THE NATIONAL LABOR RELATIONS BOARD ISSUES SECOND IN TRIO OF AGENCY RULES TO CLARIFY ITS JOINT EMPLOYER STANDARD

Date: 2 March 2020

U.S. Labor, Employment and Workplace Safety Alert

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On February 26, 2020, the National Labor Relations Board (NLRB) formally issued its final rule on joint employment under the National Labor Relations Act (NLRA). The NLRB's final rule is the second in a trio of rules on joint employment by federal agencies. The U.S. Department of Labor (DOL) published its final rule on joint employment under the Fair Labor Standards Act (FLSA) on January 16, 2020,[1] and last year, the Equal Employment Opportunity Commission (EEOC) published a notice that it intends to clarify its joint employer analysis for assessing potential liability under some of the laws it enforces. The NLRB's final rule rejects the broad joint employer standard articulated in the NLRB's 2015 Obama-era *Browning-Ferris* decision[2] and sets a stricter, narrower standard for when a worker is considered a joint employee of separate entities under the NLRA. According to the NLRB, the final rule gives the joint employment standard important clarity, stability, and predictability. The final rule takes effect on April 27, 2020.

Under *Browning-Ferris*, joint employment could be found when a business had only indirect control over a worker's working terms and conditions or when a business had a contractually reserved level of control over a worker that it never exercised. Under the NLRB's final rule, businesses must have "direct and immediate control" over essential terms and conditions of another employer's employees to be considered a worker's joint employer under the NLRA.

While the NLRB and DOL have both significantly narrowed the scope of joint employment for purposes of their respective laws, and there is overlap between the two agencies' final rules, it is important to note that joint employment status under one agency's rule does not dictate joint employment under the other's rule. For example, although both the NLRB's and DOL's final rules consider control over key employment decisions such as hiring and firing, work schedule, and salary, the rules involve some different considerations. For example, the DOL rule expressly allows "actual direct or indirect control" to establish joint employment under the FLSA, whereas the NLRB rule requires "substantial direct and immediate control," as described in more detail below.

The NLRB's narrowing of its joint employment test has significant ramifications for all employers, but is especially relevant to parties to franchise agreements, contractors, and staffing agencies, each of which had a high risk of being considered joint employers under the prior test. The rule is also important for workers and the unions representing them, as the NLRA imposes bargaining obligations on joint employers, makes a joint employer potentially liable for unfair labor practices committed by the joint or related employer, and could subject a joint

employer to lawful non-secondary picketing, boycotts, or other economic pressure in a labor dispute.

THE NLRB'S FINAL RULE

Under the NLRB's final rule, to be a joint employer under the NLRA, "two employers [must] share or codetermine the employees' essential terms and conditions of employment." An entity "shares or codetermines" the essential terms and conditions of another employer's employees if it "possess[es] and exercise[s] such *substantial direct and immediate control* over one or more *essential terms or conditions* of…employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees."[3] "Essential terms and conditions" of employment are limited to wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. Control over these essential terms and conditions of employment is substantial, direct, and immediate where the employer has "regular or continuous consequential effect on an essential term or condition of employment of another employer's employees."[4] Under the final rule, exercising the required level of control over essential terms and conditions of employment includes:

- actually determining salary, fringe benefits, work schedules, or work hours;
- deciding which employees will be hired or terminated;
- deciding how employees will be disciplined;
- instructing employees how to perform their work;
- issuing employee performance appraisals; and
- assigning employees their individual work schedules, positions, and tasks.

An entity does not exercise substantial direct and immediate control over an essential term or condition of employment if, among other things, it merely enters into a cost-plus contract with an employer, permits an employer to participate in its benefit plans, establishes operating hours, sets minimal hiring or performance standards, expresses a negative opinion of another employer's employee, provides limited and routine instructions on task completion, or describes the work to be performed on a project.

Further, while indirect or contractually reserved yet never exercised control is no longer dispositive of joint employment under the final rule, such a finding can still be relevant evidence of direct control. For example, an entity's control over grievance adjustments or drug or alcohol testing may be probative of and demonstrate one entity's direct and immediate control over discipline and supervision at a purportedly joint or related entity.

Finally, the NLRB's final rule is intended to apply to a wide range of industries and business relationships and does not address any particular industry or type of business relationship. Joint employer status under the NLRB thus must be determined based on the totality of the relevant facts of each particular employment setting. Accordingly, similar to the DOL's final rule, certain industries and business relationships are not more or less likely to give rise to joint employer status under the NLRB's final rule. For example, as between franchisors and

franchisees, the NLRB explicitly "decline[s] to put [its] thumb on the scale."

ARE THESE AGENCY "FINAL RULES" REALLY FINAL?

Although the NLRB's final rule is not scheduled to go into effect until April 27, 2020, it likely will be challenged in the courts before that date, as opponents of the final rule have already raised concerns about the rulemaking process, criticizing the NLRB for using outside contractors to review public comments. Indeed, this rule, as well as the EEOC's anticipated rule, may face legal challenges similar to the one recently asserted against the DOL's joint employment rule, which is scheduled to take effect on March 16, 2020. On February 25, 2020, a coalition of Democratic state attorneys general from 17 states and the District of Colombia filed suit in the Southern District of New York, alleging that, among other things, the DOL's joint employment rule violates the Administrative Procedure Act because the rule "contravenes the statutory text and remedial purpose of the Fair Labor Standards Act" and contradicts controlling U.S. Supreme Court authority interpreting the statute.

While the final rules may very well survive initial legal challenges like the one asserted by the state attorneys general against the DOL's final rule, they are likely to face another wave of opposition from organized labor and pro-employee groups that will continue to test the boundaries of the final rules through the courts.

ABOUT K&L GATES' LABOR, EMPLOYMENT AND WORKPLACE SAFETY PRACTICE GROUP

The Labor, Employment and Workplace Safety practice group of K&L Gates has a team of labor relations and employment lawyers in various U.S. jurisdictions with extensive experience regarding joint employment law, including prior agency experience from their years at the NLRB and DOL.

Notes

[1] *See* Kathleen D. Parker, Amy L. Groff & Jonathan R. Vaitl, *Department of Labor Issues Final Rule to Clarify Joint Employer Standard*, K&L GATES (Jan. 17, 2020), http://www.klgates.com/department-of-labor-issues-final-rule-to-clarify-joint-employer-standard-01-17-2020/.
[2] *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599, 1600 (2015) ("*Browning-Ferris*"), *aff'd in part, rev'd in part & remanded*, 911 F.3d 1195 (D.C. Cir. 2018).
[3] 29 C.F.R. § 103.40 (emphasis added).
[4] *Id.*

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