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The NLRB's New Joint-Employer Standard: 5 Key Takeaways for Employers

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On October 27, 2023, the National Labor Relations Board ("NLRB") published a final rule setting forth a new standard for determining joint-employer status under the National Labor Relations Act ("NLRA"). This new rule replaces a prior rule published by the NLRB in 2020. Notably, the final rule replaces the prior "substantial direct and immediate control" threshold with an analysis of whether the putative joint employer has the authority to control the essential terms and conditions of employment, regardless of whether such control is actually exercised. The final rule is set to take effect on December 26, 2023.

1) Inclusion of Reserved Control

The new standard's inclusion of reserved control contemplates situations where an entity maintains the authority to control the essential terms and conditions of employment (*i.e.*, by potentially intervening at any moment), even if it has not exercised it and remains passive in day-to-day operations. This is similar to an aspect of the Labor Department's proposed rule addressing employee and independent contractor classification under the Fair Labor Standards Act, which would eliminate a regulatory provision stating that actual practice is more probative of employment status than what is contractually or theoretically possible. *See* 87 Fed. Reg. 62,218, 62,257–59 (Oct. 13, 2022). The Labor Department recently submitted its draft final rule to the White House's Office of Management and Budget for review, which is usually the final step in the rulemaking process.

2) Recognition of Indirect Control

In addition to reserved control, the NLRB's final rule takes into account control exercised through an intermediary or controlled third parties, a concept drawn from Section 2(2) of the NLRA. The NLRB explained that the inclusion of indirect control as a means for establishing joint employment is intended to prevent entities from evading joint-employer status by using intermediaries to make decisions about the essential terms and conditions of employment.

3) Defined Essential Terms & Conditions of Employment

The final rule broadly defines essential terms and conditions of employment to include wages, benefits, hours of work, scheduling, job assignments, supervision, work rules, tenure, and working conditions related to safety and health. Joint-employer status is only found under the final rule when an entity employs workers and has the authority to control *at least one* of these terms or conditions, regardless of whether they exercise that control directly or indirectly.

4) Collective Bargaining Obligations

Once an entity is deemed a joint employer due to its control over the essential terms and conditions of employment, the NLRB takes the position that it must engage in collective

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bargaining regarding these specific terms. Note, however, that the final rule clarifies that a joint employer is only obligated to bargain over subjects it has the authority to control, not those beyond its purview.

5) Challenges to the Final Rule Likely Ahead

The NLRB's new rule is likely to face litigation (as prior rules have) and challenges from Congress. On October 26, Senators Bill Cassidy (R-La.) and Joe Manchin (D-W.Va.) announced that they will introduce a Congressional Review Act ("CRA") resolution to overturn the new rule in light of their concern about its implications for small businesses and the American franchise model. If successful, the CRA would not only nullify the new rule but also prohibit the NLRB from publishing a rule that is "substantially the same."

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The NLRB's 2023 joint-employer standard could have far-reaching implications for employers across industries. Accordingly, in preparation for the final rule's implementation on December 26, 2023, employers should proactively engage in a careful, case-specific examination to grasp and clearly define their employment relationships with other entities, including roles, responsibilities, and the extent of control exerted over the essential terms and conditions of employment.

Gibson Dunn attorneys are closely monitoring these developments and available to discuss these issues as applied to your particular business.

The following Gibson Dunn attorneys assisted in preparing this client update: Michael Holecek, Jason Schwartz, Svetlana Gans, Rachel Brass, Katherine Smith, Andrew Kilberg, and Emily Lamm.

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 authors and practice leaders:

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