Dont Confuse New Joint Employer Rules

PUBLISHED ON
February 28, 2020

Is that worker an "employee" of that company? Or of another company? Or both?

This joint employer question implicates two federal laws: the Fair Labor Standards Act (FLSA), which considers if employers are jointly liable to employees for payment of wages and overtime. The second is the National Labor Relations Act (NLRA), which considers whether an employer is a joint employer liable for unfair labor practices, and whether the company is obligated to bargain with workers.

The National Labor Relations Board enforces the NLRA. If a company is found to be a joint employer under the NLRA, it must participate in collective bargaining with employees and the unions that represent them over their terms and conditions of employment. Additionally, companies found to be joint employers under the NLRA may be held jointly and severally liable for unfair labor practices committed by the other employer.

However, the FLSA has a completely different standard that implicates wage-and-hour law. We received clarification about the FLSA joint employer rule in January when the U.S. Department of Labor finalized its joint employer rule . One of the interesting outcomes of the FLSA final joint employer rule is that 18 state attorney generals, including AG Josh Shapiro, filed a lawsuit claiming the proposed change in the FLSA joint employer rule would cause fewer employers to be liable for unpaid wages, creating incentives for increased wage theft and other labor law violations.

But while those 18 states were formulating their lawsuit against the U.S. Department of Labor concerning the clarification in the FLSA, the NLRB was coming up with its own change to the definition of a joint employer. Tuesday, the board issued a final rule that will help companies answer the "Who is the employer?" question when it comes to collective bargaining and employer liability for unfair labor practices. The new rule rolls back the more expansive test for determining joint employer liability that the NLRB adopted in 2015 *Browning-Ferris Industries of California, Inc.*, which made it possible for a business to be deemed a joint employer if it exhibited "indirect control" over another employer's employees or reserved the ability to exert such control. The new rule reinstates the standard that the NLRB applied for several decades prior to the Browning-Ferris decision. This standard provides that a company is only a joint employer if it exercises "substantial direct and immediate" control over one or more essential terms and conditions of employment of another employer's employees.

Under the NLRB's final rule, an employer may be considered a joint employer of a separate employer's employees only if the two employers "share or codetermine the employees' essential terms and conditions of employment." To share or codetermine the essential terms and conditions of employment, the rule provides that an employer must possess and exercise "such substantial direct and immediate control" over one or more of those eight core aspects of employment as would warrant a finding that the business "meaningfully affects matters relating to the employment relationship" with those employees.

Once again, it is good to be an employer under President Donald Trump's administration. The final rule is an important development for companies covered by the NLRA who use sub-contractors, staffing agencies, franchise models, and other arrangements that have historically faced litigation over their alleged joint employer status. The legal standard used by the NLRB has significant implications for those businesses since the NLRB's final rule restricts the circumstances in which businesses that use employees hired by third parties will be considered joint employers. It reduces the risk of litigation for unfair labor practices, and reduces many companies' obligations to bargain with franchisee or subcontracted workers.

The nearly 200-page final NLRB rule published in the Federal Register on February 26, and will take effect on April 27.

For help interpreting this 200 pages of NLRB joint employer rule, please contact me or anyone in the Barley Snyder Employment Practice Group.