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Blog Post

NLRB Proposes New Joint Employer Rule

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Do you know which workers are your employees? That answer may change if a new rule proposed by the National Labor Relations Board (NLRB) takes effect. Last month, the NLRB issued a Notice of Proposed Rulemaking on the joint-employer standard. If that announcement sounds familiar, that may be because the NLRB previously issued a Notice of Proposed Rulemaking on the joint-employer standard in September 2018, and that final rule took effect on April 27, 2020. A little more than two years later and with a different political administration, the NLRB's proposed rule seeks to rescind and replace the April 27, 2020 rule.

Joint Employment

In a joint-employment relationship, an employee who is formally employed by one employer may also be deemed to be an employee of another employer. The issue of joint employment can arise in a number of different circumstances, for example: when a company hires a subcontractor to perform certain services; when a company hires a staffing agency; or in the franchisor/franchisee context. If certain factors are met, a worker may be considered jointly employed by both companies. The issue is further complicated by the fact that a company can be considered a joint employer of certain workers under some laws, but not under other laws. The proposed NLRB rule change would only impact the joint-employer standard under the National Labor Relations Act, but not under other laws like Title VII,

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the Fair Labor Standards Act, the Family Medical Leave Act, or various state laws.

Although watching the recent changes to the joint-employer standard can feel like watching a ping-pong ball, it is imperative for employers to know which standard applies. A joint employer may be required to bargain with the union representing the employees, could be held liable for unfair labor practices committed by the other employer, and could even be subjected to secondary boycotts or other labor picketing that would otherwise be illegal.

Exercised and Direct v. Reserved and Indirect Control

The joint-employer standard has oscillated back and forth since 2015. Traditionally, to be considered a joint employer, a company needed to have sufficient control over the employees' essential terms and conditions of employment. This was commonly understood to mean that the employer both possessed and exercised such authority.

However, in 2015, the NLRB revised its joint-employment standards and stated it would no longer require that a joint employer both possess and exercise such authority, and that whether the joint employer "[r]eserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry." The NLRB stated that even indirect control, such as through an intermediary, could also establish joint-employer status. In the same 2015 decision, the NLRB also stated that the list of items qualifying as an essential term or condition of employment was non-exhaustive, and included matters "*such as* hiring, firing, discipline, supervision, and direction." (Emphasis in original).

In a 2017 decision, the NLRB reversed course, overruled its 2015 decision, and held that, to be considered a joint employer, the employer must actually exercise control over the essential terms

and conditions of employment, instead of simply reserving the right to exercise such control, and that the control must be exercised directly and immediately, instead of indirectly. To complicate matters further, in 2018 a federal circuit court of appeals upheld the NLRB's 2015 decision that joint employment could be based on reserved and indirect control over the workers.

To help settle matters, in September 2018 the NLRB issued the aforementioned Notice of Proposed Rulemaking on the joint-employer standard. The final rule took effect in April 2020. It rejected the NLRB's 2015 decision that indirect control and reserving the right to exercise control, were sufficient to establish a joint-employment relationship. The 2020 NLRB rule formalized the requirement that to be a joint employer, an employer must possess and exercise substantial direct and immediate control over the terms and conditions of employment. The rule further provided an exhaustive list of what constituted the terms and conditions of employment: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. This rule remains in effect and is the currently appropriate standard to follow to determine whether a joint-employment relationship exists.

Proposed New Standard: Reverting to the Old Standard

Under the 2022 proposed standard, the NLRB seeks to return to the standard from its 2015 decision. This would mean that a joint-employment relationship could be found even if the putative employer does not share or codetermine the essential terms and conditions of employment, provided that the putative employer exercises indirect control or reserves the right to exercise such control over the essential terms and conditions. The proposed rule also eliminates the "exhaustive" list of terms and conditions of employment set forth in the current

rule, in favor of a non-exhaustive list of items that could be considered.

What Employers Need to Know

The proposed rule is currently in the public comment phase—it has not yet been finalized and there currently is no effective date for any changes. That's good news because employers will need time to make changes to agreements and relationships with staffing agencies, third-party vendors, subcontractors, and franchisees.

Members of the public can file comments on the NLRB's proposed rule until November 7, 2022. If the proposed rule is enacted, employers will need to carefully analyze their contracts to determine whether they unknowingly have the "authority" to control, even indirectly, one or more of the workers' essential terms and conditions of employment. If they do, employers may need to make changes to lessen the chance that a joint-employment relationship would be found, or take action to lessen the impact a finding of joint employment would have. For information or guidance regarding the joint-employer standard or the NLRB's proposed new rule, contact your Akerman labor and employment attorney.
