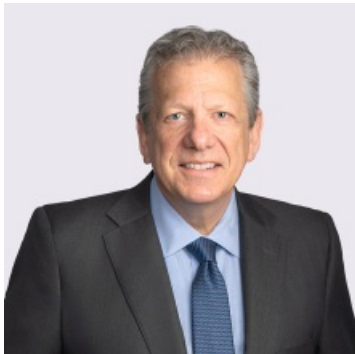


What a Return to Earlier Definitions of Joint Employer Means for Manufacturers, Temp Agencies

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Joint-employer rules appear to be changing again, and this will create challenges for manufacturers.

On July 29, 2021, the U.S. Department of Labor (DOL) rescinded an earlier version of the Joint Employer Final Rule implemented during the previous administration. The “new” rule is effective September 28, 2021, and is really a return to the much broader rule in effect prior to March 2020. Also pending in Congress is the PRO Act, and one of its key provisions would return the National Labor Relations Board’s joint-employer rule to its pre-2020 definition.

The return to the more expansive definitions of joint employer comes at a time when nearly all manufacturers are already struggling to staff their production facilities, and there appears to be a great shortage of workers at entry levels for general labor. What does the DOL’s move to the broader interpretation mean for manufacturers struggling to fully staff factories? What steps can manufacturers take to prepare for a return to a broader interpretation?

While the benefits of using temporary or contingent workers for manufacturing include flexibility and rapid response to fluctuations in demand, as well as providing a possible “runway” to regular employment, manufacturers need to be aware of how the return to the earlier version of the joint-employer rule can impact them in unintended, sometimes adverse, ways.

Both the DOL’s and the proposed PRO Act definitions expand the focus on direction and control of workers from actual or “substantial” evidence of control to the “right to control” (also referred to as “indirect control” or “reserved control”) over decisions affecting the work environment of the temporary workers. This change in focus from actual or “substantial” control to “right to control” or “reserved control” in many cases may have the intended effect: both the manufacturer and temporary agency found to be joint employers and jointly sharing liability for violations of wage and hour or other workplace laws.

This requires manufacturers to not only pay similar attention to working conditions for the temporary workers as is paid to regular employees, but to work together with the temporary agency in administering wages, as well as addressing workplace issues. In the short term, manufacturers should examine their temporary agency contracts to clearly understand how responsibility for decisions and liability for claims from workers will be allocated between the parties to the contract. A good working relationship between the manufacturer and the temporary agency should include a plan for how to investigate worker complaints so that liability can be minimized for both parties. Increased and regular communication between the parties can help avoid finger-pointing and address workplace issues before charges are filed. If charges are filed, the

parties should work through their respective legal counsel to address joint defense approaches in order to cooperatively and efficiently resolve charges. Staffing agencies will have to ensure their HR functions are effective.

Long-term, manufacturers should continue to evaluate their reasons for using temporary workers. Where possible, manufacturers should address underlying causes of worker shortages so they can reduce or eliminate increased vulnerabilities associated with high turnover due to uncompetitive wages or poor training, for example. By addressing root causes of worker shortages within their control, a manufacturer will likely not only reduce potential liability arising under workplace law, but improved the quality of their products and decrease missed production deadlines.

There are many sound business reasons for manufacturers to utilize temporary workers, such as rapidly responding to changes in production demands, fluctuations in the availability of parts or supplies, or using staffing agencies as a “temp to hire” recruiting tool. In some instances, temporary agencies may bring special expertise that a manufacturer can utilize.

The return to the more expansive definition of joint-employer rule, however, will mean that avoidance of liability for non-compliance with wage and hour laws (or any of the laws and regulations governing the workplace, for that matter) may be questionable as a basis not to utilize temporary workers. This means that, as a practical matter, many manufacturers should reexamine their own current approach to temporary worker utilization to ensure that the manufacturer and temporary agency are working closely together when it comes to compliance with workplace laws.

For additional guidance on this and other workplace issues, please contact a Jackson Lewis attorney.

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