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Latest Labor and Employment Developments: Federal Court Vacates NLRB Joint Employer Rule; Overtime Rule Under Review at OIRA

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In vacating the NLRB's new 2023 joint employer rule, the Texas district court determined that the test set forth in the rule is contrary to the National Labor Relations Act. On March 8, 2024, U.S. District Judge J. Campbell Barker of the Eastern District of Texas vacated the National Labor Relation Board's ("NLRB") 2023 final rule that set forth a new standard for determining joint-employer status under the National Labor Relations Act ("NLRA"). The rule had been scheduled to take effect on March 11, 2024. As we discussed in a previous alert, the 2023 rule, if it were to take effect, would significantly expand the bases on which a joint employment relationship may be found under the NLRA. Instead, a Trump Administration rule adopted in 2020 remains in effect. Separately, a Labor Department proposal to raise the required pay for exempt executive, administrative, and professional employees has taken a step closer to becoming a final rule. In vacating the NLRB's new 2023 joint employer rule, the Texas district court determined that the test set forth in the rule is contrary to the NLRA. In particular, the court held that the rule's provisions that would make indirect or reserved control over working conditions sufficient to establish joint employer status sweep more broadly than, and are therefore inconsistent with, the common law test for employment codified in the NLRA. The court also noted that the second step of the 2023 rule's two-part joint employer test, which requires an assessment of whether an entity controls various working conditions, is coextensive with, and perhaps even more expansive than, the test's first step, which asks whether an entity is a common law employer. Because a common law employer will always control key working conditions, the court reasoned, the test's second part would likely do nothing to limit who qualifies as a joint employer. While noting that it need not decide the issue, the court suggested that the rule thus likely fails to articulate a comprehensible standard, and is therefore arbitrary and capricious. The court also vacated the 2023 rule's rescission of the agency's previous joint employer rule issued in 2020, holding that the agency was incorrect that the 2020 rule is inconsistent with the NLRA and that the agency had failed to articulate a reason why the 2020 rule should be rescinded if the 2023 rule does not go into effect. The 2020 rule therefore remains operative. The 2020 rule's joint employer test is different from the 2023 rule in a few important ways that make it less likely that the 2020 rule will result in a determination that a joint employment relationship exists. Whereas the 2023 rule treats indirect or reserved control as sufficient to establish a joint employment relationship, the 2020 rule requires a showing that an entity possesses and exercises "such substantial direct and immediate control" over working conditions that would "warrant finding that the entity meaningfully affects matters relating to the employment relationship." Thus, under the 2020 rule, it is unlikely that an entity will be deemed a joint employer simply because it contracts with another business for services. By contrast, Judge Barker determined that the 2023 rule "would treat virtually every entity that contracts for labor as a joint employer because virtually every contract for third-party labor has terms that impact, at least indirectly, at least one of the specified 'essential terms and conditions of employment.'" *Chamber of Commerce et. al. v. National Labor Relations Board, et. al.*, No. 6:23-cv-00553, Dkt. 44 at 25 (Mar. 8, 2024). Likewise, the 2020 rule's enumeration of essential terms and conditions of employment—control over which may

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demonstrate joint employer status—is more limited than the list contained in the 2023 rule. Unlike the 2023 rule, the 2020 rule does not identify control over "work rules and directions governing the manner, means, and methods of performance," or "working conditions related to the safety and health of employees" as probative of joint employer status. There are thus fewer bases on which joint employer status may be found under the 2020 rule as compared to the 2023 rule. Finally, the 2020 rule provides that control over workers exercised on a sporadic, isolated, or de minimis basis is not sufficient to establish joint employer status—a provision that the 2023 rule would have eliminated. That also makes the 2020 rule's test narrower and less likely to result in a joint employment determination. In response to the ruling, NLRB Chair Lauren McFerran said that the agency "is reviewing the decision and actively considering next steps." It is likely that the NLRB will appeal the decision. If the agency were to appeal, it may be as long as a year, if not longer, before the Fifth Circuit issues a decision, during which time the 2020 rule will remain in effect. The rule has also attracted attention in Congress. In January 2024, the House of Representatives passed a resolution pursuant to the Congressional Review Act disapproving of the rule. In February, Senators Bill Cassidy and Joe Manchin wrote Chair McFerran to ask her to delay the effective date of the rule while the Senate considers the disapproval resolution. However, the White House has stated that President Biden would veto the disapproval resolution were it to pass.

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Separately, on March 1, 2024, the Department of Labor ("DOL") sent the Office of Information and Regulatory Affairs ("OIRA") a final rule revising DOL's regulations implementing minimum wage and overtime exemptions for executive, administrative, and professional employees, among others, under the Fair Labor Standards Act ("FLSA"). The Department issued the proposal to revise its overtime regulations in August 2023, which we discussed in a prior alert. Over 15,000 comments were submitted on the proposal. OIRA review is typically the last step before issuance of a final rule. It remains unclear if the Department made any modifications to its proposal to address the comments it received. If the final rule follows the approach DOL originally proposed, it will significantly change how the FLSA's minimum wage and overtime exemptions operate. Among other things, DOL proposed substantial increases to the compensation thresholds for applying the FLSA's exemptions, including raising the salary threshold to $1,059 per week—a nearly 55 percent increase over the current threshold—and increasing the annual compensation threshold for highly compensated employees to $143,988—an increase of approximately 34 percent. Further, in its proposal DOL left open the possibility that it may use more recent wage data when it finalizes the rule, which means that the thresholds in the final rule could be even higher. By some estimations, these increases could expand the number of workers who would be eligible for overtime wages by at least 3.6 million. DOL also proposed automatic increases to the thresholds every three years. Although OIRA review can sometimes take a few months, it is likely that OIRA will complete its review—and that the final rule will be published—much sooner. Once the final rule is promulgated, legal challenges are possible. Indeed, DOL's existing overtime regulations are already the subject of a lawsuit, currently on appeal in the Fifth Circuit, that argues that the Department lacks the authority to use salary thresholds to determine the applicability of the FLSA's overtime exemptions. The case is *Mayfield v. U.S. Dep't of Labor*, No. 23-50724 (5th Cir.). Similar arguments could likely be made in a challenge to DOL's new overtime rule once it is issued. Gibson Dunn lawyers are closely monitoring these developments and available to discuss these issues as applied to your particular business.

The following Gibson Dunn lawyers prepared this update: Jason Schwartz, Eugene Scalia, Andrew Kilberg, Svetlana Gans, Michael Holecek, and Blake Lanning.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment or Administrative Law and Regulatory practice groups, or the following

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