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Employers Beware: National Labor Relations Board Makes It Easier to Qualify as a Joint Employer

On October 26, 2023, the National Labor Relations Board (Board) issued a Final Rule for determining joint employer status under the National Labor Relations Act (Act), departing from the Trump-era standard limiting employers' potential liability. The Final Rule goes into effect on December 26, 2023.

Background

Joint employer status under the Act has significant ramifications for employers relying on staffing firms or other arrangements to supply workers, as well as for franchisee-franchisor relationships. If two entities are deemed joint employers, both are potentially liable for any unfair labor practices committed by one of them, and they may also face bargaining obligations with a labor organization.

As is often true with the Board, the standard for determining joint employer status has gone back and forth in recent years. Traditionally, the analysis focused on whether both entities shared or co-determined the employees' terms and conditions of employment, and the Board focused on whether the putative joint employer's control over terms and conditions of employment was "direct and immediate." *Airborne Express*, 338 NLRB 597, 597, n.1 (2002). Since 2015, the Board has flip-flopped on whether joint employer status requires the **exercise of control** over employees' terms and conditions of employment, or whether simply having the **right to exercise control** is sufficient, regardless of whether the right is exercised.

The Obama-Board standard from *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), said that an entity is a joint employer if it **indirectly affects** employees' terms and conditions of employment or **reserves the right to control** employees' terms and conditions of employment. Next, in April 2020, the Trump-Board issued a Final Rule limiting which entities are subject to joint employer status by again requiring proof of "direct and immediate" control over employees' terms and conditions of employment. The Trump-Board's Final Rule departed from the Obama-Board standard where indirectly affecting terms and conditions of employment or reserving the right to control them was sufficient, but stated such evidence of indirect or reserved control would be considered **if** it supported the putative joint employer's direct and immediate control.

New Standard

Under the new Final Rule issued October 26, 2023, an entity will now be considered by the Board to be a joint employer if it has an employment relationship with the employees and it shares or co-determines one or more of the employees' essential terms and conditions of employment. However, according to the Board, "the policies of the Act … make it appropriate for the Board to give **determinative weight** to the existence of a putative joint employer's **authority to control** essential terms and conditions of employment, whether or not such control is exercised, and **without regard to whether any such exercise of control is direct or indirect"** [emphasis added]. The Board will now evaluate whether a putative joint employer has authority to control (directly or indirectly) the following exhaustive list of terms and conditions of employment:

(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.

Implications

The implications of this Final Rule are not limited to employers with unionized workforces. Under this new standard, an entity with the authority to control employees' terms and conditions of employment as provided in the Board's exhaustive list (even if indirectly) would likely be a joint employer. So, for example, if a currently union-free employer contracts with a staffing service to supply workers who are already unionized, or who vote to unionize after beginning work for the employer, the employer would be required to collectively bargain with the representative of the unionized employees over the terms and conditions of employment the employer has the "authority to control." In addition to any bargaining obligations, a joint employer may also be liable for unfair labor practices committed by its co-employer, which again does not require the presence of a union. Accordingly, franchisees, contractors, or other employers relying on similar agreements to provide workers should be wary of this new standard and take time to review any relevant agreements to avoid unwanted risk from these arrangements.

FOR MORE INFORMATION

If you have questions on how this Final Rule may impact your operations, please contact:

John Wymer
404.407.3669
John.Wymer@ThompsonHine.com

Bret W. Vetter
513.352.6502
Bret.Vetter@ThompsonHine.com

or any member of our Labor & Employment group.