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What's Mine is Yours and What's Yours is Mine: The NLRB's New Joint Employer Rule Vastly Expands Joint Employer Status

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Do you know who your employees are? It seems pretty simple – those individuals on your payroll whose employment you control and supervise, right? Not so fast, says the National Labor Relations Board (NLRB or Board). Under the NLRB's new joint employer rule, a company can be deemed a "joint employer" of another entity's employees if it "possesses the authority to control (whether directly, indirectly, or both), or exercises the power to control... one or more of the employee's essential terms and conditions of employment," even if such control is NEVER actually exercised. And, bah humbug, the NLRB's final rule on joint employer status takes effect the day after Christmas. Here is what employers need to know to avoid getting a lump of coal in their stocking.

Overview of the NLRB's 2023 Joint Employer Rule

On October 26, 2023, the NLRB issued its expected final rule setting forth the standard for determining when two or more employers are joint employers of employees under the National Labor Relations Act (the Ac"). The final rule significantly resembles the 2022 proposed joint employer standard released by the Board in its Notice of Proposed Rulemaking, and

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it takes effect on December 26, 2023. The Board's stance on the joint employer standard under the Act has oscillated over recent years in line with changes to the Board's composition under each administration, and the Board has now returned the joint employer standard to its 2015 version in effect under the Obama administration. It rescinds and replaces the Board's 2020 joint employer final rule issued by the prior administration, and will only be applied to cases filed *after* the December 26, 2023, effective date.

The final rule is only related to the Board finding a company is a joint employer under the Act and does not implicate other federal laws like Title VII of the Civil Rights Act or the Fair Labor Standards Act. Companies who do not have employees that are unionized should still pay close attention. The Act applies to most private sector employees, whether or not they are unionized; and, as a joint employer, a company may now have the duty to bargain with another company's employees' representatives and could be held jointly liable for unfair labor practices under the Act.

What Has Changed Between the 2020 and 2023 Joint Employer Standard?

The final rule is an expansion of the Board's existing joint employer standard from 2020. It removes the requirement of proof that a company must have actually exercised substantial direct and immediate control over one or more essential terms and conditions of employment of certain employees. It does not require that the joint employer reserved authority to control the terms and conditions of employment, and it reverts back to the 2015 standard that indirect control, including control through an intermediary, and reserving the right to exercise control are sufficient to establish a joint employment relationship.

The Board does not provide specific factual examples of when a company's exercise of indirect

control over another company's employees counts as evidence of a joint employment relationship, but states the joint employer inquiry is factual and requires examining incidents of indirect control of a particular relationship on a particular factual record. The Board explained that evidence that a putative joint employer that communicates work assignments and directives to another company's managers or exercises detailed ongoing oversight of the specific manner and means of employees' performances of work tasks may demonstrate indirect control sufficient to establish a joint employer relationship.

The Joint Employer Standard

Under the final rule, two or more employers of the same particular employees are considered joint employers of those employees if the employers *share or codetermine those matters governing employees' essential terms and conditions of employment*. To share or codetermine those matters governing employees' essential terms and conditions of employment means the employer must *possess* the authority to control (whether directly, indirectly, or both) or exercise the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment.

The Board provides a list of seven categories of terms and conditions of employment in the final rule that will be considered essential for the joint employer inquiry:

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.

Possessing the authority to control one or more of these essential terms and conditions of employment will be sufficient to establish status as a joint employer, regardless of whether the control is actually exercised by a company, and exercising the power to control indirectly (including through an intermediary) one or more of these essential terms and conditions of employment will also be sufficient to establish status as a joint employer. The Board states that evidence of a company's control over matters that are immaterial to the existence of an employment relationship that does not bear on the employees' essential terms and conditions of employment is not relevant to the determination of whether the employer is a joint employer. The party asserting that an employer is a joint employer of particular employees will have the burden of establishing, by a preponderance of the evidence, that the company meets the requirements of the joint employer standard.

What Does the Board's Joint Employer Final Rule Mean for Companies?

The final rule removes the requirement that a company must have actual control over another company's employees' terms and conditions of employment. A company that does not play an active or substantial role in hiring, supervising, or directing employees in setting their work hours, wages or benefits, and/or disciplining or discharging them could potentially be considered a joint employer and have the duty to bargain collectively with union representatives. The Board explains that the bargaining obligations will extend beyond just the essential terms and conditions of employment that an employer controls, to "any ordinary mandatory subject of bargaining that is also subject to an employer's control." The implications of the final rule

could have a frustrating effect on companies and unions facilitating collective bargaining and reaching agreements. Companies that were never subject to the Board's jurisdiction may now be forced to participate in collective bargaining and cover the costs of having to find representation in collective bargaining negotiations and hearings. Additionally, companies that would otherwise be considered neutral employers immune to picketing and boycotts may now be subject to lawful picketing in the case of a labor dispute involving the primary employer. Even in the absence of any union, employers may find themselves on the hook for the unfair labor practices of another entity. As noted, nonunion employees still have protections under the Act and can file unfair labor practices against their employers, including any alleged joint employers.

The implications of the final rule may have the greatest impact on franchise businesses, staffing companies, and professional employer organizations, as well as companies in construction and healthcare sectors. These companies could find themselves having to participate in collective bargaining for employees for whom they never exercised any real control over their employment terms. For example, franchisors that require their franchisees to adhere to strict brand standards that may extend to essential employment terms such as "work rules and directions governing the manner, means, or methods of work performance" or "working conditions related to the health and safety of employees" could find themselves a joint employer under the Board's joint employer standard. Additionally, clients of staffing companies could now be considered a joint employer of that staffing company's provided employees if any authority to control and/or indirectly control an essential employment term is reserved by the client (e.g. hours of work and scheduling, tenure of employment, etc.).

Industry groups within these business sectors, such as the International Franchise Association, have

signaled that they will use every measure possible, including litigation, to enjoin the final rule. These groups, as well as other challengers, have raised the alarm that the Board's final rule could create a new host of confusion for companies assessing whether they are a joint employer under the Act and have noted that other federal agencies, like the U.S. Department of Labor, have different joint employer standards. The confusion could create a landmine for new lawsuits for small businesses with contractual relationships for workers.

How Companies Can Avoid Ending Up on the Naughty List

Employers will now have to review their existing business contracts and practices to determine if they possess any reserved authority to control or exercise any indirect control over any essential term and condition of employment of another company's employees. This assessment should be conducted under the guidance of an experienced labor and employment attorney. If a company is found to be a joint employer under the new final rule and has a contract with a company whose employees are unionized, they may find themselves having to participate in collective bargaining. Employers who want to get ahead of potentially adverse repercussions from the new NLRB joint employer rule should contact their Akerman labor attorney.
