MorrisonCohen LLP

Client Alert

## NLRB Issues Final Rule for Determining Joint Employer Status

This week the National Labor Relations Board ("NLRB") issued its final rule ("Final Rule") concerning the standard for determining joint-employer status under the National Labor Relations Act ("NLRA"). This standard applies to most private sector employers. The Final Rule, which goes into effect April 27, 2020, is intended to provide guidance to the agency and employers under its jurisdiction in determining whether an enterprise is considered a joint employer of employees directly employed by another employer. The Final Rule abrogates the Obama-era test permitting businesses to be deemed "joint employers" if they exercise "indirect control" of a contractor or franchisee, and now implements a more heightened standard such that a business must exercise "substantial and immediate control over one or more essential terms and conditions of employment" in order to be deemed a joint employer.

## Background

On December 14, 2017, the NLRB overruled its earlier decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015) and announced that two or more entities will be deemed "joint employers" only if there is "proof that one entity has exercised control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so directly and immediately (rather than indirectly) in a manner that is not limited and routine." On September 13, 2018, the NLRB announced a further proposed rule aimed at codifying the December 14, 2017 decision and definitively overturning the "indirect control" test previously established in *Browning-Ferris*. A protracted notice and comment period followed, which yielded tens of thousands of comments and resulted in the Final Rule published this week. Those comments, predictably, ranged from approval of the new restricted

definition by private enterprise groups and dissent from labor and other employee rights-oriented groups.

## The New Final Rule

The Final Rule specifies that a business is a joint employer of another employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment. The "essential terms and conditions" of employment include wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. Moreover, the Final Rule provides that to be a joint employer, a business must *possess and exercise* such "substantial direct and immediate control" over one or more essential terms and conditions of employment of another employer's employees. The Final Rule defines "substantial direct and immediate control" as direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees. The Final Rule is thus clear that such control is not "substantial" if it is only exercised on a sporadic, isolated, or *de minimis* basis. While the exercise of indirect control or contractually reserved control over workers can be a factor in determining joint employer status, evidence showing that a company *actually exercised* its authority or control is now required.

## Takeaway for Employers

Despite the fact that fewer employers may be covered by the NLRB's heightened standard for determining joint-employer status, the Final Rule and its interpretative guidance (*see* NLRB Press Release and Fact Sheet) make clear that a non-union "joint employer" will still be obligated to participate in collective bargaining negotiations concerning its related company's unionized workforce, regardless of whether it itself has a collective bargaining relationship with a union. Furthermore, each business deemed a joint employer may be found jointly and severally liable for the other's unfair labor practices regardless of whether their own specific conduct gave rise to the liability. By way of example, if Company A is found to be a joint employer of Company B because it "shares or codetermines the employees' essential terms and conditions of employment" of Company B's employees, and Company B is found to have committed an unfair labor practice against its employees, Company A will be jointly and severally liable for Company B's unlawful actions. In this example not only will Company A be liable for Company B's unlawful labor practices (and in many instances Company A

will be a far deeper pocket than its joint-employer) but it will result in Company A's non-economic liability, such as its obligation to post official notices at its workplace that it has violated the NLRA, when, in reality, only Company B committed the unfair labor practice.

While the Final Rule will be seen as providing relief to businesses who fear joint-employer status and liability, the manner in which the Final Rule will be interpreted by the Agency and the courts is an open question.

If you require any additional information concerning the Final Rule or joint employer issues in general, or about any other employment-related issues, please contact:


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