National Labor Relations Board Expands Joint Employer Rule

By Michelle De Oliveira on November 1, 2023

On October 27, 2023, the National Labor Relations Board ("NLRB") issued a Final Rule that revises the applicable standard to determine whether two or more entities may be considered joint employers under the National Labor Relations Act ("NLRA"). The test is more expansive than the previous test and warrants a close examination.

Effective Date

The Final Rule's effective date is February 26, 2024, and it will only apply to cases filed after that date.

NLRB's New Joint Employer Test

Under the Final Rule, an entity is a joint employer of another entity's employees if the two entities share or codetermine the employees' "essential terms and conditions of employment[,]" meaning that an employer has **"the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment."**

Essential terms and conditions of employment under the Final Rule include:

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 grounds for discipline;
6. The tenure of employment, including hiring and discharge; and
7. Working conditions related to the safety and health of

To determine whether an entity is a joint employer, the question is whether the entity has the right to control at least one of these essential terms and conditions of employment-regardless of whether: (a) the entity exercises the control, and (b) exercising the power to control is direct or indirect. This in turn means that even if an entity has indirect control, such as through a staffing agency, it may be considered a joint employer.

Massachusetts Test

The applicable joint employer test under Massachusetts law is the "totality of the

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circumstances test," which examines whether the alleged employer:

1. had the power to hire and fire the employee;
2. supervised and controlled employee work schedules or conditions of employment;
3. determined the rate and method of payment; and
4. maintained employment

The first three prongs of the above test overlap with the new NLRB test-and the only factor that is not captured in the Final Rule is whether the entity maintained employment records (#4).

Key Takeaways

The inevitable result of this broader NLRB Final Rule is that entities may increasingly be found to be joint employers given that merely having indirect control over another entity's employees may suffice to establish a joint employer relationship. To that end, businesses working with third parties may be well-served by reviewing their existing agreements, as well as underlying policies and procedures, to assess whether those agreements and/or policies and procedures may be interpreted as directly or indirectly controlling an essential term or condition of another entity's employees. If yes, then businesses should consider ways in which to better protect themselves by, for example, updating such agreements and/or policies and procedures, as well as reassessing their day-to-day practices and interactions with other entities. Moreover, franchisors and businesses that utilize staffing or temp agencies should closely assess the Final Rule and its related implications. Last, Massachusetts employers may need to assess a potential joint employment relationship under both the NLRB and the MA-specific tests.

This alert is for informational purposes only and may be considered advertising. It does not constitute the rendering of legal, tax, or professional advice or services. You should seek specific, detailed legal advice prior to taking any definitive actions.

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