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Insights

New NLRB Rule Spells McTrouble for Some Employers

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Lowndes
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The National Labor Relations Board (NLRB) has published a final rule regarding the Standard for Determining Joint-Employer Status under the National Labor Relations Act (NLRA). This significant development clarifies how two or more entities can be recognized as joint employers of a group of employees.

The new rule replaces a 2020 policy that required employees to prove "direct and immediate control" by alleged joint employers for collective bargaining to occur. While the previous rule primarily affected collective bargaining in unionized settings, the new rule also affects non-union workplaces in terms of employees exercising their Section 7 rights.

Defining Joint-Employer Status

Under the new joint employer standard, an entity may be considered a joint employer of a group of employees if they meet specific criteria. To be recognized as joint employers, each entity must have an employment relationship with the employees, and the entities must share or co-determine one or more of the employees' 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.

Implications for Employers

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The new joint employer rule has profound implications for businesses, most notably that a business is *automatically* a joint employer if it has the *authority* to control one or more of the seven topics listed above, *even if it never does so*. In other words, reserved but unexercised control is not merely probative of joint employer status; it is determinative of joint employer status.

Illustrative examples demonstrate how the new rule may apply:

- *Franchisee and Franchisor Relationships:* Employees of the local franchisee of your favorite fast food restaurant may be determined to have a joint employer relationship with the corporate franchisor.
- *Staffing Agencies and Clients:* Employees of a staffing agency may be determined to have a joint employer in the company that engaged the staffing agency's services to provide workers.

Agreements between franchisors and franchisees and between staffing companies and their clients should be reviewed for any language that could be construed as establishing forms of employee control in one or more of the seven areas listed above, as the rule is *expected* to allow the NLRB to rely on standard contractual terms to make wholesale declarations of joint employer status, regardless of the factual circumstances.

Distinction from the Department of Labor Rule

It is important to clarify that the NLRB's rule operates independently of the Department of Labor (DOL) rule concerning joint employment. These two agencies establish joint-employer standards that align with their distinct governing statutes. The NLRB's rule is based on the NLRA and common-law principles, while the DOL employs an economic-realities test to define "employer" for Fair Labor Standards Act (FLSA) and Family and Medical Leave Act (FMLA) enforcement purposes.

Effective Date of NLRB's Rule

The final rule received approval through a three-to-one vote, with all three Democratic members of the NLRB endorsing it. In contrast, the NLRB's sole Republican member voted to disapprove and issued a lengthy dissent[1] critiquing the final rule.

The NLRB's new rule is scheduled to become effective on December 26, 2023, if it is not delayed, stayed, or enjoined.

Organizations who might be affected by the NLRB's new joint employer rule should consult with counsel to identify risk factors under the new rule and work proactively to limit liability. Lowndes attorneys are ready and available to assist employers in navigating this issue.

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[1] *See* Section VII