The Never-Ending Story? NLRB Proposes New Rule Shifting Back to Broad Definition of 'Joint Employer'

Insights
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The National Labor Relations Board (NLRB) just proposed a controversial new rule that could soon make it easier for workers to be considered employees of more than one entity for labor relations purposes. The Biden administration's NLRB – which announced its anticipated Notice of Proposed Rulemaking (NPRM) yesterday – is seeking to rescind and replace a 2020 rule from the Trump administration that offered flexibility for modern working relationships by only deeming joint employment to exist when two businesses share or co-determine the employees' essential terms or conditions of employment and they *actually exercise* control over them. Yesterday's proposed rule, however, would set that aside in favor of a broader standard through which evidence of even potential, unexercised, and *indirect control* over *any* working conditions could be deemed sufficient to confer joint employer status. The rule is just a proposal at this point. Nonetheless, employers should expect the Board to move full steam ahead with the rulemaking process and finalization of a new standard by early 2023. What do you need to know about the proposed rule and what can you do to prepare?

Why is the Pending Change Significant for Employers?

Businesses generally want to avoid sharing joint-employer status – equal responsibility for certain labor and employment matters – for various reasons. For instance, two entities that are deemed by the NLRB to be joint employers may be compelled to bargain over the terms of shared employees and held jointly liable for unfair labor practices committed by the other.

While the Obama administration made it easier for entities to be deemed joint employers, businesses received good news in 2020 when the Trump Board's rule fundamentally altered the definition of joint employment. That rule made it more difficult for businesses to be held legally responsible for alleged labor law violations by staffing companies, franchisees, and other related organizations – while narrowing the circumstances in which they could be called to the bargaining table to negotiate over the terms of workers supplied by those organizations.

Moreover, under the 2020 rule, a putative joint employer must possess and *actually exercise* substantial *direct and immediate* control over the employees' essential terms and conditions of employment in a manner that is not sporadic and isolated. Former NLRB Chairman

John Ring made clear at the time that the rule provided "clarity, stability, and predictability" and gave employers "certainty in structuring their business relationships."

Under the Board's proposed rule, two or more employers would be considered joint employers merely by sharing or co-determining matters governing employees' essential terms and conditions of employment, such as wages and benefits and hiring, scheduling, disciplining, and firing workers.

More importantly, the proposed rule would drastically alter the liability landscape by extending the analysis to consider "*evidence of reserved and/or indirect control* over these essential terms and conditions of employment when analyzing joint-employer status," according to the Board's announcement.

This change means that – instead of requiring *actual direct control* – even potential (but unexercised) *indirect control* over working conditions could be deemed sufficient to render a business a joint employer for labor relations purposes.

The Long and Winding Road

The dilemma involving this standard has taken many twists and turns in the recent past. For over 30 years, the NLRB had held that two companies would only be considered joint employers if they shared or co-determined those matters governing the essential terms and conditions of employment, and actually exercised the right to control.

However, in 2015, the Obama Board renounced this joint-employer test in the controversial *Browning-Ferris* decision, eliminating the requirement that the employer actually exercise control. Instead, the NLRB decided that businesses need only retain the contractual right to control to be considered a joint employer – even if they had never exercised it. Further, the Board held that indirect control (such as control through an intermediary) would be sufficient to find joint employment.

The standard briefly reverted to its previous form in December 2017, when the Board effectively overturned *Browning-Ferris* in the *Hy-Brand Industrial Contractors, Ltd.* case. But just a few months later, the Board was forced to vacate that decision due to allegations that one of the Board members involved had an unacceptable conflict of interest.

The Trump Board's subsequent 2020 rule overturned *Browning-Ferris* – but the current Board is seeking a return to that standard. The seemingly perpetual pendulum swing has subjected employers to a great deal of uncertainly when it comes to engaging in long-term strategic planning for purposes of ascertaining exposure to liability within the context of organizing activity, bargaining obligations, and unfair labor practices.

What Can You Do to Prepare?

The proposal is still in the early stages of the rulemaking process, and the NLRB is inviting public comments on the proposal through November 7. While we can expect business advocacy groups to pursue litigation in an effort to challenge this proposal, you have to prepare for the distinct possibility that this broad new standard will take effect in early 2023.

[Ed. Note: The agency extended the notice-and-comment period through December 21, which will likely delay adoption of the final rule into February or March 2023.]

During this interim period, host employers relying upon employees furnished by a third parties should carefully examine the service contracts and corresponding procedures governing such arrangements, with a particular focus on language reserving the contractual and practical right to control (both directly and indirectly) essential employment terms and conditions.

Staffing companies and other alternative employer service providers should likewise conduct similar exercises from the perspective of their own services and contractual arrangements. While reservation of rights language can be a significant factor in determining joint employer status, it may be required by law in certain staffing models, adding yet another layer of complexity to the analysis.

Similar issues arise in franchisor-franchisee arrangements and other business models in which employees of one entity perform services benefitting another (such as Business Process Outsourcing vendors providing services in the facilities of another employer or multiple employers working on a common construction site).

If you have not yet done so, this may be an appropriate time to begin working closely with counsel to evaluate service contracts and related documents for language reserving the right of (direct or indirect) control over workers staffed by third parties when it comes to their employment terms and conditions.

Conclusion

We will continue to monitor the situation and provide updates as more information becomes available. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. Any questions may be directed to your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Labor Relations Practice Group or PEO and Staffing Industry Team.

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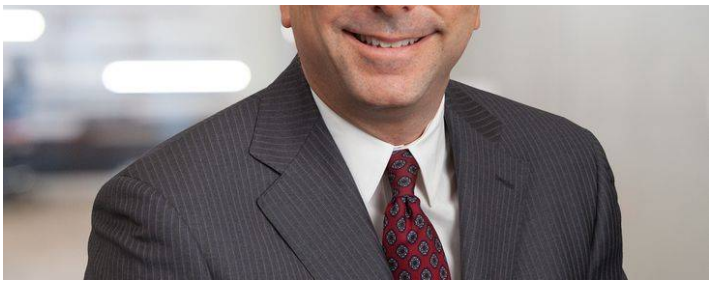

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