

NLRB Issues Employer-Friendly “Joint Employer” Definition

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On February 25, 2020, the National Labor Relations Board (the “NLRB”) announced the final rule governing “joint employer” status under the National Labor Relations Act.

The determination of whether an entity is a “joint employer” with a direct employer for purposes of the NLRA informs whether the entity may be liable for the unfair labor practices committed by the direct employer and/or has a duty to bargain with a representative of the employees of the direct employer.

Under the final rule, to be a “joint employer,” an entity must “share or codetermine the employees’ essential terms or conditions of employment.” Specifically, the entity must “possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer’s employees as would warrant a finding that meaningfully affects matters relating to the employment relationship with those employees.”

This employer-friendly definition is similar to the definition used by the NLRB prior to its landmark 2015 decision in Browning-Ferris, which endorsed a definition that relaxed the requirements for proving a joint employer relationship.

The final rule also defines key terms, including:

- “Essential terms and conditions of employment” is defined to mean “wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction.”

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- “Substantial direct and immediate control” is defined to mean “direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer’s employees.”
 - Direct and immediate control with respect to wages, is defined to mean “actually determin[ing] the wage rates, salary, or other rate of pay that is paid to another employer’s individual employees or job classifications.”
 - Direct and immediate control with respect to hours of work is defined to mean “actually determin[ing] work schedules or the work hours, including overtime, of another employer’s employees” and does not mean “establishing an enterprise’s operating hours or when it needs the services provided by another employer.”
 - Direct and immediate control with respect to discharge is defined to mean “actually decid[ing] to terminate the employment of another employer’s employee” and it does not mean “refusing to allow another employer’s employee to continue performing work under a contract.”
- “Indirect control” means “indirect control over essential terms and conditions of employment of another employer’s employees” but does not include “control or influence over setting the objectives, basic ground rules, or expectations for another entity’s performance under a contract.”

The final rule makes clear that evidence of “indirect control” over the essential terms and conditions of employment is probative of joint employer status, but only to the extent that such indirect control supplements and reinforces evidence of direct and immediate control over essential terms and conditions.

By issuing a comprehensive definition in the final rule, the NLRB has provided much-needed clarity that conflicting NLRB and Court decisions could not reach regarding the determination of whether employers are “joint employers.” The final rule will become effective on April 27, 2020.

If you have any questions regarding joint employer status or any other human-resource related issue, please contact one of our Labor and Employment attorneys.