February 28, 2020

National Labor Relations Board Promulgates Final Joint Employer Standard

On February 26, 2020, the National Labor Relations Board (the "NLRB" or the "Board") announced its final rule (the "Final Rule")[1] establishing the standard for determining whether an entity should be considered a joint employer under the National Labor Relations Act (the "NLRA" or the "Act").

In order to be considered a joint employer under the Final Rule, an entity "must possess and exercise [] substantial direct and immediate control" over one or more "essential terms or conditions of employment," which "are exclusively defined" as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.[2] The Final Rule defines what "direct and immediate control" as to each essential employment term or condition constitutes and further states that the extent of such control shall have "a regular or consequential effect" on the essential term or condition in order to be considered "substantial."[3] Any evidence that an entity has indirect control, contractually reserved but unexercised control, or actual control on "a sporadic, isolated, or de minimis basis," without more, does not give rise to joint employer status.[4]

In announcing the Final Rule, the Board stated that the Final Rule would "enhanc[e] labor-management stability," thereby promoting one of the principal purposes of the NLRA.[5]

The Final Rule is set to become effective on April 27, 2020.

Background

While the NLRA defines the terms "employer"[6] and "employee,"[7] it does not contain the term "joint employer," much less define it. The Board, through administrative decisions, has maintained that two separate entities can be joint employers if they "share or codetermine [] matters governing the essential

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1 Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184 (Feb. 26, 2020) (to be codified at 29 C.F.R. Part 103), available at https://www.govinfo.gov/content/pkg/FR-2020-02-26/pdf/2020-03373.pdf.

2 *Id.* at 11,235.

3 *Id.* at 11,236.

4 *Id.* at 11,235–36.

5 *Id.* at 11,184.

6 *See* 29 U.S.C. § 152(2).

7 *See* 29 U.S.C. § 152(3).

terms and conditions of employment."[8] Prior to 2015, the Board, in decisions such as *TLI, Inc.*[9] and *Airborne Express*,[10] applied a joint employer rule similar to the one promulgated under the Final Rule, finding that an entity's contractual right to exercise control or indirect control affecting the terms and conditions of employment, respectively, does not automatically give rise to joint employer status.

That standard changed significantly in 2015 under the Obama Administration when the Board in *Browning-Ferris* overruled its prior administrative decisions and concluded that an entity can be a joint employer even if its control over the essential terms or conditions of a separate entity's employee was indirect, "limited and routine," or contractually reserved but never exercised.[11] The *Browning-Ferris* majority explained that it was motivated to revisit the joint employer standard in part because the prevailing standard was "narrower than statutorily necessary" in its view and contributed to an increase in workplace arrangements such as subcontracting and temporary employment.[12]

In September 14, 2018, the NLRB published a notice of proposed rulemaking (the "NPRM") regarding the joint employer standard.[13]

The Final Rule

In issuing the Final Rule, the Board affirmed that the Rule "restores the joint-employer standard that the Board applied for several decades prior to the 2015 decision in *Browning-Ferris*."[14] The Final Rule takes into account a potential joint employer's indirect control or unexercised reserved control in the joint employer analysis "but only to the extent they supplement and reinforce" evidence of the entity's direct and immediate control.[15]

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8 *See* 85 Fed. Reg. at 11,184 (quoting *Cnn Am., Inc.*, 361 N.L.R.B. 439, 441 (2014)).

9 *TLI, Inc.*, 271 N.L.R.B. 798 (1984) (holding that a company that leased another business's employees was not a joint employer despite contractual language in lease agreement that company "will solely and exclusively be responsible for maintaining operational control, direction and supervision" over leased employees).

10 *In re Airborne Express,* 338 N.L.R.B. 597 (2002) (holding that "the essential element" in a joint employer analysis "is whether a putative joint employer's control over employment matters is direct and immediate").

11 *See Browning-Ferris Indus. of California, Inc.*, 362 N.L.R.B. 1599, 1613–14 (2015).

12 *See id.* at 1609.

13 The Standard for Determining Joint Employer Status, 83 Fed. Reg. 46,681 (Sept. 14, 2018) (to be codified at 29 C.F.R. Chapter I), available at https://www.govinfo.gov/content/pkg/FR-2018-09-14/pdf/2018-19930.pdf.

14 NLRB, "NLRB Issues Joint-Employer Final Rule," (Feb. 5, 2020), available at https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule.

15 85 Fed. Reg. at 11,186.

In addition to establishing that a joint employer is one that "possess[es] and exercise[s] such substantial direct and immediate control" over a least one essential term or condition of employment, the Final Rule provides definitions for each of the following essential employment terms or conditions, focusing again on *actual* control:

- *Wages*. An entity exercises direct and immediate control over wages if it actually determines the wage rates, salary or other rate of pay that is paid to another employer's individual employees or job classifications.
- *Benefits*. An entity exercises direct and immediate control over benefits if it actually determines the fringe benefits to be provided or offered to another employer's employees.
- *Hours of work*. An entity exercises direct and immediate control over hours of work if it actually determines work schedules or the work hours, including overtime, of another employer's employees.
- *Hiring*. An entity exercises direct and immediate control over hiring if it actually determines which particular employees will be hired and which employees will not.
- *Discharge*. An entity exercises direct and immediate control over discharge if it actually decides to terminate the employment of another employer's employee.
- *Discipline*. An entity exercises direct and immediate control over discipline if it actually decides to suspend or otherwise discipline another employer's employee.
- *Supervision*. An entity exercises direct and immediate control over supervision by actually instructing another employer's employees how to perform their work or by actually issuing employee performance appraisals.
- *Direction*. An entity exercises direct and immediate control over direction by assigning particular employees their individual work schedules, positions, and tasks.[16]

Notably, the Final Rule notes that commonplace third-party contracting practices—such as "[e]ntering a cost-plus contract," "setting minimal standards for hiring, performance, or conduct, such as those required by government regulation," "requiring the contractor to institute safety or sexual-harassment policies," "a franchisor's protection of its trademark or service mark," or "anything else that promotes legal compliance

[16] *Id.* at 11,235–36.

or sets the objective, basic ground rules, or expectations for a contractor's performance"—are not evidence of joint employer status.[17]

The Final Rule applies only prospectively.

