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NLRB Makes Joint Employment the Rule, Not the Exception

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The National Labor Relations Board (NLRB) has changed its joint-employer rule, making it easier for entities doing business with each other to be deemed joint employers, and so jointly subject to union organizing campaigns, collective bargaining, and related operational restraints, strikes, and unfair labor practice investigations and litigation. This new rule goes further than any earlier joint-employer standard in two ways: (1) by making clear that indirect (or even unexercised) control is sufficient to prove joint-employer status, and (2) by dropping the requirement that there be enough control to permit meaningful collective bargaining.

ANALYSIS

Under the NLRB's new joint employer rule (New Rule), two or more entities which "share or codetermine those matters governing employees' essential terms and conditions of employment" will be joint employers. These essential terms and conditions of employment have been expanded and include wages, benefits, other compensation, scheduling, hiring, discharge, discipline, safety, supervision, assignment and work rules.

The New Rule assumes authority to control (and so "codetermine"), without regard to whether such control is actually exercised and regardless of whether such control is direct or indirect. This is a radical shift from the NLRB's prior standard, which required "substantial, direct, and immediate control" over essential terms of conditions of employment. It is also far more expansive than the joint-employment tests under other employment statutes.

In counting "reserved" and "indirect" control as equivalent to actual control, the New Rule changes everything. Now, a company will be found to have "reserved control" where it maintains authority to control essential terms and conditions of employment even though it has never exercised such control. "Indirect control" will also trigger joint employment, making a company accountable for conduct of intermediaries or third parties.

The New Rule is set to take effect on February 26, 2024, and will only

be applied to cases filed after that date.

IMPACT

Business organizations will now have additional exposure for the labor law violations of their business counterparties, including suppliers and contractors. In addition, a finding of joint-employer status has implications for collective bargaining obligations. Companies found to be joint employers could be required to collectively bargain with the employees of these other entities and subjected to the same pressure campaigns. Businesses utilizing third-party staffing models will most obviously be impacted, especially franchisors.

But, in truth, there are few businesses operating in a silo immune from this exposure. For example, consider a widget manufacturer that hires a logistics contractor to package the widgets at the manufacturer's facility for shipping. Are uniform safety rules for both widgets employees and packing employees enough to make both joint employers? That appears to be the NLRB's intent based on the New Rule.

The healthcare industry will acutely feel the New Rule's effects. Some healthcare businesses, including hospitals, are required to have both employed and contracted staff follow policies, procedures and protocols for their own health and safety, and to facilitate consistent, safe patient care as part of licensing and enrollment requirements—everything from wearing identification badges, to complying with immunization requirements, to the uniform use of personal protective equipment like gloves and masks—as well as guidance around the provision of basic clinical care by nurses and other staff and the scheduling and patient assignments around such

care. If viewed as sharing or codetermining terms and conditions of employment, the New Rule will be triggered.

Under prior NLRB standards, the existence of such policies would not have met the NLRB's standard for joint-employer status; however, under the New Rule, even the mere authority to implement such policies could be determined to be sufficient to constitute a joint-employer relationship with all such staff. This would place an immediate and serious burden on healthcare businesses, which regularly contract with staff of all types to meet patient needs and cause them to treat contractors as joint employees with the physician groups, nurse and clinical staffing agencies, and other organizations that are their direct employers.

The downstream effects of the New Rule on contracted healthcare services could be even more far-reaching. Currently, hospitals that contract with (rather than directly employ) physicians rely upon such physicians' "independent contractor" status as a protection from claims of vicarious liability. While this principle is not exclusive to contractors in healthcare, the potential for significant liability claims, professional and otherwise, as the joint employer of such contracted staff makes the potential for vicarious liability especially concerning.

This is why court challenges to this expansive rule have already been filed, and more are expected. It is possible that Congress could act to invalidate the New Rule, with multiple members of Congress already planning to take action to overturn the New Rule.

NEXT STEPS

Businesses need to begin preparing for the New Rule by mapping each

business relationship for potential joint-employment exposure. As a starting point, any entity whose employees work on the premises of your business is a potential joint employer. This mapping should include an analysis of whether this business relationship is still more advantageous than utilizing your own employees for those tasks given this seismic legal shift by the NLRB on what constitutes joint employment.

Following that preliminary review, businesses should consider potential options to manage this new joint-employment risk:

- **Review agreements with an eye to amending control-related provisions.** Review third-party agreements, including with temporary staffing agencies, franchisees and other entities engaged for purposes of furnishing labor to evaluate the impact of the New Rule on those arrangements and the practical risks given the third party's current labor profile and relationships.
- **Review agreements with an eye to collateral protections.** Indemnity provisions with certain counterparties to protect against the costs of defending claims or damage obligations due to joint employment claims should be considered. So too should requiring EPLI insurance from contractors with your company named as a separate insured.
- **Evaluate day-to-day interactions with contractors.** If micromanagement occurs on a practical level, that will generally outweigh a written agreement purporting to limit or disclaim any control. The basic ground rule must be that your managers deal only with the management team of the contractor and not the contractor's rank-and-file employees.
- **Create or update existing rapid response plans.** In light of recent NLRB case law

making it easier (and quicker) for unions to organize, prepare “rapid response plans” that address what will be done IF a union attempts to organize a counterparty’s employees naming your organization as a joint employer, or what if their existing union embroils your company in a strike or hostile public relations campaign. Sun Tzu said it perfectly: “In war, prepare for peace; in peace, prepare for war.”

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