CLIENT ALERT: NLRB Substantially Broadens Standard for Joint Employer Status

On October 26, 2023, the National Labor Relations Board (NLRB) issued a final rule that significantly broadens the standard for who qualifies as a joint employer under the National Labor Relations Act (NLRA). Under the new rule, an entity may be considered a joint employer of another employer's employees in situations where the entity simply possesses authority or control over any essential term or condition of the employee's employment—even if the entity does not actually exercise such control. The rule also expands the definition of "essential terms and conditions of employment" by creating a more ambiguous and vague standard than the prior rule. The new rule makes it much easier to establish joint employer status, which can have profound consequences to employers.

The Prior Rule

Under the NLRB's existing joint employer rule, which was adopted in 2020, an employer is considered a joint employer under the NLRA only in situations where it exercises "substantial direct and immediate control" over the essential terms and conditions of another entity's employee. The essential terms and conditions of employment set forth in the existing rule were wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction. The existing rule was a welcome relief to employers, as it overruled the "indirect, reserved" control standard set forth in the NLRB's 2015 decision in *Browning-Ferris Industries*, 362 NLRB 186.

The New Rule

The new rule rejects the "direct and immediate control" standard. Instead, the new rule finds joint employment not only when such control exists, but also when an entity indirectly controls an employee, or even simply reserves (and never exercises) any control over an employee. The new rule finds joint employer status when an entity "share[s] or codetermine[s] the employees' essential terms and conditions of employment." "Share or codetermine" is defined as "possess[ing] the authority to control (whether directly, indirectly or both) or to exercise power to control (whether directly, indirectly or both) one or more of the employees' essential terms and conditions of employment, regardless of whether the employer exercises such control or the manner in which such control is exercised."

The new rule also significantly expands the definition of "essential terms and conditions of employment" to include the following: (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.

Indeed, the new rule not only revives the often-criticized *Browning-Ferris* standard, but even expands upon it, in that joint employment can now presumably exist where there is any level of authority or

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control over any essential term or condition of employment.

Next Steps

The effective date of the new rule is February 26, 2024. (**Update**: Following the original publication of this client alert, a Texas federal judge delayed the effective date of the rule by two weeks. The new effective date is March 11, 2024.) All employers who may be involved in a joint employer relationship, including but not limited to staffing companies, contractors, subcontractors, parent companies and their subsidiaries, and franchisors and franchisees, among others, should carefully consider the impacts of this rule. Potential joint employers would be required to be involved in a co-employer's collective bargaining, would be liable for a co-employer's unfair labor practices, or could become involved in strikes or boycotts as a result of the co-employer's labor disputes, among other potential consequences. All employers should carefully review their contracts with third parties for language that could be interpreted as creating the right to potentially control, even indirectly, any essential term or condition of another entity's employees. Employers should also scrutinize their actual operational practices, including the practices of their supervisors and managers, to ensure that they are not unwittingly risking the creation of joint employer status through such practices.

Employers who believe the new rule may impact them are encouraged to consult with their MBJ attorney.

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