Knox McLaughlin Gornall & Sennett, P.C.
Erie • Pittsburgh • Jamestown, NY
814-459-2800 • www.kmgslaw.com

NLRB Finalizes Joint Employer Rule

Posted on November 21, 2023

Overview

On October 27, 2023, the National Labor Relations Board (NLRB) published a final rule addressing the standard for determining joint-employer status.

This rule establishes that under the National Labor Relations Act (NLRA), two or more entities may be considered joint employers of a group of employees if each entity has an employment relationship with the employees. This consideration may also be established if the entities share one or more of the employees' essential terms and conditions of employment. **This final rule will go into effect on December 26, 2023.**

How has the standard changed?

This new rule makes it easier for employers to be labeled as "joint-employers," as it sets a lower standard to show an employer's control.

Previously, there had to be a finding of "substantial direct and immediate control" over essential terms and conditions of employment to establish joint-employer status. However, the new standard establishes a broad standard for joint employers under which an entity may be considered a joint employer of another not only where it directly exercises control over another entity's workforce, but also when its control is indirect or even reserved, even if not actually exercised.

In essence, an entity can be considered a joint employer even when its control over the terms and conditions of employment is not direct or actual. If the control is an indirect consequence of the relationship, the entity may be considered a joint employer. This rule makes it easier to label employers as joint. Being a joint employer means that all employers involved have a bargaining obligation to their employees. That is, once an entity is deemed a joint employer, it will be required to bargain over the particular essential terms and conditions it has control over, as well as other areas it possesses or exercises authority to control.

What are the essential terms and conditions of employment?

The NLRB defines 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.

Who is effected by this change?

Not all franchisors and their franchisees will be joint employers. Nor will all staffing or temporary agencies and their client employers. Instead, this rule has been established to protect employees where more than one entity is exercising or attempting to exercise any type of control over the conditions of their employment. It applies to any entity that has a say about the nature of an employee's employment without being required to bargain over the terms and conditions of such. This final rule creates a uniform joint employer standard, and the NLRB will have to conduct a fact-specific analysis on a case-by-case basis to determine whether two or more employers meet the standard.

It is important for entities to evaluate whether their involvement with a group of employees amounts to any level of control over the terms and conditions of the employment. If so, the two or more entities will likely be found to be joint employers, and each will be required to bargain with the employees.

If you have questions or concerns about the NLRB's finalization of the joint employer rule, please contact your Knox Law attorney, our Labor & Employment group, or call us at 814-459-2800.

This article was written by former Summer Associate and future full-time Associate, Rimaz Mustfa.
