The Work Week

Bassford Remele Employment Practice Group

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Welcome to another edition of *The Work Week with Bassford Remele.* Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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NLRB Expanding The Joint Employer Rule

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On October 27, 2023, the National Labor Relations Board (NLRB) issued its final rule on the new legal standard for determining joint-employer status under the National Labor Relations Act (NLRA). The new rule, "Standard for Determining Joint-Employer Status under the National Labor Relations Act," repeals the 2020 joint-employer rule and goes into effect on December 26, 2023. The rule will apply to cases filed after the effective date.

The current rule from 2020 considers an entity a joint employer if it "possess[es] the authority to control" or "to exercise the power to control" an employee's "essential terms and conditions of employment." Importantly, the new rule does not require that control actually be exercised, but only requires authority (directly, indirectly, or both) to control. Also, the new rule expands the definition of "essential terms and conditions of employment." It includes these seven terms:

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.

With this expansive rule, the NLRB hinted that it will be "mindful" in applying the final rule, taking into account any industry-specific context as well. The new rule is derived from the 2015 NLRB decision *Browning-Ferris Industries of California, Inc.* In the majority opinion, the Board stated that rejecting the "direct and immediate control framework" for a joint-employer standard was more established in common law agency principles. Chairman Lauren McFerran issued the following statement:

> The Board's new joint-employer standard reflects both a legally correct return to common-law principles and a practical approach to ensuring that the entities effectively exercising control over workers' critical terms of employment respect their bargaining obligations under the NLRA. While 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.

The impact of the new rule will make it easier for employers to qualify as a joint employer because an employer need not actually exercise control over essential terms or conditions of employment, but merely has authority to do so. This rule will likely be challenged in court, and Senators Bill Cassidy and Joe Manchin immediately announced a resolution to overturn the new joint-employer rule due to its likely impact on franchise owners. Businesses that utilize staffing firms or franchisors will likely be impacted by the changes.

At Bassford Remele, we regularly advise and counsel employers on updating policies and practices to remain compliant with changing laws. Please feel free to reach out if you need any assistance in reviewing the policies and actual practices of your business to develop a proactive plan to avoid actions that might be indicative of a joint employer.

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