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Mansfield Rule Certified 2022-2023

Employers Beware: NLRB's Controversial Joint-Employer Rule, article by Michael A. Kaufman, Firmwide Co-Managing Partner, and Aaron Solomon, Partner, 2-26-2024

UPDATE: U.S. District Judge J. Campbell Barker of the Eastern District of Texas has vacated the National Labor Relation's Board's recent rule on determining the standard for joint-employer status and the Board's recission of the 2020 joint-employer rule. Judge Barker had previously stayed the rule until March 11 as this article denotes.

A controversial new rule that vastly expands the definition of joint employment under the National Labor Relations Act looms ahead for employers.

The contentious rule, which now goes into effect March 11, will have sweeping adverse implications for employers making it much easier for the National Labor Relations Board (NLRB) to classify separate businesses as joint employers even in arms-length relationships. Notably, the latest standard represents a dramatic shift from the 2020 rule adopted under the Trump Administration. That rule set a higher bar for establishing joint-employer status and was more business-friendly and correctly focused more on a business exercising *substantial direct and immediate control over a worker's job functions.*

This new rule goes even further than the Obama-era board's decision in 2015 in Browning-Ferris Industries of California, Inc., which overturned years of precedent and focused on "indirect and reserved" control. But unlike Browning-Ferris, under the new standard a joint employment relationship may exist based on any level of control the company may have over one or more of an employees' essential terms and conditions of employment.

Growing Opposition

The rule was slated to take effect Feb. 26 after already being delayed, but U.S. District Judge J. Campbell Barker in the Eastern District of Texas has further stayed the effective date until March 11. At issue is a lawsuit filed this past November by a coalition of business groups including the International Franchise Association and U.S. Chamber of Commerce against the NLRB in federal district court alleging the joint-employer rule is "unlawful."

This growing opposition is no surprise considering the rule will essentially be a nightmare for employers who as a result of being deemed a joint employer can face a host of unwanted consequences including being held liable for their co-employer's unfair labor practices and being forced to bargain with unions representing jointly employed workers. Over the years, the NLRB's position on the joint-employer rule has been a contentious political issue and has shifted depending upon the Presidential administration. This and other NLRB policies would probably change again if Republicans win the next election.

The New Joint Employer Test

Under the new rule, two or more entities may be considered joint employers of a group of employees if each entity has a common law employment relationship with the employees and they share or codetermine ("directly or indirectly") one or more of the employees' essential terms and conditions of employment. Essential terms and conditions of employment are defined as:

(1) wages, benefits, and other compensation;

(2) hours of work and scheduling;

(3) the assignment of duties to be performed;

(4) the supervision of the performance of duties;

(5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;

(6) the tenure of employment, including hiring and discharge; and

(7) working conditions related to the safety and health of employees.

The inherent problem is that under the final rule, "joint-employer status is established if control *exists (even if only potentially or indirectly) and if the object of control is an essential term and condition of employment of another entity's employees, regardless of the extent of that control," explains Republican NLRB Board Member Marvin Kaplan, who dissented regarding the new rule.*

"The final rule eliminates the second step of the BFI standard, which required the Board to determine whether the extent of a putative joint-employer's control over the terms and conditions of employment of another business's employees was sufficient "to permit meaningful collective bargaining," noted Kaplan in his written dissent. By including indirect control in the joint-employer standard, the final rule accounts for control exercised through an intermediary or controlled third parties, according to the NLRB.

But now this essentially means that two separate entities that conduct business together could potentially be held liable for each other's actions to a much higher degree than ever before and for workers they did not even think were their employees. This could impact a variety of relationships including those between a business and its vendors, a company that utilizes contractors and temporary staff, businesses that share a common work site, or even a franchisor and a franchisee.

One major concern is the inclusion of working conditions related to the safety and health of employees as an essential term and condition of employment. If an employer requires vendors, contractors, etc. to abide by the employer's safety and health rules as a condition of the job or a condition to enter the premises, then the employer could be considered a joint employer of those vendors and contractors. So for example, then a general contractor could be considered a joint employer with a subcontractor if they have set safety standards on their construction site.

Collective Bargaining

A separate significant concern is that the new rule could subject a non-unionized business to have to bargain with a union representing jointly employed workers. According to the NLRB fact sheet, for the purposes of collective bargaining, once an entity is deemed a joint employer by virtue of its control over one or more essential terms and conditions of employment, it will be required to bargain over those particular essential terms and conditions, as well as all other mandatory subjects of bargaining that it possesses or exercises the authority to control.

Problematically, this "means that more businesses will have to bargain with labor unions and may be subject to union picketing and boycotts, as well as unfair labor practice claims," according to the National Federation of Independent Business. Additionally, it could infringe on employees' rights under the National Labor Relations Act. Particularly so, if one entity's employees do not want to be unionized or have a union as a collective bargaining representative and are now considered jointly employed with a unionized business and therefore, will be forced against their will into an undesired collective bargaining relationship.

Further, it is not clear as to how the rule will apply to particular industries, some of which like the construction industry and franchisors, have raised industry-specific concerns. Ultimately, the board did not exempt certain industries from the coverage of the final rule. Rather the board stated, "we are mindful that applying the final rule will require sensitivity to industry-specific norms and practices, and we will take any relevant industry-specific context into consideration when considering whether an entity is a joint employer."

Regardless, the final rule sets forth the broadest definition of joint employment seen to date and more legal challenges are expected.

Steps Employers Can Take

Despite opposition and continued legal challenges, employers should consider the following steps:

- Review existing and pending contracts with third parties (i.e. staffing, temporary agencies, franchise arrangements) to assess the risk level of being deemed a joint employer.
- Carefully evaluate the extent of control over essential terms and conditions of employment.
- Consider if language in contracts/agreements needs to be revised to affirm that your company has no right to control any of the essential terms and conditions of employment outlined in the new rule.
- Determine if managers/supervisors need to be trained to avoid them inadvertently exercising control (either direct or indirect) over the terms of employment of another entity's employees.

Kaufman Dolowich Can Help

Being deemed a joint employer can have a significant impact on your business and the new standard will likely result in more companies qualifying as joint employers. Kaufman Dolowich's team of skilled labor and employment attorneys can help you assess and mitigate your risk under the new standard.