of a joint employer under the National Labor Relations Act ("NLRA"). The final rule will go into effect on February 26, 2024.

Joint employment is a determination that two or more entities share control over a worker's terms and conditions of employment. Many agencies and courts use a variety of different standards to decide to apply joint employer responsibility under a variety of employment laws. For example, being deemed a joint employer can create liability under wage and hour laws, or federal and state discrimination statutes.

The NLRA is the federal statute that defines, among other things, the rights of employees in both union and non-union workplaces to organize and act together to improve working conditions, and the rights and responsibilities of employers and unions in union-represented workplaces. If two entities are found to be joint employers of employees under the NLRA, then they can be held jointly responsible for each other's employment practices, such as unfair labor practices, or have joint employment

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responsibilities for the affected workers, such as joint responsibility to collectively bargain with a union. The NLRA and joint employer status under the NLRA impacts both union and non-union workplaces.

The NLRB's new joint employer rule will expand the standard for finding a joint employment relationship under the NLRA and will likely expose more employers to these potential joint employer responsibilities and liabilities. This new rule will have important consequences for employers, particularly those relying on commercial arrangements such as staffing agencies, contractors and subcontractors, and franchises.

The New Joint Employer Test

The NLRB's final joint employer rule was published on October 27, 2023 and will go into effect on February 26, 2024.

The current joint employer rule, established in 2020 during the prior administration, is relatively employer-friendly. Under this standard, to be deemed a joint employer of another entity's employees, an entity must "possess and exercise" "substantial direct and immediate control" over essential terms and conditions of the employees' employment (and even then, the control must meaningfully affect the employment relationship). Indirect or reserved but unused control is relevant, but not sufficient to establish joint employment.

Under the new final rule, two or more entities are joint employers when they "share or codetermine those matters governing employees' essential terms and conditions of employment." 29 C.F.R. 103.40(b). The NLRB will be able to determine that an entity is a joint employer of another entity's employees if it actually exercises direct or indirect control over, or simply has the direct or indirect authority to control just one of seven identified categories of essential terms and conditions of employment. Importantly, the rule does not require that the second entity actually exercise its authority to that control.

The defined categories of essential terms and conditions of employment are expansive:

1. Wages, benefits and other compensation;
2. Hours of work and scheduling;
3. The assignment of the performance of duties;
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.

This means that an entity can be a joint employer simply when it has the authority to directly or indirectly control *any* of these seven items, *even if it never actually exercises that authority*. So long as an entity has the reserved authority to intervene and control one of these essential terms, this is enough to create joint employer status.

Moreover, the NLRB can find joint employer status when indirect control occurs through intermediaries like staffing agencies or contracted management. For example, a business and a staffing agency may be considered joint employers if both the business and agency are able to supervise a particular worker or determine working conditions related to safety and health. As a result, joint employer status is now much more likely than under the old rule.

How The New Rule May Affect Employers

The NLRA defines rights of employees in both union and non-union workplaces and, therefore, the new joint employer rule will have impacts on potential joint employers in union and non-union workplaces.

In both union and non-union workplaces joint employers can be held jointly liable for violating employees' rights to organize and act together to seek to improve working conditions or to become represented by a union. This is an area of rapidly expanding rights under the current composition of the NLRB. As a result, joint employers in union and non-union workplaces may face liability for unfair labor practices towards workers who they may not have realized were also their employees.

In both union and non-union workplaces joint employers may need to adapt their policies and practices applicable to third-party workers both to minimize the risk of being deemed a joint employer and to ensure that those policies and practices are consistent with employee rights under the NLRA in the event those workers are deemed to be jointly employed.

Joint employers can also have shared collective bargaining responsibility where unions represent workers of joint employers.

The new joint employer rule specifically provides that, a joint employer *must* collectively bargain on any term or condition of employment it has the authority to control, not just the seven "essential" terms and conditions of employment listed in the final rule. This responsibility applies even if another entity has the primary relationship with the workers and even if the primary and secondary employer have different interests.

Joint employment may also affect the determination of a proper bargaining unit. Unions will have the potential to organize workers that include a business's direct employees and the employees of another entity such as a staffing agency or vendor.

Next Steps:

- **Businesses should review written service agreements, policies and even informal business practices** to see if they or any other entities have any reserved right of control (whether direct or indirect) over workers (as well as continuing to review any actual exercise of control, direct or indirect). Potential workers of concern include, but are not limited to, workers obtained from staffing agencies, the employees of contractors, employees of related business entities, employees shared with or borrowed from another business, and employees of a franchisee. This review should consider the ways in which agreements, policies and practices may impact workers in the seven categories of "essential" terms and conditions of employment and the benefits and risks of maintaining reserved authority to control workplace conditions in these areas, especially if control is unlikely to be exercised.
- **Staffing agencies and employers that use them should be particularly careful of their contractual arrangements.** It may be impractical to write these agreements without reserving the right to control in some areas; in some situations, such as control over workplace safety, the law may require such language.
- **Franchisor-franchisee arrangements should be examined**. Business models where one entity's employees perform services that benefit another entity should be mindful of joint employer risks. Franchisor control over branding, service standards, safety, and any other item that could fall within the seven categories of "essential" terms and conditions of employment should be carefully reviewed.
- **Consult with counsel to analyze service contracts and other documents** to identify language reserving the right of control over workers even if they are provided by third parties. In addition to staffing agency and franchise agreements, some agreements of concern include, but are not limited to, management agreements including the supply and/or management of employees, independent contractor agreements, especially with contractors supplying their own workers to a project, and business-to-business agreements that may involved shared workers or shared project responsibility. In addition to reducing the likelihood of joint employment, the impacts of joint employment may be allocated or mitigated by contract, for example, through indemnity clauses.
- **Consult with labor counsel.** Because the new rule has important collective bargaining impacts in union workplaces, and unions may take advantage of the new rule's expansiveness, consulting with labor counsel to determine collective bargaining responsibility will be helpful to assessing liability.
- **Train managers about the new rule.** Teaching supervisors best practices practices to avoid asserting control over workers or creating the impression of reserved authority to control when working with outside staff, franchisees and contractors will reduce risks.
- **Consult with counsel to review or produce policies for third-party workers and vendors.** Creating clear policies with counsel's advice limits the risk of creating or

asserting unnecessary control over the conditions of work and avoids risk. For example, policies holding third-party workers or vendors to policies that dictate the method of work or create grounds for discipline may be suspect.

Foster Garvey's labor and employment attorneys stand ready to assist employers in evaluating and responding to challenges created by the new rule.