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The National Labor Relations Board Issues Expansive Joint Employer Rule

By Morris Hawk

Do you use a staffing agency to provide workers for your day-to-day operations?

Are you a franchisor that licenses your trademark and business model to franchisees?

If you answered "yes" to either of these questions, you should keep reading because the NLRB has just made it easier for you to be dragged into an unfair labor practice dispute or forced to the bargaining table as a "joint employer" of your staffing agency's or franchisee's employees.

Under the NLRB's new "joint employer" rule, a company that directly or indirectly exercises the power to control, or simply possesses the authority to control, just one of seven listed essential terms and conditions of employment for staffing agency workers at its facility will be considered a "joint employer" of those workers. The same rule applies to franchisors. And the list of essential terms and conditions is comprehensive. Direct or indirect control, or authority to control, any of the below is sufficient to establish joint employment (and joint liability):

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 employees, including hiring and discharge, and,
7. Working conditions related to the safety and health of employees.

Prior to this new rule, a joint employment relationship under federal labor law could only be established if the putative joint employer actually exercised direct and immediate control over terms and conditions of employment. Upon the new rule's effective date of December 26, 2023, all that will be required is that the putative joint employer has the authority to control one essential term and condition of employment, even if it does not exercise this authority. Merely providing an employee handbook to a franchisee may be enough for a franchisor to be considered the joint employer of the franchisee's employees.

Needless to say, this rule radically alters the playing field for companies that utilize staffing agencies and the franchise industry. The International Franchise Association has already announced that it will "use every avenue available" to stop the rule. There is also a bipartisan effort in Congress, announced by Senator Cassidy (R. La.) and Senator Manchin (D. W.Va.), to introduce a Congressional Review Act resolution to overturn the rule.

We will keep you updated on these efforts. If you have any questions, please feel free to contact any of our employment attorneys.

Aretta Bernard
Practice Group Manager
Employment Services
330.849.6630 | abernard@ralaw.com

Susan Keating Anderson
Practice Group Manager
Education Law
216.232.3595 | sanderson@ralaw.com

Heather Renée Adams
312.241.9991 | hradams@ralaw.com

Karen Adinolfi
330.849.6773 | kadinolfi@ralaw.com

Lisa Burleson
614.645.5278 | lburleson@ralaw.com

Ben Chojnacki
216.377.1492 | bchojnacki@ralaw.com

Alejandro Cortes
216.293.8171 | acortes@ralaw.com

Barry Freeman
216.615.4850 | bfreeman@ralaw.com

Morris Hawk
216.615.4841 | mhawk@ralaw.com

David Hirt
216.329.0558 | dhirt@ralaw.com

Paul Jackson
330.849.6657 | pjackson@ralaw.com

Nancy Noall
216.820.4207 | nnoall@ralaw.com