

NLRB Proposes New Standard for Determining Who Qualifies as a “Joint Employer”

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The back-and-forth dispute over who constitutes a “joint employer” under the National Labor Relations Act (NLRA) continues with the announcement this week by the National Labor Relations Board (NLRB) that it has issued a proposed new regulation on the issue. The determination of “joint employer” status is significant, as that label implicates or impacts a variety of legal rights and obligations of many companies contracting with other companies on the same projects or jobs.

Historically, the standard for determining whether a company may be deemed a “joint employer” under the NLRA over another company’s employees has changed many times, often with subtle yet significant differences and consequences. And the fight over this issue has occurred in and through multiple different decisions and forums, including NLRB litigation and decisions, federal appellate opinions, the common law, and published federal regulation.

At its heart, the dispute over the standard centers around whether the test for “joint employer” status should focus only on a company’s direct or immediate control over the terms and conditions of employment, or whether it may focus on other supposed forms of control, such as indirect control or the reservation of a right to control, even when that right is not exercised.

Currently, a federal regulation issued during the Trump presidency, which became effective in April 2020, governs the issue. This regulation requires “substantial, direct and immediate control” over at least one essential term and condition of employment. The regulation specifically identifies the following as essential terms and conditions of employment: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

This regulation was, and has been, welcomed by employers, as it provided clarity on an often complicated, fact-intensive question and reigned in a significant expansion of “joint employer status” that occurred as a result of an NLRB decision during the Obama presidency.

However, this new proposed rule threatens to unwind the current regulation entirely. According to the NLRB, “[u]nder the proposed rule, two or more employers would be considered joint employers if they ‘share or codetermine those matters governing employees’ essential terms and conditions of employment,’ such as wages, benefits and other compensation, work and scheduling, hiring and discharge, discipline, workplace health and safety, supervision, assignment, and work rules.”

The language of the proposed rule itself clarifies, however, that “essential terms and conditions of employment” is not limited to those identified in the current regulation. Instead, under the proposed rule, “essential terms and conditions of employment” has broad, non-exhaustive meaning and may refer to nearly any or every aspect of work. This appears to be markedly different from the current regulation’s exhaustive list of such terms and conditions, as noted above.

More importantly, through the new proposed rule, the NLRB “proposes to consider both direct evidence of control and evidence of reserved and/or indirect control over these essential terms and conditions of employment when analyzing joint-employer status.” This marks a clear departure from the current standard, which focuses only on “substantial, direct and immediate control.”

The net effect of these changes, if they take effect, remains to be seen. But many critics believe that such changes, if they become finalized, will open the door to a variety of issues for many companies contracting with one another and cause more uncertainty about the nature and scope of a company’s rights and obligations with respect to another company’s workers.

The proposed rulemaking process will certainly take months, as it is expected that many stakeholders and interest groups will offer commentary on the new proposed rule. So stay tuned here for further developments.