What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR

Connie Elder Carrigan is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

National Labor Relations Board Proposes Expansive New Rule For Joint Employment Status

September 9, 2022 | by

It has been the source of speculation for some time that the standard for determining whether entities that have a business relationship are deemed for labor enforcement purposes to be joint employers will soon be revised. On September 6, one day after Labor Day, the NLRB announced a Notice of Proposed Rulemaking, which seeks to rescind and replace a 2020 rule enacted during the Trump administration that deemed joint employment to exist only when two businesses share or co-determine the workers' essential terms and conditions of employment and *actually exercise* control over them. The proposed new rule would make it easier for workers to be considered employees of more than one entity as the standard would require the existence of only potential, unexercised, and *indirect control* over employees' working conditions, such as their wages, benefits, hiring, and discipline.

The Current Standard

The standard currently applied in making that analysis makes it more difficult for entities to be held legally responsible for labor law violations by franchisees, staffing companies, subcontractors, and other related organizations. In its desire to offer flexibility, clarity, and predictability in structuring modern working relationships, the employer-friendly 2020 rule provides that an alleged joint employer must possess and *actually exercise* substantial *direct* and *immediate* control over the workers' essential terms and conditions of employment in a manner that is not sporadic and isolated. Under this standard, the entity must be found to have meaningfully affected matters relating to the other entity's employment relationship with its workers.

The Proposed Standard

The proposed new rule would increase exposure to joint employer liability by extending the analysis to include "evidence of *reserved and/or indirect control* over essential terms and conditions of employment." The draft rule also broadens what is deemed to be an "essential term and condition of employment" to include not only wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction, but also workplace

health and safety, assignment of work, and "rules and directions governing the manner, means, and methods of work performance." Additionally, the proposed rule states that "control exercised through an intermediary person or entity is sufficient to establish status as a joint employer." Thus potential but unexercised indirect control over working conditions could be deemed sufficient to render an entity jointly liable for employment violations by an entity with which it is associated, such as a franchisee or staffing company.

The proposed new rule returns the employment relationship to the standard articulated in 2015 in *Browning-Ferris Industries of California, Inc.,* which eliminated the requirement that a putative joint employer actually exercise control over the worker – if a business retains the contractual right to control terms and conditions of employment, that is sufficient to impose joint employment liability. While the Board commented that "routine components of a company-to-company contract, like a 'very generalized cap on contract costs,' or an 'advance description of the tasks to be performed under the contract,' will generally not be material to the existence of an employment relationship under common-law agency principles," the draft rule's lack of detailed guidance opens the door to subjective interpretation of what constitutes indirect control. This lack of guidance is particularly troubling in light of the Board's acknowledgment that its list of what constitutes "essential terms and conditions of employment" is not exhaustive and will likely expand over time. The NLRB seeks public comments on the proposed rule until November 7, 2022, including input on "which contractual controls reserved by the joint employer over another entity's employees should establish the putative joint employer is also a common-law employer of the other entity's employees." The expected date of enactment is early 2023, barring legal challenges.

Employer Takeaways

Stay tuned as this standard continues to evolve. The debate over what constitutes joint employment has been ongoing for many years and is guided in large part by which political party is in power. The new broader standard will likely be adopted or applied by other federal agencies and courts. The United States Department of Labor continues to express its intent to clarify what constitutes an independent contractor. Many federal agencies are laser-focused on preventing companies from improperly classifying employees as independent contractors or from shielding themselves from liability in what is perceived as an effort to dodge the responsibilities they owe to their employees under the Fair Labor Standards Act and other federal laws.

It is recommended that host employers relying upon workers furnished by third parties carefully evaluate contractual language and policies pertaining to rights to control these workers' terms and conditions of employment, such as clauses requiring service providers to ensure that their workers maintain levels of quality, efficiency, safety, or performance. It is imperative that host employers, consultants, contractors, and service providers remain vigilant in enforcing sustainable employment practices and in drafting effective reservation of rights provisions pertaining to workers staffed by service providers.

If you have questions about this proposed rule or any other employment-related matter,

please call Connie Carrigan at (919) 250-2119 or e-mail her at ccarrigan@smithdebnamlaw.com.

CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, NC 27609

Phone: 919.250.2000
Fax: 919.250.2100

CHARLESTON OFFICE

171 Church Street
Suite 120C
Charleston, SC 29401

Phone: 843.714.2530
Fax: 843.714.2541