

Bodman PLC

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NLRB Announces New Employee-Friendly Joint Employer Test

By: Gary S. Fealk, Member, Workplace Law Group

On October 26, 2023, the National Labor Relations Board issued a Final Rule addressing the standard for determining joint employer status under the National Labor Relations Act. The Final Rule will make it more likely that one entity can be held liable for unfair labor practices of another entity where there is some element of interrelation with regard to employment. This most often occurs where there are leased or contracted employees or similar co-employment relationships.

The effect of this change is that employers who lease from or contract with other employers will be more likely to be held liable for the unfair labor practices of the leased or contracted with employer, even when they have minimal influence over the employees' terms and conditions of employment. The new Rule will go into effect on December 26, 2023.

In 2020, the Labor Board issued a rule that stating that to be considered a joint employer, a company must exercise "actual and substantial direct and immediate control" over another employer's employees' essential terms of employment. Terms and conditions of employment under the 2020 Rule are defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. The Rule also required that the Company must exercise control over these terms and conditions in such a way that it "meaningfully affects matters relating to the employment relationship with those employees."

The 2023 Final Rule announces a new standard and rescinds the old one. Under the new Rule an entity may be considered a joint employer of a group of employees if each entity has an employment relationship with the employees and they share or codetermine one or more of the employees' essential terms and conditions of employment, which are defined exclusively as: (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.

If you have questions regarding how to mitigate the risk of joint employer liability under the National Labor Relations Act, contact a member of Bodman’s Workplace Law Group. Bodman cannot provide legal advice without first clearing potential conflicts with other clients and establishing an attorney-client relationship. Thank you for your patience and understanding.

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