BURR FORMAN LLP

National Labor Relations Board's Notice of Proposed Rulemaking - Potential Change in the Standard for Determining "Joint-Employer" Status

Articles / Publications
09.15.2022

Joint-Employer Doctrine under the National Labor Relations Act

Under the joint-employer doctrine, an individual may be considered an employee of an entity that is not the individual's formal employer. If a company is a joint employer under the National Labor Relations Act (the Act), then it could be (1) held liable for the unfair labor practices of the other joint employer; (2) required to collectively bargain about the terms and conditions of employment it jointly controls; and (3) may even be subject to lawful picketing.

Recent Shifts in the Joint-Employer Standard

The joint-employer standard under the Act has changed multiple times over the past seven years. The recent shifts began with the Board's decision in *Browning-Ferris Industries of California, Inc., d/b/a BFI v. Newby Island Recyclery*, 362 NLRB 1599 (2015) (BFI), which revised the traditional rule cemented in the 1980s. In *BFI*, the Board replaced the requirement that an entity actually exercise "direct and immediate control" over essential terms and conditions of employment. Instead, under the *BFI* standard, reserved authority and indirect control over essential terms and conditions were sufficient to create a joint-employer relationship.

RELATED PROFESSIONALS

Joseph Barnello

RELATED CAPABILITIES

Labor & Employment

National Labor Relations Board's Notice of Proposed Rulemaking - Potential Change in the Standard for Determining "Joint-Employer" Status

In 2018, the Board reversed course and proposed a rule that rejected the principles expressed in BFI. That proposal – which essentially returned the standard to the traditional rule cemented in the 1980s- was promulgated by the Board on February 26, 2020, became effective on April 27, 2020, and remains the current standard for determining joint-employer status. To be a joint employer under the current rule, an entity must possess and *actually* exercise substantial direct and immediate control over essential terms and conditions of employment. Further, the current rule provides an *exhaustive* list of "essential terms and conditions of employment": wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

Proposed Changes to the Joint-Employer Rule

On September 6, 2022, over the dissent of two members, the Board issued a notice of proposed rulemaking (NPRM) that again seeks to change the joint-employer standard and essentially revert to the 2015 BFI standard. For instance, the proposed rule would merely require the authority to control one or more essential terms and conditions of employment (also referred to as reserved control), in contrast to actually exercising that authority. The proposed rule would also elevate indirect control over essential terms and conditions of employment from being probative (and merely supplemental to direct and immediate control) to sufficient for establishing a joint-employer relationship.

Additionally, the proposed rule expands the categories of essential terms and conditions of employment. The proposed rule lists: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rule and directions governing the manner, means, or methods of work performance. Further, under the proposed rule, this list is *non-exhaustive*. In other words, the Board could add categories on a case-by-case basis.

TAKE ACTION

The Board is seeking public comment on all aspects of the NPRM, which can be found in the Federal Register published on September 7, 2022. Public comments must be received by the Board on or before November 7, 2022.

Employers should also prepare for the NPRM to take effect. This preparation includes determining whether it has authority, directly or indirectly, to control any of the listed essential terms and conditions of employment for employees of another entity through an agreement or practices.