NLRB ISSUES FINAL RULE REGARDING THE STANDARD FOR DETERMINING JOINT-EMPLOYER STATUS

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On October 27, 2023, the National Labor Relations Board (the "NLRB" or "Board"), the agency that enforces the National Labor Relations Act ("NLRA"), published a final rule addressing the Standard for Determining Joint-Employer Status. This final rule establishes that "two or more entities may be considered joint employers of a group of employees if each entity has an employment relationship with the employees, and if the entities share or codetermine one or more of the employees' essential terms and conditions of employment."

BACKGROUND

The final rule rescinds and replaces the 2020 final rule, which took effect on April 27, 2020. Under the 2020 final rule, an entity was a joint employer of a separate employer's employees only if the two employers shared or codetermined the employees' essential terms or conditions of employment. The Board defined "share or codetermine" as the possession and exercise of "such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." Indirect control was insufficient to hold an entity liable as a joint employer.

Somewhat predictably following the change in administration, the NLRB now asserts that the 2020 final rule made it possible for "actual" joint employers to avoid a finding of joint-employer status because of the threshold requirement that entities must "'possess and exercise . . . substantial direct and immediate control' over essential terms and conditions of employment."

2023 FINAL RULE

The new 2023 final rule makes it easier for entities to be treated as joint employers. Specifically, the rule "considers the purported joint employers' authority to control essential terms and conditions of employment, *whether or not such control is exercised*, and without regard to *whether any such exercise of control is direct or indirect*."

Essential terms and conditions of employment are defined as:

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.

Thus, an entity that can exercise direct or indirect control over such terms and conditions of employment may be considered a joint employer for purposes of the NLRB. Unfortunately, many employees provided by temp agencies may easily be deemed to be under the control of their actual employer, the employing agency, and the contractor who has hired services from the employing agency under this new test. However, "[w]hile the final rule establishes a uniform joint-employer standard, the Board will still conduct a fact-specific analysis on a case-by-case basis to determine whether two or more employers meet the standard."

An entity that is deemed to be a joint employer will be required to bargain over the essential terms and conditions that the entity has control over, as well as "all other mandatory subjects of bargaining that it possesses or exercises the authority to control." Such entities also will potentially be liable for and required to defend against other claims that may be brought against a traditional employer, as plaintiffs may argue for the application of this test in different contexts.

CONCLUSION

Under the NLRB's new rule, entities may be more likely to be considered joint employers and thus subject to NLRB bargaining and other employment requirements. Unfortunately, no specific industries or sectors (including health care) are exempt from the Final Rule. The NLRB's Final Rule may significantly impact hospitals and health systems that rely on contracts with staffing agencies. We recommend that employers review the NLRB's 2023 final rule and consider whether they have control, directly or indirectly, over the above-listed terms and conditions of employment and whether that control is exercised. Amending agreements may be essential to help limit liability.

If you have any questions or need further guidance regarding this final rule or the NLRA generally, please contact a member of Hancock Daniel's Labor & Employment team.