NLRB Creates NEW Joint Employer "Test" Likely Resulting in *De Facto* Liability for Employers Regarding Another Employer's Obligations Under Federal Labor Law

Labor & Employment Law Update

By Jeffrey Risch on October 27, 2023

Today the National Labor Relations Board (NLRB) officially published its *NEW Joint Employer Rule,* that lowers the standard to an unprecedented level whereby an entity may be deemed jointly liable and responsible under the National Labor Relations Act (NLRA) for another entity's unfair labor practices or collective bargaining obligations. In short, the NLRB's new rule will find joint employment when more than one statutory employer simply *possesses the authority* to control (even indirectly) another employer's employees – with respect to the employees' *terms and conditions* of employment.

The new rule greatly expands the factors to be examined when finding joint-employer liability. The exercise of actual and/or direct control will no longer be required. And, mere contractual authority to do so is not only "probative" on the issue, but will be deemed sufficient to show joint-employer status under the new rule.

This new rule impacts private sector employers across a vast majority of industries. But, the new rule likely impacts staffing agencies and their user clients, franchisors and their franchisees as well construction contractors the most. Again, control need not be actually exercised and it need not be direct. The NLRB is expanding joint employer status through 1) reserve control and 2) indirect control.

> Example of Reserved Control: The "contractual fine print" that permits one employer to ensure that another employer is following its legal obligations and contractual responsibilities may be enough; even if such contractual terms are necessary under the plethora of workplace laws, rules and regulations. Additionally, any contractual reservation that details the

manner and means by which work is to be performed and/or impacts terms and conditions of the work performed can have legal force and effect under the new rule.

Example of Indirect Control: When one employer communicates work assignments and directives to another entity's managers or exercises detailed ongoing oversight of the specific manner and means of employees' performance of the individual work tasks, the type of indirect control needed to trigger joint employer status can be demonstrated.

Of course, such actual/reserved and direct/indirect control relevant to this issue must also touch upon "essential terms and conditions" of employment. And yes, the new rule identifies seven (7) such terms and conditions. They are:

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.

What's Next? Legal challenges are already in the works. However, until and unless the rule is invalidated, the NLRB and the labor unions it supports will surely take every opportunity to try and hold multiple employers liable and accountable under the NLRA whenever and however they can – particularly staffing companies and their user clients along with franchisors with respect to their franchisees. Employers who rely on another employer's employees should seek competent legal counsel to discuss these issues and closely examine relevant contracts.