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6 KEY TAKEAWAYS

National Labor Relations Board Issues New Final Rule on Joint Employers

This week, the National Labor Relations Board (NLRB/Board) issued a new rule effectively overturning an Obama-era precedent on joint employer status and making it harder to show that two companies are joint employers. In doing so, it lessened – at least for the moment – the threat of employers being found to be joint employers in many circumstances where they did not intend to be, or where they would not have been found to be joint employers under prior law.

Key takeaways include:

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The NLRB became the second agency to issue a clarifying rule on joint employer status by releasing its final rule under the National Labor Relations Act (NLRA). The Department of Labor released an interpretive regulation on January 12, 2020, under the Fair Labor Standards Act (FLSA). The NLRB's final rule will carry the force of law.

The final rule just announced returns the Board to a focus on whether the putative joint employer has and exhibits "direct and immediate control" over substantial terms and conditions of employment. It effectively overturns the Obama-era NLRB precedent in *Browning-Ferris*, decided in 2015. When *Browning-Ferris* was decided, it overruled more than 30 years of past Board precedent. It said that the Board would look to see whether the putative joint employer "possesses sufficient control over employees' essential terms and condition of employment to permit meaningful bargaining." But, under the final rule just announced, that will no longer be the standard.

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Under the new final rule, a business is a joint employer of another employer's employees only if the two employers share or codetermine the workers' essential terms and conditions of employment. Essential terms and conditions of employment include benefits, hours of work, hiring, discharge, discipline, supervision, and direction. The just announced final rule also defines key terms used throughout its text, including what does and does not constitute "substantial direct and immediate control" of each essential employment term.

The final rule should increase a business' ability to predict its liability for joint employer status. While many companies who contract with staffing agencies may continue to qualify as joint employers, franchisors are most certainly excluded as only exerting indirect control over the franchisee employees.

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This new NLRB rule will probably be the subject of litigation seeking to block it. As well, a change in the composition of the NLRB could result in further modifications.

Although the final rule is very helpful to employers, they should still be conscious of the joint employer issue and make sure to comply with the final rule. It should also be noted that the EEOC has not updated its position on the issue.

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