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NLRB Announces Final Rule on Joint Employer Standard

Services

Labor & Employment

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Key points

On February 26, 2020, the National Labor Relations Board issued its final rule on the joint employer standard limiting the imposition of joint employer status to businesses that exercise substantial, direct and immediate control over the essential terms and conditions of employment.

A business must control at least one of eight terms defined as "essential terms and conditions" to be classified as a joint employer.

The level of control exercised over the essential terms and conditions of employment must be "direct and immediate" which is evaluated in the context of each individual term or condition.

Businesses that exercise only limited, sporadic or isolated control will not be classified as joint employers.

Businesses which exert indirect control or contractually reserve but never exercise authority to control essential terms and conditions of other businesses' employees may be considered joint employers *only if* the unexercised authority or indirect control supplements evidence of direct and immediate control over essential terms and conditions of the employment relationship.

Certain business practices between contracting companies are specifically excluded as evidence probative of an employment relationship.

The effective date of the final rule is April 27, 2020.

On February 26, 2020, the National Labor Relations Board (NLRB) issued its new final rule for the joint employer standard under the National Labor Relations Act. The final rule restores the joint employer standard that was applied prior to the 2015 *Browning-Ferris* NLRB decision and reestablishes a narrow approach to determine the existence of a joint employer relationship. As a result, franchisors and businesses that use workers who are hired by other employers such as sub-contractors and staffing companies will not be: 1) required to participate in the collective bargaining process; 2) subject to joint and several liability for unfair labor practices; and 3) subject to lawful targeting as a primary employer through tactics such as picketing and secondary boycotts unless they satisfy the requirements of the new joint employer standard. The party asserting joint employer status bears the burden of proof of establishing the existence of a joint employer relationship. The final rule is effective on April 27, 2020.

The 2020 final rule: joint employer standard

Under the NLRB's final rule, two entities (supplier employer and user employer) that share or codetermine the essential terms and conditions of a supplier employer's employees are considered joint employers of the shared employees when the user employer possesses and exercises *substantial, direct and immediate control over the employees' essential terms and conditions of employment*. The new rule defines the following key terms of the joint employer definition to provide clarity and guidance to employers:

Essential terms and conditions

Control by an employer over the essential "terms and conditions of employment" must relate to one or more of the following eight terms and conditions: hiring, firing, discipline, supervision, direction, wages, benefits and hours worked. Any other factors would be probative of an employment relationship *only if* the factor "supplements or reinforces" one of the mandatory factors included in the list of essential terms and conditions.

Direct and immediate control

Direct and immediate control over the essential terms and conditions of employment is defined in the context of each of the essential terms and condition. Evidence of such control requires a factual finding that a user employer engaged in the following activities with respect to each essential term or condition:

Wages – Evidence must establish that the user employer actually determines the wage rate, salary or other rate of pay provided to the supplier employer's individual employees or job classifications. The definition excludes from consideration cost plus contracts that establish wage reimbursement rates.

Benefits – Evidence must establish that the user employer actually determines the benefit plan or level of benefits of the supplied employees;

Hours worked – Evidence must establish that the user employer actually determines the work schedules or hours worked, including overtime of the supplied employees.

Hiring – Evidence must establish that the user employer actually determines the individual employees hired, but establishment of minimal hiring standards is insufficient to establish control over hiring;

Discharge – Evidence must establish that the user employer makes the actual decision to terminate the supplier employer's employee, but a user employer is not precluded from providing negative reviews of an employee to the supplier employer or a from refusing to allow the supplier employer's employee to work under a contract;

Discipline – Evidence must establish that the user employer makes the actual decision to suspend or discipline the supplied employee. A user employer's report of misconduct or issuance of an incident report to the supplier employer is not tantamount to direct and immediate control over discipline;

Supervision – Evidence must establish that the user employer instructs a supplied employee on "how to perform the work" or issues performance appraisals. Limited and routine instructions on what work to perform and when and where to perform the work are not indicia of direct and immediate control over supervision of the supplied employees.

Direction – Evidence must establish that the user employer is engaged in assigning work schedules, positions and tasks to particular employees.

Substantial

To be substantial, the control exerted over the supplied employees must "meaningfully affect the employment relationship" such that the control cannot be characterized as sporadic, limited or confined to an isolated incident.

Evidence not probative of a joint employer relationship

Unexercised, contractually reserved authority - reserved authority under a contract alone is not dispositive of control, and the NLRB will look to the actual actions of the parties to establish a joint employer relationship. Such authority only will be considered probative of an employment relationship to the extent it supplements or reinforces evidence of substantial, direct and immediate control over essential terms and conditions of employment

Limited control - Similar to unexercised but contractually reserved authority, limited control will only be considered probative of an employment relationship to the extent it supplements or reinforces evidence of substantial, direct and immediate control over essential terms and conditions of employment.

Routine features of company to company contracting - The final rule specifically excludes the following from the list of evidence probative of a joint employer relationship: entering into a cost-plus contract; setting minimal standards for hiring, performance or conduct; requiring implementation of safety or sexual harassment policies; a franchisor's protection of its trademark or service mark; and any other acts that promote compliance with the law, or sets objectives, basic ground rules or expectations regarding a contractor's performance.

Final rule invalidates 2015 *Browning Ferris* joint employer test

The new rule invalidates the NLRB's 2015 *Browning Ferris* decision which had adopted a traditional test based on common law agency principles to determine whether two or more entities are joint employers. The 2015 decision resulted from the NLRB's concern with changes in the working conditions brought about by an increase in the use of outsourced workers through staffing and sub-contractor relationships across a widening range of occupations. According to the 2015 NLRB, such changes necessitated a robust joint employer rule to hold user employers accountable for the working conditions and collective bargaining rights of employees. The 2015 NLRB adopted the test set forth in the 1982 Third Circuit decision, *NLRB v. Browning Ferris Indus of Pennsylvania, Inc.*

While the Third Circuit test was articulated in terms similar to the new final rule, its consideration of factors probative of a joint employer relationship was significantly broader in scope and adopted the common law inquiry into control to determine the existence of an employment relationship and "sufficient control over the essential terms and conditions of employment…" In an effort to recognize the different types and "layers" of control that can exist over employees outsourced to a business entity, the 2015 NLRB under *Browning Ferris* broadly construed "control over the essential terms

and conditions." It required only the right to control or the retention of authority under a contract to set the terms and conditions of employment, not the actual exercise of those rights. Similarly, evidence of limited control, without direct and immediate control, was also considered probative of an employer relationship justifying imposition of the joint employer status on a user employer.

What this means to you

The NLRB's final rule is the second in a trio of new joint employer rules to be issued by federal agencies. In January, the U.S. Department of Labor issued its interpretive joint employer rule under the Fair Labor Standards Act which we discussed here, and the Equal Employment Opportunity Commission is expected to publish its rule in the months ahead. The NLRB's final rule significantly reduces the likelihood that employers which are franchisors or use outsourced employees will be considered joint employers. As a result, only those employers that meaningfully affect the employment relationship are required to engage in collective bargaining and be held liable for unfair labor actions. Although it is likely that the new rule will be challenged, businesses should review their business practices and contracts to ensure their employment relationships are structured to comply with the guidelines and examples provided in the NLRB's final rule.

Contact us

If you have questions about the new NLRB joint employer rule and the implications for your business or require an assessment of your status as a potential joint employer, please contact Terry Potter, John Moore or your Husch Blackwell attorney.

Tracey Oakes O'Brien is a contributing author of this content.