Legal Update Article

Impact of Labor Board's New Joint-Employer Rule on Construction Industry

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The National Labor Relations Board's new final rule for determining joint-employer status under the National Labor Relations Act would find joint-employer status if one employer 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 apply this standard to evaluate alleged joint-employer status among general contractors, contractors, and subcontractors, including on projects that only require temporary workers. This raises serious concerns in an industry in which higher-tier general contractors and contractors oversee and coordinate work, job progress, and performance of lower-tier contractors and subcontractors and impose uniform, top-down safety rules on a construction site over subcontractors' employees. The Final Rule deviates from the customary and practical understanding of contracting parties in the industry, which, with few exceptions, has long accepted the separate employer identity in a traditional contractor-subcontractor model.

The Final Rule takes effect Feb. 26, 2024. A coalition of business groups has filed a lawsuit challenging the Final Rule for violating the Act and the Administrative Procedure Act.

Right to Control

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.

This means that indirect control or reserved control of any of these factors — for example, by a contractor over a lower-tier contractor — regardless of whether the control is actually exercised, 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 Construction Industry

The new rule broadens the forms of control that determine joint-employer status. As a result, it is likely that many (perhaps *all*) contractor-subcontractor relationships may fall under the joint-employer umbrella. This will significantly impact the construction industry. Worksites often operate with general contractors and prime contractors exercising certain control over lower-tier subcontractor's employees, usually to coordinate overall work and ensuring uniformity of site rules, access requirements, and safety rules for any person working on the project site, often as the agent for the project owner. The Board's new test would consider such coordination and project management to support joint employment if it touches upon employee terms and conditions of any lower-tier employers.

In fact, the Board cited comments to the proposed rule (issued in September 2022) that raised concerns the construction industry will be unfairly targeted and impacted by the rule's broader reach. The Board acknowledged that U.S. Supreme Court precedent "precludes treating a general contractor as the employer of a subcontractor's employees solely because the general contractor has overall responsibility for overseeing operations on the jobsite." In addition, the Act incorporates the custom and practice of contracting within the building and construction industry. For example, the Act was amended in 1947 to authorize the use of Section 8(f) pre-hire agreements, the use of which long predated the original 1935 Act. Interpretations of the Act by the courts and the Board have considered industry practice. Fundamental to historical interpretations of the Act in the construction context is the uniqueness of the industry and a long-standing acknowledgment that projects are transient, manpower needs must be scaled to meet time and productivity demands, and multiple independent employers must coordinate work to meet these needs.

While a marked departure from long-standing and accepted industry practice in the construction industry, the Board reasoned that, under its expanded rule, construction employers need not be found to be joint employers "absent evidence that a firm possesses or exercises control over particular employees' essential terms and conditions of employment, that firm would not qualify as a joint employer" under the rule. The Board majority's attempt to justify the rule's application to construction misses the point.

The very nature of the contractor-subcontractor relationship frequently and customarily involves the contractor exerting some control over essential worksite conditions such as safety, supervision, and shift hours, although the purpose of doing so is intended to flow-down non-employer owner requirements or ensure coordinated work flow on a project among multiple employers, suppliers, and professionals working under specific timelines and other restraints. The Board did not provide any guidance or detail for when "overall responsibility for overseeing operations" rises to the level of joint employment on a jobsite, or whether the industry context matters. However, the Board's decision to adopt a standard that will materially expand the concept of joint employment under the Act supports deep concerns within the industry that its application of the new standard in actual cases will inevitably have similar effect.

Recognizing these concerns and the uniqueness of the construction industry, dissenting Board Member Marvin Kaplan forewarned that the new rule creates the risk that general contractors will presumptively be held as joint employers due to the very nature of the construction industry. For example, because general contractors "ultimately determine the duration of each part of the construction project" they arguably control, even indirectly, the "tenure of employment" and therefore could be held as a joint employer of every employee hired as part of a subcontract.

Member Kaplan noted that standard construction contracts among industry employers make the general contractor "responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the contract." Indeed, these provisions are "routine components of company-to-company contracting in the construction industry." This means that everyday clauses requiring the general contractor to oversee the operations of a jobsite relating to discipline, assigning tasks, coordinating projects across multiple subcontractors, and ensuring benchmarks and quality standards are being met could lead to a finding of joint employment. Industry employers are left to grapple with the commercial and operational impact of the Board's expansion of joint employment on derivative liability for conduct of other contractors, and the potential that recognition, bargaining and related obligations may also pass through to them.

Next

While it remains uncertain if the Final Rule's effective date will be extended again beyond February 2024 or whether its implementation will be enjoined in pending court challenges, employers must anticipate how the new rule will affect them.

It will be important to closely review contracts that contain terms or rights (regardless of whether exercised) over other employers that would create a basis for the Board to find the potential of control over such other employers' employees. These terms or rights would include, for example, rights to ensure subcontractors (and their employees) follow site rules and maintain levels of quality, safety, or performance. The Final Rule creates a risk that standard-form commercial agreements, or any other boilerplate terms, that give or reserve authority to the general contractor to exercise control over even one of the seven essential terms and conditions of employment can give rise to a joint-employment relationship.

Industry employers should also revisit commercial agreements, including risk-shifting and indemnity provisions between and among contractors, developers, and owners relating to labor and employment matters, and reconsider the legal structure and operation of its contracting entities to mitigate risks.

Please contact a Jackson Lewis attorney with any questions.