BARNES & THORNBURG LLP

NLRB Proposes Rescinding Trump Board Rule And Expanding Definition Of 'Joint Employer'

September 8, 2022 | Labor And Employment,National Labor Relations Board

Aaron Vance
Associate

The National Labor Relations Board (NLRB) issued on Sept. 6 its expected proposed rule broadening the definition of a joint employer and overturning the rule promulgated by the previous board. The NLRB had signaled this major rule change was forthcoming and it was announced days after the NLRB issued its first major decision under President Biden, overturning established precedent in *Tesla Inc.*, 370 NLRB 131 (2022).

The public will have until November 7, 2022, to provide feedback before the NLRB issues its final rule. When finalized, this proposed rule will not only expand the scope of organizing and bargaining efforts around staffing company employees, but franchise employees as well.

In addition, this rule will likely provide the jurisdictional justification for the NLRB to take on cases concerning collegiate student athletes, for which NLRB General Counsel Jennifer Abruzzo has shown interest.

When shared workers, such as staffing company employees, seek to organize or file a charge with the NLRB, the board must determine which employer(s) 1) must recognize these organizing efforts, 2) be present during bargaining, and 3) be potentially held liable for an unfair labor practice. In these instances, the board applies the joint employer standard.

The issue of who qualifies as a joint employer has been lingering since the Obama board took up the issue in *Browning-Ferris Indus.*, 362 NLRB 186

RELATED PRACTICE AREAS

Labor and Employment
Labor Relations
National Labor Relations Board (NLRB)

RELATED TOPICS

Joint Employers
Labor Relations

(2015). In that decision, the NLRB announced it would rely on common law precedent to determine when entities qualified as joint employers. Specifically, the NLRB held that joint employers were not required to exercise direct control, but might retain "reserved or indirect control."

The Trump board limited this standard in 2020 with its own rule. This included limiting joint employers to only those that have "direct and immediate" control over workers' "essential terms and conditions of employment." The rule limited what qualified as an "essential term" to an exhaustive list that only included "wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction."

Under the recent proposed rule, however, multiple employers would be considered joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment" whether directly, indirectly, or together. Unlike the previous rule, this test will be applied broadly to determine joint employer status. Specifically, the definition of "essential terms and conditions of employment" is not limited to an exhaustive list, but is replaced by an open-ended list of possible terms and conditions of employment ("will generally include, but are not limited to: wages, benefits . . . .")

With this return to the "common law" factors, the NLRB has made it clear that it is not afraid to reverse course concerning board precedent to champion its aggressive pro-labor policy agenda. Hot on the heels of the *Tesla* decision, this proposed rule makes it clear that employers should continue to be mindful of this rapidly changing landscape and what these new rules might mean for their workplace's policies and practices.