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NLRB issues final joint employer rule

On February 26, the NLRB finalized its joint employer rule, reinstating the direct control test that had been in place until 2015 for determining rights and obligations under the NLRA relative to collective bargaining, strike activity, and unfair labor practices. Employers should review their business arrangements in light of the new joint employer standard set to take effect on April 27, 2020.

Background

From 1984 until 2015, the NLRB required a business to actually exercise direct and significant control over another entity's workers in order to be deemed a joint employer for purposes of the National Labor Relations Act (NLRA or Act). Entities that are found to be joint employers share responsibility for complying with the Act and potential liability for each other's violations.

In 2015, the Obama labor board issued its controversial *Browning-Ferris Industries of California, Inc.* decision, adopting an expansive standard that based joint employment on a company's indirect control (such as through an intermediary) or its contractual right or authority to control the essential terms and conditions of a contractor's or franchisee's employees. (See our September 25, 2015 *FYI*.) In 2018, the Trump labor board proposed a rule to restore the pre-*Browning-Ferris* standard grounded on direct and immediate control over another entity's workers. (See our September 14, 2018 *FYI Alert*.)

Joint employer rule finalized

On February 26, 2020, the NLRB issued its long-awaited final rule establishing the standard for determining whether two employers are a joint employer under the Act. Under the final rule, a business may be considered a joint employer of another company's employees only if the two share or codetermine the employees' essential terms and conditions of employment. Essential terms and conditions are defined exclusively as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

To be considered a joint employer under the final rule, a business must have, and actually exercise, "substantial direct control" on a regular or continuous basis over at least one of those essential terms and conditions of another company's employee. Control exercised on a sporadic, isolated or *de minimis* control will not support a joint employment finding. The rule also clarifies that joint employer status cannot be based solely on indirect or a contractually reserved but unexercised control over the employees' essential terms and conditions of employment. However, such factors may still be relevant in a joint employer analysis — but "only to the extent they supplement and reinforce evidence of direct and immediate control" over essential terms and conditions.

Importantly, the final rule makes clear that joint employer status is best resolved on a case-by-case basis "based on the totality of the relevant facts in each particular employment setting." It also provides examples of common contract provisions and actions that will not establish the direct and immediate control over essential terms and conditions needed to establish joint employment, such as:

- Setting objectives, basic ground rules, or expectations for the contractor's performance under a contract
- Setting minimal standards for hiring, performance or conduct
- Establishing an enterprise's operating hours or setting deadlines for services
- Entering into cost-plus arrangements
- Requiring the contractor to maintain workplace safety or sexual harassment policies
- Allowing an employer, under an arms-length contract, to participate in another's benefit plans
- Requiring a franchisor to take steps to protect its trademark

Buck comment. Like the NLRB, other federal agencies are addressing joint employment standards under laws they enforce. The EEOC has announced that it will propose a rule clarifying joint employment under federal antidiscrimination laws. Earlier this year, the DOL issued a joint employer rule to clarify the applicable standard under the Fair Labor Standards Act. (See our January 23, 2020 *FYI*.) On February 26, 2020, a coalition of Democratic state attorneys general filed a federal lawsuit to block the DOL's rule, which is slated to take effect March 16. It remains to be seen whether the NLRB's joint employer rule will face similar challenge.

In closing

The final rule rolls back the Obama-era test for determining joint employment and reinstates the NLRB's pre-2015 joint employer standard, effective April 27, 2020. Grounded on direct and immediate control over another entity's workers, it provides greater clarity for determining whether two separate businesses are joint employers for collective bargaining, unfair labor practices, and other purposes. Businesses — particularly those that use temporary or contingent worker, franchising, and outsourcing arrangements — should review their joint employer status in light of the new standard.

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