LEGAL MINUTE

What Employers Should Know About the NLRB's New Joint Employer Rule

The National Labor Relations Board ("NLRB") recently issued a new rule that significantly expands who qualifies as a joint employer under the National Labor Relations Act. Under the new rule, an entity may be considered a joint employer of another entity's employees if the employers "share or codetermine" the employees' essential terms and conditions of employment. The new rule defines "share or codetermine" to mean for an employer "to possess the authority to control (whether directly, indirectly or both) or to exercise the power to control (whether directly, indirectly or both) one or more of the employees' essential terms and conditions of employment." The party asserting joint employer status has the burden of establishing it by a preponderance of the evidence.

The new rule provides an exhaustive list of what qualifies as essential terms and conditions of employment for purposes of a joint employer determination:

1. Wages, benefits and other compensation;
2. Hours of work and scheduling;
3. The assignment of the performance of duties;
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 an entity can be a joint employer simply when it has the authority to directly or indirectly control any of these seven items, *even if it never actually exercises that authority*. So long as an entity has the reserved authority to intervene and control one of these essential terms, this is enough to create joint employer status.

Businesses should review written agreements, policies and even informal business practices to see if they or any other entities have any reserved right of control over workers. Potential workers of concern include, but are not limited to, workers obtained from staffing agencies, the employees of contractors, employees of related business entities, employees shared with or borrowed from another business, and employees of a franchisee. Staffing agencies and employers that use them should be particularly careful of their contractual arrangements.

Be sure to consult with your employment attorney for additional information or guidance.

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