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Employee Benefit Plan Review

National Labor Relations Board's Expanded Joint-Employer Rule Could Impact Third-Party Staffing and Outsourcing

By Jeffrey L. Harvey, Ryan A. Glasgow, Jaime E. Bloxom and Reilly C. Moore

The National Labor Relations Board (the Board) has released its anticipated amendments to its joint employer rule. The rule could dramatically expand the types of relationships that create joint employment liability under the National Labor Relations Act (the Act).

If the Board determines that two companies qualify as joint employers, then it may hold either company responsible for the labor law violations and obligations of the other.

As a result, businesses that rely on staffing companies and outsourcing arrangements should examine their contracts and relationships with service providers to ensure they understand their joint employer risks and consider changes that may reduce those risks under the new joint employer rule.

The New Rule

The new joint-employer rule focuses on whether putative joint employers have a contractual right to directly or indirectly control the employees of another business, even if that control is not exercised. The rule purports to rely on common-law agency principles, but emphasizes that possessing the authority to control one or more essential terms and conditions of employment is sufficient to establish status as a joint employer regardless of whether the control is exercised. Furthermore, the rule also emphasizes that exercising the power to control indirectly (including through an intermediary) one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly. Accordingly, the Board will find a joint employer relationship if the putative joint employer has the right to control one or more *essential* terms and conditions of employment.

The amended rule defines essential terms and conditions of employment broadly to include:

(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 joint-employer standard is therefore implicated if an entity has the authority to control at least one of these essential terms or conditions. This broad definition renders the term "essential" illusory because it covers nearly every aspect of the employment relationship. As a result, common business-to-business contractual provisions that set baseline standards for the performance of contract service partners could result in joint employer liability.

The rule, which became effective on December 26, 2023, represents a major departure from the Board's prior joint-employer rule, which found that a joint employer relationship existed only if the putative joint employer actually exercised "direct and immediate" control over essential terms and conditions of employment. That rule allowed service recipients to enter into arms-length agreements with service providers without significant risk of joint employer liability, as long as the service recipients did not meddle in the direct, day-to-day employment terms of the service provider's employees.

The new rule now accounts for control exercised through an intermediary or controlled third parties, preventing an entity that has an employment relationship with employees from avoiding joint-employer status by using an intermediary to implement decisions about essential terms and conditions of employment.

Further, the addition of reserved control in the new rule now accounts for situations where an entity maintains the authority to control essential terms and conditions of employment but has not yet exercised such control.

What Risk Does A Joint Employer Finding Create?

The new joint employer rule is relevant to companies with outsourcing or staffing agency arrangements because joint employers may be jointly and severally liable for the acts and omissions of their business partners, and, if applicable, may be required to engage in collective bargaining with a union that represents the employees of the other employer. Either of the foregoing could result in the substantial financial costs and significant administrative burdens on the operations of the business.

The new rule will also apply in the context of unfair labor practice proceedings. In an unfair labor practice proceeding, an employee or union files a charge with the Board, alleging that the relevant employer violated the Act. The Board investigates the charge, and if it finds merit, will issue a complaint against the employer seeking monetary damages, reinstatement of employment, notice postings or other forms of relief.

There are several ways this may create liability for a putative joint employer if an employee of a staffing agency or outsourced service provider files a charge:

- A staffing agency employee may file a charge under Section 8(a)(3) of the Act, claiming that the staffing agency fired the employee because she supported a union or engaged in some other form of protected concerted activity. If the employee also names the putative joint employer, and the Board finds merit to the charge, the Board could seek remedies which include back pay, front pay, compensatory damages, mandatory reinstatement, and notice postings, against both the staffing agency and the putative joint employer.
- A staffing agency union files a refusal-to-bargain charge under Section 8(a)(5) of the Act against the staffing agency and the putative joint employer. The union claims that the staffing agency has refused to bargain in good faith over a wage increase because the staffing agency claims it is constrained by the overall value of the contract with the putative joint employer. If the Board investigates and finds merit, it could order both the staffing agency and the joint employer to engage in good-faith collective bargaining with the union. More specifically, under the new rule, the joint employer would be required to bargain with respect to any term and condition of employment that it possesses the authority to control or exercises the power to control, but would not be required to bargain over terms that it does not possess the authority to control.

For obvious reasons, it serves all employers to avoid entanglement in unfair labor practice proceedings. Not only can such proceedings result in financial damages or bargaining obligations, but they can also make employers more visible targets for potential union organizing among their own employees. Thus, companies that rely on outsourcing or staffing agency providers should take reasonable steps now to react to the new rule and, where possible, modify their contracts or relationships to reduce the risk of a joint employer finding.

Review Your Contracts And Relationships

The new joint employer rule dramatically alters the state of play for companies that engage other

businesses to perform services on their behalf. It is highly likely that business relationships that previously created virtually no risk of joint employer liability are now at risk of a joint employer finding under the new rule.

As an initial step, businesses that engage staffing agencies or similar outsourcing service providers should review their contracts for provisions that impose direct control over the service provider's employees. Such provisions include those provisions relating to specific employee training, preconditions for employment, decisions regarding staffing or firing, and business supervision over the service provider's employees.

Businesses that engage staffing agencies or similar outsourcing providers should also review their contracts for provisions that contemplate reserved, but unexercised, control over the employment relationship. For example, if a contract provides the company a right to ask for the replacement of a particular staffing company employee for cause, even if that provision has never been utilized, it could create joint employment liability.

In addition to reserved control, businesses should also analyze their contracts for evidence of "indirect" control over employment conditions. For example, provisions about compliance with diversity and inclusion initiatives or the business's workplace policies and rules, general compliance with law provisions, or provisions limiting or restricting payment of overtime could create joint employer liability, particularly if they impose any greater requirements on the staffing agency than would be required under state or federal law. While these provisions may provide reasonable assurances that a business partner will align with a company's values, that benefit must be balanced against the potential legal and financial risks of joint responsibility for labor law violations.

Admittedly, many of the changes that may be necessary to entirely avoid joint employment under the new rule would require a business to take a more hands-off approach with respect to its third-party arrangements. As businesses evaluate these issues, there will always be a tension between maintaining as much control and oversight as possible of the relationship and services provided, on the one hand, and avoiding such control and oversight so as to limit joint employment liability, on the other hand. There are no silver bullets to resolving that tension. Instead, what is important is that businesses entering into these types of arrangements understand the nuances of and consequences related to the joint employer issue so that they can decide where along the risk continuum they want to be with each unique arrangement, instead of defaulting to standard contract language in each arrangement.

Even in situations where the business necessities of the arrangement do not lend themselves to minimizing joint employment risks through minimizing control and eliminating risky contractual provisions, businesses can protect themselves against most (but not all) of the joint employment risks by using robust compliance and indemnification contract provisions that make the service provider ultimately responsible for any liabilities incurred as a result of joint employer finding.

The authors, attorneys with Hunton Andrews Kurth, may be contacted at jharvey@HuntonAK.com, rglasgow@HuntonAK.com, jbloxom@HuntonAK.com and rmoore@HuntonAK.com, respectively.