New Year, New Rules: NLRB Reverses Course (Again) on Joint-Employer Standard, Employers Should Beware

January 30, 2024

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Employment Law Monthly

Precedent is a core principle in every field of legal practice. Courts interpret statutes and issue decisions, and those decisions become guideposts for practitioners and later courts alike. It is exceedingly rare for a court to reverse course and overturn a prior decision based on nothing more than a radical reinterpretation of the law. Although it may seem inflexible, adherence to precedent ensures consistency in the law, clarity in what the law requires of the governed, and the avoidance of unpleasant surprises.

Not so in the world of federal administrative agencies such as the National Labor Relations Board. The Board can and frequently does overturn prior decisions based on nothing more than changing political forces. Because Board members serve for limited terms and are appointed by the President, the Board often revisits prior decisions once a new political persuasion gains a majority. Simply put, precedent often takes a back seat to political policy considerations. Businesses subject to the NLRB's rules therefore must be diligent in keeping up to date with the Board's most recent decisions, given that prior decisions are subject to change, if not wholesale reversal, every few years.

The NLRB's New Joint-Employer Rule

Recently, the NLRB revisited its rule regarding joint-employer status for employees. In October 2023, it issued a new final rule for joint-employer status, reversing a 2020 decision on the same subject. It is the third time in the last decade that the NLRB has changed its rules regarding joint employers. The new rule took effect on December 26, 2023.

What is a joint employer? In simple terms, joint employment may occur any time two or more entities share control and supervision of a particular employee. If an entity is considered a "joint employer" of a worker, then that entity must adhere to the National Labor Relations Act, meaning it must provide the worker with all of the protections the Act requires, including minimum wage, overtime, and more. The question of whether a worker is a joint employee of a particular entity is a legal question. In practical terms, this means a business entity may be a joint employer of a particular worker even if the entity did not intend to or did not want to be a joint employer. For example, a company may receive temporary workers through a staffing agency. The company may believe the workers are not its employees, but rather employees of the staffing agency because the company does not pay them or provide them with other benefits. Even so, if the workers meet the NLRB's standard for joint employment vis-à-vis the company, then the company is a joint employer, with all of the additional obligations the title requires. If the workers are not receiving the rights to which they are entitled under the National Labor Relations Act, the company may be liable even though it received the workers indirectly through the staffing agency and was not directly responsible for providing them pay and other employment rights under the Act.

The NLRB's 2020 Joint-Employer Rule. Under the Board's previous joint-employer rule, an entity would be considered a joint employer if it exercised **actual and direct control** over a **specified and clearly defined list of essential terms and conditions of employment**. The prior rule was business-friendly. Business entities easily could take steps to ensure they did not exercise the great degree of control and oversight necessary to confer joint-employer status.

The NLRB's New Final Rule. The new rule removes the prior rule's strictures, significantly broadening the scope of joint-employer status and increasing the risk that a business may unwittingly become a joint employer. Accordingly, an entity may be considered a joint employer under the new rule if it "possesses the authority to control" – whether **directly or indirectly** – one or more of the employee's essential terms and conditions of employment. Unlike the old rule, the new rule does not require that the entity actually exert control. Rather, the entity can be a joint employer so long as it has the ability to exert control. The new rule also removes the "list" of essential terms and conditions of employment. Now, an entity need only have the potential to exert control over any single essential term or condition of employment, including wages and benefits; hours of work; job duties; supervision; work rules and grounds for discipline; working conditions; and tenure of employment, such as hiring and discharge. There are no exceptions to the new rule; it applies in every state and to every industry, including industries where workers performing tasks for various entities is expected and widespread, such as construction, healthcare, seasonal work, and other industries and trades where staffing agreements and temporary workers are common.

What Should Business Entities Do?

The new rule creates a significant risk that businesses that accept workers from third-party staffing agencies and other similar entities will be deemed a joint employer of those workers. In fact, it is exceedingly likely to occur if businesses are not careful, given the new rule's broad scope. To manage these new risks, businesses should review their contracts with third parties, particularly staffing agencies, to determine whether those contracts permit the business to exercise control over the third party's workers as described above. Businesses also should speak with their managers and supervisors and, to the extent possible, train them to avoid interactions in which they exert direct or indirect control over another entity's employees. Limitations over the manner and means of a worker's job duties are the key for businesses to avoid falling unwittingly into an unwanted joint employment arrangement.

The Porzio Employment Team is available to help employers with policy development, training, and guidance to mitigate the risk of joint-employment claims under the National Labor Relations Act.

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