Labor and Employment Alert

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The NLRB Issues Final Rule on Joint Employment

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Key Points

- On February 26, 2020, the NLRB issued a final rule tightening the standard for joint employment under the NLRA.
- The joint-employer standard is important because if two entities are joint employers, both must bargain with the union that represents the jointly employed employees, both are liable for unfair labor practices committed by the other and both are subject to economic pressure in labor disputes with the union.
- The new rule will have the most significant impact on businesses that were most vulnerable to a joint employer finding under the NLRB's prior test based on their **indirect** control over other entities. These include franchisors, companies that utilize contractors for any number of tasks, and private equity firms in their relationships with portfolio companies. The requirement in the new rule clarifies that these businesses will not be viewed as joint employers unless they have **direct** control over wages, hours, or other terms or conditions of employment.

The National Labor Relations Act (NLRA) gives employees the right to unionize and imposes obligations on employers to collectively bargain with unions representing their employees. Failing to recognize those rights and obligations can expose an employer to liability. But how do those statutory obligations on employers work when there's more than one employer on the scene? Or what if two different employers decide important aspects of the employer-employee relationship?

The National Labor Relations Board (NLRB) treats two independent entities that jointly decide the terms and conditions of employment for one set of employees as joint employers. Each joint employer is liable for the other's labor violations and obligations. But deciding when an entity is a joint employer has not always been straightforward.

In 2015, the NLRB held in Browning-Ferris Industries of California, 362 N.L.R.B. 1599 (2015), enforcement denied in part by Browning-Ferris Indus. of Ca., Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018), that merely having the right to control another employer's workforce indirectly was enough to be a joint employer. This test called into question whether businesses in industries with longstanding contracting and franchising practices would be liable for the decisions of franchisees or contractors over whom they had little, if any, actual control. The test also pulled many neutral businesses into

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labor disputes between unions and employers over whose employees they had no control, and subjected them to the type of economic pressure that the NLRA normally forbids. Last year, the NLRB turned to rulemaking to address those concerns.

On February 26, 2020, the NLRB published a final rule that cemented a narrower test for joint employment. To be a joint employer under the new rule, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees. Essential terms and conditions of employment are limited to wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction. Evidence of indirect or contractually reserved control over essential employment terms may be a consideration for finding joint-employer status, but only when there is substantial direct and immediate control. The final rule will be effective April 27, 2020.

Although the final rule narrows the class of employers who can be held jointly liable for labor violations and obligations, it does not affect other types of joint and several liability under the NLRA, such as single-employer liability. Nor does it affect joint-employer status under other laws, such as Title VII of the Civil Rights Act, the Fair Labor Standards Act or most of the other statutes administered by the Department of Labor (DOL). However, like the NLRB, the DOL has made recent efforts to limit joint-employer liability under federal wage and hour statutes. Notwithstanding the current trends at the agency level, opponents of the new NLRB rule have already begun mounting legislative efforts to override it and are threatening legal challenges under the Administrative Procedure Act. While the viability of those challenges has not been tested, the safest course of action for employers is to take steps to ensure that they avoid joint and several liability with their contractors, franchisees or other businesses.

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