Legal Update Article

Impact of Labor Board's New Joint-Employer Rule on Healthcare Industry

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December 11, 2023

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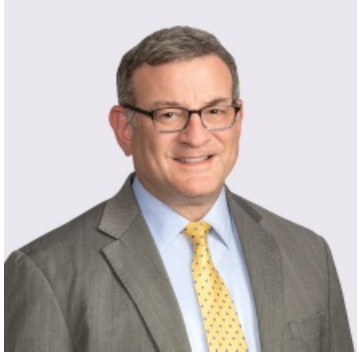

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The National Labor Relations Board's Final Rule for determining joint-employer status under the National Labor Relations Act raises serious concerns among healthcare employers who often use staffing agencies and other contractors.

The new rule expands the arrangements where the Board may find joint-employer status, going so far as to cover relationships with an intermediary or other third parties where the entity possesses the authority to control one or more of seven enumerated essential terms and conditions of employment, regardless of whether that control is actually exercised.

Joint-employer status is significant for employers, as it can determine whether an organization can be liable for an unfair labor practice committed by another entity or have a duty to collectively bargain with another entity's employees. The new rule therefore raises serious concerns among healthcare employers who often use staffing agencies and other contractors, particularly in the wake of the COVID-19 pandemic when hospitals, nursing homes, and other providers nationwide are facing a critical staffing shortage.

The Final Rule is scheduled to take effect February 26, 2024.

History of Joint-Employer Standard

For more than 30 years, the Board consistently maintained that a joint-employer relationship existed only where "two separate entities share or codetermine those matters governing the essential terms and conditions of employment." To find joint-employer status, the Board required evidence that a putative joint employer "meaningfully affect[ed]" matters relating to the employment relationship and that its control over such matters was "direct and immediate."

In 2015, the Board overruled this precedent, articulating a two-factor test for determining joint-employer status. *Browning-Ferris,* 362 NLRB No. 186. That standard evaluated:

1. Whether a common-law employment relationship exists; and

2. Whether the putative joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining."

In applying both prongs of the test, the Board no longer required "direct and immediate" control over workers to establish a joint-employer relationship. Instead, it considered both reserved and indirect control, such as through an intermediary or through contractual provisions that reserve the right to control, as potentially sufficient evidence to establish a joint-employer relationship, regardless of whether

the right to control is ever exercised.

Employers and pro-employer groups widely criticized the *Browning-Ferris* decision as impermissibly vague and impractical. They argued the standard lacked adequate guidance on potential bargaining obligations and the types of reserved or indirect control that may result in a joint-employment finding, among other problems. They also maintained the standard failed to serve the purpose of the Act by potentially imposing obligations and joint-and-several liability on a business that did not play an active role in making decisions regarding terms and conditions of employment.

In 2017, the Board under the Trump Administration overruled *Browning-Ferris* and reinstated the traditional "direct and immediate control" standard. *Hy-Brand,* 365 NLRB No. 156. For reasons unrelated to the substance of the case, however, that decision was vacated, and the broader *Browning-Ferris* joint-employer standard was revived. Following review by the U.S. Court of Appeals for the D.C. Circuit, and the case was remanded to the Board. The Trump-majority Board then issued a Final Rule on April 27, 2020, which "reinstated and clarified the joint employer standard in place prior to" *Browning-Ferris* (since 1984), again requiring proof of "direct and immediate" control over workers. Any indirect or reserved control would be considered only to the extent such evidence "supplemented and reinforced" one entity's direct and immediate control over essential terms and conditions of employment of another entity.

The New Rule

Under the Final Rule set to take effect on February 26, 2024, the Board returned to a modified version of *Browning-Ferris.* An entity is a joint employer of another employer's employees if the two share or codetermine the employees' "essential terms and conditions of employment." The Final Rule provides an exhaustive list of the essential terms and conditions it will review:

1. Wages, benefits, and other compensation;
2. Hours of work and scheduling;
3. The assignment of duties to be performed;
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.

The reserved right to control at least one of these essential terms and conditions will be given determinative weight in the analysis, "whether or not such control is exercised, and without regard to whether any such exercise or control is direct or indirect." This means that even indirect control through a staffing agency supplying nurses or other healthcare workers can be sufficient to establish joint-employer status. Accordingly,

employers could be held as joint employers if they "possess the authority to control (whether directly, indirectly, or both), or exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment."

Impact on Healthcare Employers

Certain business entities, such as healthcare organizations, can be more susceptible to a finding of joint-employer status due to how often the entities in the industry contracts with vendors and staffing agencies. This is particularly true in light of the nursing shortage across the healthcare industry that required many organizations to use staffing agencies to supplement their workforce. Other common business arrangements in the industry that can create a joint-employment relationship include contracting with payroll services or human resource companies or healthcare organizations acting as the parent company of a subsidiary's employees.

Healthcare employers must be diligent in day-to-day practices regarding another entity's workforce because even reserved or indirect control over issues such as handbook compliance, compensation, continued assignment to a particular unit or facility, or health and safety measures can trigger joint-employer status. As a result, employers may want to consider ceding reserved control over workers brought in through a staffing agency or contractor. Although it is often necessary for organizations to exercise some degree of oversight over their labor contractors and temporary workforce, employers will have to balance between maintaining control (even if not exercised) and implementing a hands-off approach.

Likewise, employers also may want to revisit vendor contracts to review terms and obligations relating to the workforce. One strategy that can mitigate risk is to carefully craft contracts with vendors, staffing agencies, or other entities expressly outlining the relationships between the parties and ensuring each party understands its obligations. For example, employers using staffing agencies to relieve administrative burdens from human resource management may want to reduce risk by letting the outside agency perform the routine functions of hiring, firing, setting compensation, scheduling, and recordkeeping. It also may be beneficial to train managers and supervisors to avoid micromanaging the contracted workforce.

Choosing the right agencies and contractors will also be crucial. Such entities will need to understand that mitigating the joint-employer risk is an essential component of the business relationship. Employers may want to work with experienced and cooperative agencies in structuring the relationship and administering the staffing agreement accordingly. Employers should therefore take steps now to reduce the prospect of joint-employer liability.

Please contact a Jackson Lewis attorney with any questions.