NLRB ISSUES FINAL RULE BROADENING STANDARD FOR DETERMINING JOINT-EMPLOYER STATUS

On October 27, 2023, the National Labor Relations Board ("NLRB" or the "Board") issued its final rule revising the standard for determining whether two employers are considered joint employers under the National Labor Relations Act ("NLRA") ("Final Rule"). The Final Rule goes into effect on February 26, 2024. It will apply to cases filed after the effective date.

HISTORY OF THE JOINT-EMPLOYER STANDARD

After the *1983* Third Circuit Court of Appeals decision in *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.*, the Board began requiring that an entity actually exercise direct control to be deemed a joint employer over another entity's employees.

In 2015, the NLRB departed from its longstanding, common law-based standard for determining whether two entities are joint employers under the NLRA in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599, 1600 (2015), *affd. in part, reversed in part and remanded*, 911 F.3d 1195 (D.C. Cir. 2018). In the 2015 *Browning-Ferris* decision, the Board explained that an entity could be considered a joint employer even if its control over the essential terms and conditions of another entity's employees was indirect, limited and routine, or contractually reserved but never exercised.

Thereafter, in 2020, the NLRB issued a rule stating that an entity is a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms or conditions of employment. As we previously alerted in this article regarding the Board's 2020 rule, the Board defined "share or codetermine" as the possession and exercise of "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." (emphasis added)

THE NEW JOINT-EMPLOYER STANDARD

The 2023 Final Rule significantly resembles the 2015 standard established by the *Browning-Ferris* decision. Specifically, it returns the standard to common-law agency principles. Further, the Final Rule considers the purported joint employers' authority to control essential terms and conditions of employment, regardless of whether such control is exercised, and without regard to whether or not it is direct or indirect control. The Board stated that the facts of each instance must be analyzed on a case-by-case basis.

Under the new standard, an organization may be considered a joint employer with another organization if: i) each has an employment relationship with the employees; and ii) they share or codetermine one or more of the employees' essential terms and conditions of employment. The Final Rule specifically defines an employee's essential terms and conditions of employment as:

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.

Further, the Final Rule broadens the scope of joint-employer determinations, considering even the *potential*, rather than actual, exercise of control. Said differently, an employer must control or have the *authority* to control, one or more of the above items of essential terms and conditions of employment.

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Notably, under the Final Rule, entities deemed to be joint employers may be held jointly liable for unfair labor practices. Moreover, the Final Rule's impact extends beyond the direct employment relationship to vendors and suppliers. Practically speaking, non-unionized businesses that the NLRB deems to have a joint-employment relationship with a unionized employer may find themselves as respondents in an unfair labor practice charge brought by representatives of organized workers.

PRACTICAL TAKEAWAYS

The NLRB declined to exempt certain industries or sectors, like the staffing industry or health care sector, from the Final Rule. Because staffing agencies and subcontracted workers are used as a resource-saver for hospitals and health systems, the NLRB's Final Rule could have significant implications for the health care sector. Hospitals and health systems should consider analyzing their relationships and contracts with staffing and other subcontracting vendors.

If you have any questions about this new joint-employer standard, please contact:

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