NLRB Proposes New "Joint Employer" Standard – What Does It Mean For Your Operations?

On September 6th, the National Labor Relations Board (NLRB) released a Notice of Proposed Rule Making (NPRM) proposing a revised standard that would dramatically expand the concept of "joint employment" – that is, when an individual worker will be deemed to be an "employee" of two organizations. This would include circumstances such as staffing agency workers and workers employed by subcontractors. Under the new standard, joint employers could ***both*** be:

- required to bargain with a union representing jointly employed workers; ***and***
- subject to liability for unfair labor practices committed by the ***other*** employer.

As discussed below, the key change in the proposed, joint employer rule is a move from a clear standard of "direct and immediate control" of an individual to a broader, more nebulous standard of "indirect control" being sufficient to find joint employer status.

When the NPRM issued, the Chair of the NLRB issued a statement indicating that the Board's goal was to implement a "clear standard defining joint employment that is consistent with controlling law." Unfortunately, if the Rule is implemented as proposed, the allegedly "clear standard" is likely to lead to further confusion and disputes.

Historically, the standard for determining joint employment was "whether a putative joint employer's control over employment matters is ***direct and immediate***." *Airborne Express*, 338 NLRB 597, 597, n.1 (2002). In other words, two employers will only be considered joint employers if the two "share or codetermine the employees' essential terms and conditions of employment."

The long-standing, "direct and immediate" standard was abandoned by the NLRB during the Obama Administration and broadened to include employers who ***indirectly*** affected employees' terms and conditions of employment and even those who have the ***right*** to such control but do not exercise that authority. *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015). Under this broad standard, employers that could influence the terms and conditions of employment – e.g., the authority to direct a staffing agency to terminate a worker from a job site – could be deemed a joint employer even if they never exercised that authority. After *Browning-Ferris*, there was a series of NLRB and federal court cases where the "direct and immediate" or "indirect control" were alternatively supported or rejected. Ultimately, the Trump-era NLRB issued a Rule in 2020 reestablishing the earlier "direct and immediate" standard as the law of the land.

The "direct and immediate" standard Rule included a broad and exhaustive list of terms and conditions that the NLRB would consider, specifically - wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. Most importantly, the exercise of authority over these terms and conditions had to be done to a degree that had a "regular or continuous consequential effect on …

another employer's employees." In other words, both employers had to regularly and directly control the staff in question for a joint employer relationship to be created.

The "new" standard largely returns to the broad scope of *Browning-Ferris;* and arguably, even expands upon *Browning-Ferris.* Specifically, the earlier indirect control standard required that a joint employer's level of control be such that "meaningful collective bargaining" might be conducted – i.e., both entities' interests must be sufficiently aligned so that joint bargaining would be practicable. That requirement is conspicuously absent from the proposed rule, as two dissenting members of the NLRB pointed out in their commentary to the recently issued NPRM.

The NPRM and new standard are particularly relevant to contractors that utilize staffing companies or other subcontract labor to perform projects. It is very typical that such contracts permit the contractor to have a modicum of control over the individuals at a given worksite – e.g., dictating hours of work, manner of performance and retaining the right to dismiss workers for nonperformance or other reasons. Similarly, those contracts typically include requirements that staffing agency and subcontract labor maintain sufficient levels of quality and safety of performance. Under the "indirect control" theory, even if these rights were never exercised, the contractor would likely be deemed a "joint employer" of the individuals working for the staffing agency or subcontractor.

This in turn would expose the contractor to potential liability for any unfair labor practice committed by it staffing agency or subcontractor, regardless of whether or not the upstream contractor had ***any*** visibility – let alone influence – over the employment action or conduct that gave rise to the unfair labor practice charge. Similarly, if a union attempted to organize the workers of a staffing agency or subcontractor, the contractor would be expected to participate in such bargaining and be bound by any resultant collective bargaining agreement.

The NLRB is accepting comments on the proposed rule until November 7, 2022. Contractors that will be adversely affected by the new, broad standard should consider submitting comments in an effort to clarify the proposed standard. And all contractors are well advised to review their existing contracts to determine if their terms may unexpectedly create a joint employer relationship should the new rule pass as currently constructed.

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