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425-454-4233
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Employment Law Note

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NLRB Issues New Rule on Determining Joint-Employer Status

By Amanda V. Masters, amasters@sbj.law

The National Labor Relations Board ("NLRB") has again issued a new ruling for determining joint-employer status under the National Labor Relations Act ("NLRA"). The ruling rescinds the previous standard of "substantial direct and immediate control" that took effect in April 2020. This new ruling may have a significant impact on employers across the nation. The new standard takes effect on December 26, 2023.

Background

Joint employment occurs when two or more legal entities share control over worker(s) to the extent they can all be considered employers of the worker(s) in question. For over 30 years, indirect control over a worker was generally insufficient to establish that there was joint-employer status. Then, in 2015, the Obama-era board expanded the standard to include indirect and unexercised control with its ruling in *Browning-Ferris Industries*. The Trump-era board reversed this decision through notice-and-comment rulemaking, which was a deviation from its standard practice of establishing and revising labor law standards through individual case decisions.

The new definition returns to the *Browning-Ferris* standard but makes it clear that indirect or unexercised control alone could be enough for a joint-employer finding.

The new definition of "Joint Employer" under the NLRA

The new ruling states that an employer may be found to be a joint employer with another entity if each entity has an employment relationship with the employee and they share or codetermine one or more of the employee's essential terms and conditions of employment, which are defined exclusively 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.

The ruling focuses on whether an employer has "reserved" control, regardless of whether it has actual control.

Impact of new ruling on employers

The new ruling may have a profound impact on employers. The Act mandates that joint employers:

must bargain collectively with the representative of those employees with respect to any term or condition of employment that it possesses the authority to control or exercises the power to control (regardless of whether that term or condition is deemed to be an essential term or condition of employment under the rule).

In other words, if entities are joint employers, both entities must be at the bargaining table of each employer.

Furthermore, joint employers are potentially liable for any unfair practices conducted by the other.

The ruling may also increase costs for employers, including but not limited to wages, benefits, and the administrative and legal costs of bargaining, labor disputes, and unfair labor practices penalties.

While every employer should be mindful of how the new ruling may impact it, some employers have more exposure. These industries include:

- Staffing agencies and entities that use staffing agencies;
- Franchisers-franchisees; and
- Building management or hospitality entities that contract with vendors to supply services such as maintenance and cleaning.

Challenges to the NLRB's new ruling

Many NLRB rulings face litigation and challenges from Congress and this ruling is no different. Senators Cassidy (R-La.) and Manchin (D.-W.Va) have indicated they will team up to introduce a Congressional Review Act ("CRA") resolution in an attempt to overturn this new rule. For a CRA to be successful, it would have to survive a Presidential veto.

Employers should proceed with the understanding that the new ruling is the standard for the foreseeable future.

Steps employers should take now

If an employer has any questions or concerns that it may be a joint employer under the new standard, it should take the following actions:

- Ensure all NLRA bargaining requirements are being met;
- Review all commercial agreements, including staffing agreements, to determine whether there are any terms and conditions under the control of the other entities and what exposure there is for potential liability due to actions of other entities; and
- Conduct an audit to determine whether restructuring is necessary to avoid joint liability.

If you have any questions as to whether your company may have liability as a joint employer, please contact Sebris Busto James.

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