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NLRB Prepares To Issue New Joint Employer Standard in 2023

The National Labor Relations Board (the Board) released its notice of proposed rulemaking (Proposed Rule) to establish a new "joint employer" legal standard under the National Labor Relations Act (NLRA) on September 6, 2022. This standard is consequential for both unionized and nonunionized entities because if an entity is deemed an employer under the NLRA, it must recognize collective bargaining efforts and can be liable for violations arising from unfair labor practice allegations.

The Board's Current Joint Employer Rule

Under the Board's current Trump-era [rule](#) that took effect in 2020 (the 2020 Rule), an entity can only be considered a joint employer of another employer's employees if it exercises actual "substantial direct and immediate control" over the employees' essential terms and conditions of employment. These are exclusively defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. Further, the entity must exercise control over these terms and conditions in such a way that it "meaningfully affects matters relating to the employment relationship with those employees."

Importantly, under the current rule, evidence of an entity's indirect control over an essential term and condition of employment, its contractually reserved but never exercised authority over said term and condition, and its control over mandatory subjects of bargaining other than essential terms and conditions are only probative and may only be considered to the extent that these factors supplement and reinforce evidence of the entity's direct and immediate control over an essential term or condition.

The Proposed Rule

The Proposed Rule would rescind and replace the 2020 Rule and make it easier for an entity to be deemed a joint employer. Specifically, under the Proposed Rule, evidence of an entity's potential, unexercised, and indirect control over any working condition could be deemed sufficient to confer joint employer status.

Additionally, unlike the 2020 Rule, which provides a defined list of essential terms and conditions of employment, the Proposed Rule would adopt a non-exhaustive list of factors, including: "wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance." Accordingly, an entity's reserved, unexercised right to control any of these factors—or even factors not listed—could be considered in determining whether the entity is an employer under the NLRA.

Next Steps

It is important to note that the Board published only a *proposed* rule. Therefore, the Board may alter the final rule based on public comments it received. The Board is likely to issue its final rule in 2023. Nevertheless, while employers wait for the final rule, they should closely examine their relationship with other companies' employees and consider memorializing the terms of these relationships in writing with an eye towards minimizing authority, direction, and control over the other companies' employees.

Authors

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