NLRB Expands Its Joint Employer Standard - More Seats May Be Required at the Collective Bargaining Table

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Takeaways

- The National Labor Relation Board ("NLRB") issued a Final Rule effective Dec. 26, 2023 (if it survives pending legal challenges) that changes the standard for determining whether two or more companies are joint employers under the National Labor Relations Act ("NLRA"). The Final Rule provides that indirect control of or the reserved right to control (even if never exercised) another entities' employees, standing alone, may establish joint-employer status, which broadens the circumstances under which the NLRB will consider a company to be a joint employer of the employees of another company.
- Franchisors and staffing agencies are particularly at risk, but the Final Rule may also have implications for parent and subsidiary relationships, construction industry employers, healthcare employers, and any business that has vendor employees at the workplace.
- If franchisors are deemed joint employers under the National Labor Relations Act, they will have a duty to collectively bargain with their franchisees' employees to the extent that those employees are unionized and may be held liable for their franchisees' unfair labor practices.

The Final Rule

Flip-flopping yet again, on Oct. 26, 2023, the NLRB issued a Final Rule that changes the standard for establishing joint-employer status under the NLRA. Under the Final Rule, one company is a joint employer of a second company's employees when: (1) the first company exercises control over the second company's workforce ***or*** (2) the first company's control over the second company's employees is indirect or even simply available but never actually exercised.

Specifically, under the Final Rule, two or more employers are joint employers if the two "share or codetermine the employees' essential terms and conditions of employment." 29 CFR 103.40(b). The Final Rule goes on to define "essential terms and conditions of employment" 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. *Id.* The NLRB further explains that possessing the authority to directly or indirectly control (including through an intermediary) one or more essential terms and conditions of the employment is sufficient to establish status as a joint employer, regardless of whether control is actually exercised. In other words, under the Final Rule, one company's indirect or reserved right to control (even if never exercised) a second company's employees *standing alone* can establish joint-employer status.

The rule is scheduled to go into effect on Dec. 26, 2023, but the Final Rule has already been contested by both litigation and a Congressional Review Act ("CRA") resolution, which allows

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repeal of regulations within 60 legislative days of issuance. On Nov. 9, 2023, the U.S. Chamber of Commerce and other business associations, including the International Franchise Association, filed a lawsuit against the NLRB in the US District Court for the Eastern District of Texas, where seven of the ten sitting judges were appointed by Republican presidents, seeking to vacate the Final Rule and enjoin the NLRB from enforcing it. This Texas lawsuit follows the first lawsuit filed by the Service Employees International Union on Nov. 6, 2023 in the D.C. Circuit. Additional lawsuits are anticipated. In addition, on Nov. 9, 2023, a bipartisan CRA resolution was introduced in the Senate to overturn the Final Rule. However, since the Democrats control the Senate, the CRA resolution may not get far and the courts will likely decide the ultimate fate of the Final Rule.

Legal Ramifications of Being a Joint Employer under the Final Rule

The potential ripple effects of the Final Rule cannot be gainsaid because an entity deemed to be a "joint employer" becomes just that: an "employer" of a separate entities' employees under the NLRA and all that entails. Thus, if the joint employers' employees are unionized, both employers will be obligated to bargain in good faith with the union representing the employees regarding wages, hours, and other terms and conditions of employment over which they exercise joint control. Similarly, if the group of employees that are jointly controlled are covered by a collective bargaining agreement, both employers will be obligated to abide by that agreement. Moreover, regardless of whether the jointly employed employees are unionized, both employers are jointly and severally liable for unfair labor practices with respect to employees for whom they possess joint control.

However, notwithstanding the late Justice Antonin Scalia's quip that Congress does not hide elephants in mouseholes, the Final Rule suggests that the current NLRB believes it does. Although the broader implications of the rule are far from clear, among other things it could expand the category of entities that may legally be subject to picketing, shrink the number of employers who are protected by the NLRA's secondary boycott prohibitions, and impact bargaining unit determinations in representation cases involving otherwise separate entities. Most troubling, the new rule purports to subject a putative joint employer to pickets, boycotts, or liability for actions it never took part in simply because it reserved the right to exert control over the rule's ambiguous seven essential terms of employment.

Although the Final Rule is limited to joint employment under the NLRA, other federal agencies and states may follow suit. In fact, the federal Equal Employment Opportunity Commission has taken the position that since the concept of joint employment arose in the labor relations context and Title VII's definition of an "employer" is virtually identical to the NLRA's definition, the joint-employer test should be the same under both laws. It is also possible that plaintiffs may attempt to apply the definition of joint employer to lawsuits, including claims based on personal injury, discrimination, and harassment.

What Should Franchisors Do?

Joint-employer status may have significant consequences for franchisors. The franchise model is built on a contract where franchised locations are independently owned and operated, and franchisees make their own employment decisions. The franchising model gives the franchisor power to license and protect its trademarks and brand while the franchisee has direct management of day-to-day-operations, including employment decisions.

Under the Final Rule, franchisor brand standards and necessary controls to protect the brand may be argued to subject a franchisor to joint-employer liability. Franchisors will need a transitionary period to determine their best response, which could include a franchisor further distancing itself

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from oversight of its franchisees' businesses, especially with respect to human resources issues. Given the breadth of expanded joint-employer status under the Final Rule, franchisors should:

- Review franchise agreements and other key documents and practices so that it is clear that the franchisee is responsible for all employee-related issues. Franchisors should also consider modifying these contracts to add that the franchisor has no right to control any of the seven essential terms of employment listed in the Final Rule.
- Review indemnification clauses in franchise agreement and require franchisees to pay for legal costs incurred for joint-employer claims.
- Review operating manuals and other communications and avoid expressing operating standards that read like workplace rules (i.e,. "no employee shall …").
- Do not include an employee handbook or personnel policies in the operations manual.
- Review franchisee inspection policies and procedures. Franchisors should offer their field teams training and periodically observe franchisor employees. Franchisor should not be directing franchisee employees on-the-job.
- Franchisors should review pricing controls since it could be argued that they influence how much a franchisee can pay its employees.
- Follow new developments, both at the NLRB and in the courts. It is especially important for franchisors to understand the effect of the Final Rule since it may not be stayed pending review.

Haynes Boone will continue to monitor agency guidance and decisions. In the meantime, we encourage you to reach out to a member of the Haynes Boone Franchise and Distribution Practice Group or Labor and Employment Practice Group as you prepare for the Final Rule.

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