CARLTON FIELDS

NLRB's Joint Employer Rule Signals a Welcome Return to Sensible Workplace Regulation

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For countless companies that contract with other businesses for human capital or other services in which the employees of one entity are deployed to perform work for another, there is always a risk that the misdeeds of one will also land the other in trouble. For instance, if Company A enters into a contractual arrangement with Company B to provide on-site contingent staff support, and an employee of the former harasses an employee of the latter, can both be sued and held liable for discrimination? In the union context, can a group of Company B's employees placed in a long-term assignment working alongside unionized workers demand to be recognized by Company A?

Imposing joint employer liability on two business entities can have serious legal and practical workplace compliance and risk mitigation implications. In the federal labor relations context, the joint employer doctrine is critical in determining when a business entity has a legal duty to bargain with workers directly employed by another business entity and may be liable for that entity's unfair labor practices or "may be targeted as a primary employer in a labor dispute."

On February 26, 2020, the National Labor Relations Board published a final rule designed to clarify the circumstances under which two unrelated business entities may be considered joint employers under the National Labor Relations Act. The rule effectively overrules a controversial 2015 NLRB decision that purported to expand long-standing precedent in a manner that threatened to expose a substantially larger number of businesses to potential liability as joint employers for NLRA violations than ever before.

The final rule adds a new section to the NLRB's existing regulations devoted exclusively to the subject of joint employer status. It provides that a business may be considered a "joint employer" of another business's direct employees *only if* the two entities "share or codetermine the employees' essential terms and conditions of employment," as demonstrated by the actual exercise of "substantial direct and immediate control over one or more essential terms or conditions" of employment.

In other words, joint employer liability will not exist when an entity exerts merely indirect authority over the direct employer's workers, or contractually reserves the right to control the terms of workers employed by another entity, but never exercises that right. In addition, the *quality* of control exercised matters once again, with joint employer liability limited to those actions that tangibly and substantially impact the workers in question, such as hire, fire, benefits, and pay-setting decisions, as well as determinations about what work the employee is to perform, how, and when.

The new rule is slated to go into effect on April 27, 2020 — unless after a mandated congressional review the NLRB is required to "establish the new effective date or to withdraw the rule."

Joint Employer Liability Under the NLRA

The term "joint employer" is not defined in the NLRA. Rather, the standard for evaluating when two business entities are joint employers in the labor-management context derives from common law principles developed over years of NLRB adjudications and case decisions. In general, two or more separate entities may be considered joint employers if they share some tangible control or authority to determine the working conditions or other terms of an individual's employment.

For at least three decades before 2015, the NLRB consistently held that *indirect* control over a worker's employment conditions, or direct and immediate supervision that is "limited and routine," is not enough to impose joint employer liability on the business entity in question. In *Browning-Ferris Industries of California* , however, a divided NLRB held that joint employer status may be established even when the putative employer's control over another entity's employees was indirect, limited and routine, or contractually reserved, but unexercised. The NLRB majority's view at the time was that the new, relaxed standard more accurately captured the "economic realities" of the workers' relationships with these entities and would allow for "meaningful collective bargaining" over the terms and conditions of their employment.

The *Browning-Ferris* joint employer standard was roundly criticized by the business community as replacing what had been a reasonably administrable standard with one that was bound to cause confusion and spur litigation over its meaning. Although the D.C. Circuit ultimately allowed the NLRB's new test to stand, it sharply criticized the NLRB's lack of clarity, especially with respect to what kinds of decisions over which a putative employer possesses reserved authority or indirect

control would be sufficient to trigger joint employer liability.

Rather than address those issues in a new case decision, the NLRB elected instead to exercise its rulemaking authority and, in September 2018, published a proposed rule establishing joint employer liability when two employers "share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." It specified further that to be considered a joint employer, a business entity would have to possess "and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine."

NLRB's Final Rule on Joint Employer Status

After receiving and considering more than 4,000 written comments submitted in response to the proposed rule, the NLRB published its final rule on joint employer status on February 26, 2020. As noted in the preamble, the NLRB "intends in this final rule to return, with clarifying guidance, to the carefully balanced law as it existed before the Board's departure in *Browning-Ferris.*"

The NLRB's final rule aligns closely with the proposed rule while providing some important additional clarification. First, it defines "share or codetermine" — a key term in the new test — as possessing and exercising "such substantial direct and immediate control over one or more essential terms or conditions" of another entity's employees such that the putative employer "meaningfully affects matters relating to the employment relationship with those employees."

Second, the final rule clarifies the extent to which a putative employer's indirect or reserved (but unexercised) control over essential terms or conditions of employment, or control over mandatory subjects of bargaining involving non-essential terms and conditions of employment, may factor into the joint employer analysis. Under the new joint employer standard, the NLRB will consider indirect control or bargaining authority only to the extent that it bolsters evidence that the putative employer exercises *direct and immediate control* over the essential terms and conditions of the worker's employment. Thus, indirect control alone will be insufficient to establish a joint employer relationship.

In addition, the NLRB explains that there is a difference between exercising indirect control — which along with other proof may factor into a joint employer assessment — and exerting control or influence over setting contractual objectives, expectations, or ground rules — which is excluded from the definition of "indirect control" and thus never plays a role in determining joint employer liability. Moreover, distinguishing between indirect control over an essential work term or condition on the one hand, and setting ground rules, conditions, or expectations as to how a contract is to be performed on the other, "is an issue of fact to be determined on a case-by-case basis."

As for reserved but unexercised control over essential terms and conditions, the final rule similarly notes that such authority will be relevant (although not dispositive) only when there is other evidence of the putative employer's direct and immediate control over terms and conditions of employment.

Finally, the rule explains the meaning of two additional key terms contained in the NLRB's new joint employer standard. The first, "essential terms and conditions of employment," means "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction" — and nothing else. In other words, as the NLRB explains in the preamble, that list is exhaustive, and no other terms or conditions will be considered as "essential" for purposes of establishing joint employer status.

The second, "substantial direct and immediate control," means that which has a "regular or continuous consequential effect" on at least one essential term or condition of employment, such as when, with respect to another entity's employees, the putative joint employer actually:

- Determines wages, salary, or rates of pay;
- Determines the type and level of benefits provided or offered;
- Determines work schedules or work hours, including overtime;
- Makes decisions to hire, fire, or impose discipline;
- Provides instruction on how to perform their work;
- Issues employee performance appraisals; or
- Assigns individual work schedules, positions, and tasks to particular employees.

What Does This All Mean for Employers?

A finding of joint employer status can impose significant compliance obligations and legal risks on the entities involved. As the NLRB explains, if an entity is considered a joint employer of another entity's workers, then it will be obligated to participate in collective bargaining over the terms and conditions of employment and may be found jointly liable for the other entity's unfair labor practices, and any picketing activity directed against it will be considered primary and lawful (rather than secondary and unlawful).

To the extent that the NLRB's new rule provides greater clarity as to when and under what circumstances joint employer status may be imposed on two separate business entities — thus triggering joint liability for collective bargaining and other direct labor relations obligations — it is a welcome development for the business community.