Legal Update Article

NLRB's New Joint-Employer Rule: What It Means for Retailers and Other User Employers

By Laura A. Pierson-Scheinberg & Lorien E. Schoenstedt

November 7, 2023

Meet the Authors

Laura A. Pierson-Scheinberg

(She/Her)
Principal
415-796-5408
Laura.PiersonScheinberg@jacksonlewis.com

Lorien E. Schoenstedt

KM Attorney
312-803-2516
Lorien.Schoenstedt@jacksonlewis.com

Related Services

Labor Relations
Retail

The National Labor Relations Board's new Final Rule for determining joint-employer status under the National Labor Relations Act expands the current standard by allowing the Board to find joint-employer status if an entity possesses the authority to control at least one of the seven enumerated essential terms and conditions of employment, regardless of whether that control is actually exercised. The Board would use the same standard even when an entity is using intermediaries or other third parties, such as a staffing agency. This raises concerns among retailers and other employers in commercial arrangements, including franchisors-franchisees, contractors-subcontractors, and staffing agencies-user employers.

The Final Rule takes effect December 26, 2023.

Right to Control Essential Terms and Conditions of Employment

Under the Final Rule, an entity is a joint employer of another employer's employees if the two share or codetermine the employees' "essential terms and conditions of employment." The Final Rule provides an exhaustive list of the essential terms and conditions:

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.

The reserved right to control at least one of these essential terms and conditions will be given determinative weight in the analysis, "whether or not such control is exercised, and without regard to whether any such exercise or control is direct or indirect." This means that even indirect control, such as through intermediaries like staffing or temporary agencies, is sufficient to establish joint-employer status. Accordingly, employers could be held as joint employers if they "possess the authority to control (whether directly, indirectly, or both), or exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment."

Impact on Retail, Staffing, Franchises, Other Contracted Services

The new, broader rule is expected to bring more joint-employer findings, as reserved or indirect control is sufficient for a joint-employer status determination. It is likely that retail and other employers involved in business

arrangements that often rely on contracted services, such as staffing agencies, will be heavily impacted as a result. For example, the Board cited public comments that suggested examples where control exercised through intermediaries should be sufficient to establish joint-employer status that noted franchise, staffing, and temporary employment as likely impacted industries. One comment suggested indirect control over workplace health and safety could be sufficient to establish joint-employer status. The Board, however, declined to provide much clarity or guidance regarding the examples of control required to establish joint-employer status.

Furthermore, the Final Rule fails to provide specific guidance on what otherwise common provisions in commercial agreements will give rise to a joint-employer relationship. The Final Rule provides that evidence of control over matters that are "immaterial to the existence of an employment relationship" and "do not bear on the employees' essential terms and conditions of employment" are not relevant to the joint-employer analysis. It is not clear what matters will be considered "immaterial" though.

In the comments preceding the Final Rule, the Board acknowledged "routine components of a company-to-company contract will generally not be material to the existence of an employment relationship under common-law agency principles." The Board discussed two examples from the proposed rule: a "very generalized cap on contract costs" and "an advance description of the tasks to be performed under the contract." It did not provide specific guidance on terms that might be sufficient to create an employment relationship. Instead, the Board will address such terms on a "case-by-case" basis. The case-by-case analysis may be particularly troubling for retail or franchise employers who seek clarity when incorporating contract provisions relating to staffing requirements, logo or branding standards, or general policy compliance relating to health and safety.

Moreover, many employers carefully drafted their contracts to ensure compliance with the current standard. Those should be revisited for legal compliance under the Final Rule. Indeed, as Board Member Marvin Kaplan noted in his Dissent, under the Final Rule, "virtually every client of a staffing firm predictably will be the joint employer of that firm's supplied employees" since the client likely will have at least certain reserved or indirect authority over at least one of the essential terms and conditions of employment ("e.g., hours of work and scheduling; tenure of employment, possibly 'work rules and directions governing … the grounds for discipline'").

Employers will need to closely review their commercial agreements with other companies that contain terms or rights (regardless of whether exercised) requiring these companies to ensure their employees maintain levels of quality, safety, or performance. The Final Rule creates a risk that even relatively routine commercial terms, if touching indirectly or remotely employment terms and conditions, can be interpreted to create the potential of direct or even indirect control over employment terms and conditions.

Please contact a Jackson Lewis attorney with any questions about the Final

Rule or how it may impact your organization.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit https://www.jacksonlewis.com.