NLRB Joint Employer Regulations Provide Clarity but Not Full Picture

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The modern workplace has a dizzying array of formal and informal relationships between individuals performing work and the persons and entities they perform the work for—beyond just the typical employer/employee relationship. For employees in a traditional employment relationship, the identity of their employer is generally clear, but this is not always the case in today's world of outsourcing, gig work, franchising, subcontracting, joint ventures, strategic alliances, and other long- and short-term business arrangements.

This uncertainty concerning who is an employer has had a quite substantial effect on collective bargaining. Unions have been concerned for decades about the fracturing of the workforce and its effect on their ability to effectively bargain on behalf of their members. Businesses have similarly been concerned about the logistics of having to coordinate collective bargaining among two or more separate entities just to engage in potentially limited and short-term business arrangements.

While it always has been possible for two entities to legally be considered "joint employers" of a group of workers, the National Labor Relations Board (NLRB) under the Obama administration made this more common by expanding the definition of joint employer. Under this definition, a variety of relationships affecting the working conditions of employees became joint employment through the NLRB's attempt to apply an "economic reality" test to the National Labor Relations Act (NLRA). The NLRB, though, recently brought some clarity to at least a part of this landscape.

On February 26, 2020, the NLRB published new regulations strictly defining joint employer under the NLRA. These regulations, which become effective in May 2020, provide perhaps the narrowest definition of joint employment of any state or federal statutory or regulatory scheme. Businesses should remember, however, that this definition applies only to the NLRA, which governs private-sector labor relations—a shrinking share of the U.S. economy. This is not to say that these new regulations may not be persuasive to other agencies, courts, or to the states, but they are not binding outside the context of the NLRA. Consequently, it should not be assumed that this narrow definition will apply in other contexts.

The new regulations provide that two employers may be considered joint employers "only if the two employers share or codetermine the employees' essential terms and conditions of employment." In order to share or codetermine such terms and conditions of another employer's employees, the entity alleged to be a joint employer must exercise "substantial direct and immediate control" over such terms, i.e., a level of control having "a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees," as opposed to control that may only be exercised sporadically or on a de minimis basis. The NLRB identified eight specific

terms and conditions that it deemed "essential" and described what is and is not needed for a finding of substantial direct and immediate control over such terms or conditions:

1. Wages—The entity must actually determine wages paid to another employer's employees; entering into a cost-plus contract, even with a maximum reimbursable wage rate, is not direct and immediate control over wages.
2. Benefits—The entity must actually determine benefits to be provided to another employer's employees; merely permitting another employer to participate in its benefits plan is not sufficient.
3. Hours of work—The entity must actually set the work hours of another employer's employees; it is not enough for the entity to establish its own operating hours when it needs services from another employer.
4. Hiring—The entity must actually determine which employees are hired by another employee; it is not enough for the entity to set a minimum hiring standard.
5. Discharge—The entity must be making the actual termination decisions with respect to another employer's employees; it is not enough to bring misconduct reports to another employer or even to bar a particular employee from performing services for the entity.
6. Discipline—The entity must make actual disciplinary decisions (e.g., suspensions) regarding another employer's employees; again, it is not enough to report misconduct to another employer or express a negative opinion of another employer's employee.
7. Supervision—The entity must actually instruct another employer's employees how to do the job or actually issue employee appraisals; it is not enough to give minimal instructions about what work needs to be done.
8. Direction—The entity must assign another employer's employees their individual work schedules, positions, and tasks; it is not enough for an entity to set schedules for the completion of a project or to describe the work to be accomplished.

Under these regulations, businesses should be better able to review their relationships, and enter into new relationships, without inadvertently taking on liability as an employer under the NLRA. Through this analysis, union organization or activity at an employer will therefore less likely be of concern to potential customers and business partners who wish to avoid the obligation to bargain with a union.

The regulations also have the benefit of being stable. The NLRB has traditionally developed law through case decisions, which have tended to get reversed by new administrations, sometimes without much warning. Because changing regulations require notice to the public and a comment period, followed by a period of congressional review, businesses are now assured that they will receive warning before the NLRB may revert to a more aggressive version of joint employment analysis.

Many states, however, may adopt (or may already have adopted) a more expansive joint employer test for various state laws covering wage and hour, unemployment, and discrimination matters, much as states have done to clarify confusion over employee versus independent contract distinctions and given the shifting nature of NLRB regulations, as we noted earlier. Therefore, the determination of joint employer status will remain somewhat uncertain for some time—though at least under the NLRA, there is now certainty, stability, and a narrow view of joint employment.