SAXTON & STUMP
LAWYERS AND CONSULTANTS

NEWS & INSIGHTS

NLRB reverses course, proposes new definition for "joint employer"

BY: RICHARD L. HACKMAN, STEPHEN J. FLEURY, JR. | INSIGHTS | LEGAL UPDATE

SEPTEMBER 19, 2022

An important, barely two-year-old rule from the National Labor Relations Board could already be on the way out.

The NLRB announced this month that it has proposed new criteria defining a "joint employer" – two employers that share the responsibility and liability for an employee or group of employees. The new rule would replace the board's current definition, which is perceived as employer-friendly, and establish a much more employee-friendly model.

Since at least 2015, the NLRB has taken the position that an entity may be a joint employer even where it has exercised "indirect control," or where it "reserved" but did not actually exercise control, over workers. Under the

Trump Administration, in 2020, the NLRB adopted a heightened standard requiring that an entity exercise “direct and immediate control” over workers in order for it to potentially be considered a joint employer.

The proposed rule largely restores the “reserved or indirect control” standard thereby returning to a much broader definition of joint employer. Moreover, according to the proposed rule, two or more employers would be joint employers if they “share or codetermine those matters governing employees’ essential terms and conditions of employment.” “[S]hare or codetermine” is defined to include the “authority to control,” whether directly or indirectly.

The proposed rule also provides a non-exhaustive list of the essential terms and conditions of employment to include: “wages, benefits and other compensation, work and scheduling, hiring and discharge, discipline, workplace health and safety, supervision, assignment and work rules and directions governing the manner, means or methods of work performance.” This represents a significant change from the current rule which provides a shorter, inclusive list of essential terms and conditions.

The proposed rule could significantly impact businesses that outsource employees, especially in the trucking and healthcare staffing industry, as well as those in the franchise industry. Under the current rule, many franchisors are protected from certain labor violations by individual store owners and third-party contractors because the franchisors are generally not considered joint employers. But if the proposed rule goes into effect, the risk of liability for these franchisors will likely increase. Additionally, organizations that use labor contractors – or temp agencies – will likely face increased exposure for labor law violations by those contractors and/or the agencies that employ them. The proposed rule will render an increasing number of businesses that utilize independent contractors to be deemed joint employers.

The NLRB is accepting public comment on the proposed rule until Nov. 7. To send public comment, click here. Once the comment period closes, the NLRB will finalize the proposed rule, but it is not expected to undergo significant change. It will likely take effect sometime in early 2023.

In anticipation of this rule change, there is no better time to have your existing contracts with independent contractors, staffing or temp agencies and franchisees reviewed by experienced legal counsel. Policies and procedures should also be reviewed and updated to ensure clarity as to which party is responsible for various terms and conditions of employment. If your business does not yet have appropriate contracts, policies and procedures in place, now is the time to have them created.

If you have any questions about the proposed rule or how it could affect your business, please contact attorney Rick Hackman or any other member of the Saxton & Stump Labor and Employment group.

Related People

Richard L. Hackman
Stephen J. Fleury, Jr.

Related Services and Industries

Labor and Employment