Potential Effect of the Final Rule

The joint employer analysis plays an important role under the NLRA because it determines whether an entity other than the direct employer of certain employees has a duty to bargain with the representative of those employees, share liability for unfair labor practices it did not directly commit, and may be selected as a primary employer in a labor dispute.[18]

The view expressed by the NLRB Chairman John F. Ring is that the Final Rule will foster predictability and clarity in structuring business and labor-management relationships.[19] And during the public notice-and-comment period, several commenters who supported the proposed rule argued that requiring actual control not only is practical but also helps appropriately assign potential unfair labor practice liability to the employer actually responsible for the violation.[20]

The Rule, however, may face some challenges in court. The Final Rule itself notes the position of several commenters who opposed the proposed rule. Opposing commentators argued, for example, that the return to the narrower pre-2015 standard would increase contingent employment and alternative workforce arrangements which might result in lower wages and poor workplace conditions for workers.[21] Others argued that a putative joint employer that has contractually reserved or indirect control over a contractor or subcontractor's employees should be required to participate in a collective bargaining negotiation to better protect the employees' rights.[22] The Board responded to these arguments in the Final Rule, stating that it was not persuaded that any of these arguments was a reason not to adopt the new rule.[23] According to the Board, the Final Rule, which brings to the bargaining table only those entities that actually control

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17 *Id.* at 11,227–28.

18 *See id.* at 11,224.

19 NLRB, "NLRB Issues Joint-Employer Final Rule," (Feb. 5, 2020), available at https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule.

20 *See* 85 Fed. Reg. at 11,192 (citing comments of International Foodservice Distributors Association, National Association of Truckstop Operators, COLLE, and Americans for Tax Reform).

21 *Id.* at 11,213 (citing comments of SEIU National Fast Food Workers Union, Law and Economics Professors, Congressman Scott and Senator Murray, Legal Aid at Work, and APALA).

22 *Id.* (citing comments of Attorneys General of New York, Pennsylvania, *et al.*, AFT, and Teamsters Local 848).

23 *Id.* at 11,213.

the essential terms and conditions of an employee, will best promote meaningful collective bargaining negotiations, and is not based on a prediction of any purported economic impacts, but rather is warranted on policy grounds.[24]

A potential joint employer under the NLRA should be mindful of the fact that other federal statutes or applicable state laws may impose a different or more stringent joint employer standard. Importantly, the Final Rule does not address joint employment under other federal statutes, such as the Fair Labor Standards Act (the "FLSA"), or analogous state statutes. Last month, the Department of Labor (the "DOL") issued its joint employer test under the FLSA,[25] which similarly focuses on the actual exercise of control over an employee.[26] The DOL joint employer test is viewed as being more favorable to putative joint employers than the tests applied by some circuit courts.[27] On February 26, 2020, New York and seventeen other states filed a lawsuit challenging the DOL rule under the Administrative Procedure Act in the Southern District of New York, and asserting that the new rule unlawfully narrows the joint employer standard under the FLSA.[28] In particular, the plaintiffs argue that the DOL rule, by focusing only on direct control, provides "a de facto exemption" for businesses that outsource hiring to third parties and makes workers more vulnerable to underpayment and wage theft.[29] In addition, the Equal Employment Opportunity Commission has announced its plan to issue its own joint employer rule as guidance in implementing the federal employment discrimination laws.[30]

The Final Rule can be found here: https://www.govinfo.gov/content/pkg/FR-2020-02-26/pdf/2020-03373.pdf.

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24 *Id.* at 11, 213–14.

25 Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020) (to be codified at 29 C.F.R. pt. 791), available at https://www.govinfo.gov/content/pkg/FR-2020-01-16/pdf/2019-28343.pdf.

26 For more details about the DOL's joint employer test, please refer to our previous client alert titled "U.S. Department of Labor Promulgates Final Joint Employer Standard," (Jan. 28, 2020), available at https://www.paulweiss.com/practices/litigation/employment/publications/us-department-of-labor-promulgates-final-joint-employer-standard?id=30554.

27 *See e.g.*, *Zheng* v. *Liberty Apparel Company*, 355 F.3d 61, 69 (2d Cir. 2003); *Baystate Alt. Staffing, Inc.* v. *Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *Gray* v. *Powers*, 673 F.3d 352, 354–55 (5th Cir. 2012); *Moldenhauer* v. *Tazewell-Pekin Consol. Commc'ns Ctr.*, 536 F.3d 640, 644 (7th Cir. 2008); *In re Enterprise Rent-A-Car Wage & Hour Emp't Pracs. Litig.*, 683 F.3d 462, 469 (3d Cir. 2012).

28 *State of New York et al.* v. *Eugene Scalia et al.*, No. 1:20-cv-01689 (S.D.N.Y.).

29 *See* ¶¶ 1–9 of the complaint filed by the plaintiffs in *State of New York et al.*

30 Office of Information and Regulatory Affairs, "Joint Employer Status Under the Federal Equal Employment Opportunity Statutes," available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3046-AB16.

The NPRM can be found here: https://www.govinfo.gov/content/pkg/FR-2018-09-14/pdf/2018-19930.pdf.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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