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Labor & Employment Alert

NLRB Issues Joint-Employer Final Rule, Narrowing Employer Liability

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On February 26, 2020, the National Labor Relations Board ("NLRB") published its long-awaited final rule governing joint-employer status under the National Labor Relations Act. The new rule limits the circumstances under which employers can be held liable as a joint-employer, and clarifies the analysis to be applied in making these determinations.

The final rule, which takes effect April 27, 2020, effectively overturns the NLRB's controversial 2015 decision in *Browning-Ferris*, in which the Obama Board had reversed decades of precedent and greatly expanded the joint-employer doctrine.

Under the final rule, to be deemed a joint-employer, an employer must possess *and exercise* substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees. The mere ability to exercise control in the future, or exercise of "indirect control," standing alone will no longer give rise to joint-employer liability, as had been the case under the *Browning-Ferris* standard.

As defined by the new rule, "substantial direct and immediate control" means direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees. Essential terms and conditions of employment are limited to wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. Under the new standard, even if an employer exercises direct and immediate control over another's employees, it is not *substantial* if exercised only on a sporadic, isolated, or de minimis basis.

In announcing the final rule, the NLRB emphasized that routine elements of an arms-length contract cannot turn a contractor into a joint-employer. For example, a business "does not exercise direct and immediate control over wages by entering into a cost-plus contract (with or without a maximum reimbursable wage rate)." Likewise, the right to cancel a contract does not constitute "control" over essential terms and conditions of employment.

A business also does not become a joint-employer simply by "bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision, by expressing a negative opinion of another employer's employee, or by refusing to allow another employer's employee to access its premises or perform work under a contract."

Significantly, by implementing the new standard as a regulation through the formal rulemaking process, the rule is not subject to the back-and-forth overruling of case law precedent that often occurs with changes in presidential administrations.

Although the final rule provides much-needed clarity and stability on the issue of joint-employer liability, employers still should exercise care as to how business relationships are structured, as it remains to be seen how the rule will be applied.

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