NLRB Proposes New Rule That Would Expand the Scope of Joint Employment

On Sept. 6, 2022, the National Labor Relations Board (Board) released a Notice of Proposed Rulemaking that would revise the standard for determining joint-employer status under the National Labor Relations Act (NLRA). The proposed standard would rescind and replace the joint-employer rule that has been in effect since April 27, 2020.

The standard for determining joint-employer status has changed frequently throughout the years. In 2015, the Board's decision in *Browning-Ferris* established a joint-employer standard that broadly expanded the definition of joint employer and effectively overturned years of labor law precedent. Under the *Browning-Ferris* decision, an employer was considered to be a joint employer if the employer had either a direct or indirect contractual right to control any terms and conditions of an employee's employment. This decision went beyond the prior standard, which required the putative joint employer to exercise actual control over the essential terms and conditions of employment, with such control being "direct and immediate." The Board additionally identified a non-exhaustive list of essential terms and conditions that an employer must assert control over in order to be deemed a joint employer. The broad standard established by the *Browning-Ferris* decision dramatically increased the universe of potential joint employers.

The Board then shifted toward a more employer-friendly version of the joint-employer standard with the adoption of the current joint-employer standard on April 27, 2020. Under the Board's 2020 rule, an employer is considered a joint employer if the employer shares or codetermines the employee's essential terms and conditions of employment. In direct contrast with the *Browning-Ferris* standard, the Board no longer considers indirect control over an employee's terms and conditions of employment when analyzing joint-employer status under the current rule. The Board further limited the list of essential terms and conditions that an employer must have control over, which only includes wages, benefits, hours of work, hiring, discipline, discharge, supervision and direction. Under the current standard, an employer is less likely to be considered a joint employer because the Board requires a higher standard of "substantial direct and immediate control" over employment terms.

The Board's newly proposed 2022 rule, however, seeks to replace the 2020 standard with a less demanding legal standard intended to expressly ground the joint-employer rule in common-law agency principles. The new rule would reject the 2020 rule's focus on "direct and immediate control" and would restore the *Browning-Ferris* "indirect, reserved" control standard. Under the proposed rule, two or more employers would be considered joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment." The Board defines "share or codetermine" to mean "for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment."

In analyzing joint-employer status, the Board proposes consideration of both direct evidence of control and evidence of reserved and/or indirect control over the essential terms and conditions of employment. Therefore, an employer's indirect or unexercised authority to control would again be enough to find joint employment. Additionally, the new rule would expand the 2020 rule's non-exhaustive list of terms and conditions to include, "wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or method of work performance."

Although the joint-employer rule is constantly transforming, it is important for employers to remain updated on these changes because an employer's joint-employer status can result in serious consequences. The rule is still in the proposal stage. However, if the rule becomes final, the new joint-employer standard could significantly impact employers that regularly work with other entities, such as contractors, franchisors and temporary staffing agencies. If an employer is found to be a joint employer under the NLRA, the employer may be required to bargain with a union representing jointly employed workers and could potentially share liability for violations of the NLRA.

The Board has invited the public to comment on all aspects of the proposed rule. The public comment period will be open until Nov. 7, 2022 and replies to comments filed during the initial comment period must be filed with the Board on or before Nov. 21, 2022. Due to the notable history and evolution of the joint-employer standard under the NLRA, it can be anticipated that the proposed rule will generate substantial commentary.

For more information on the information presented in this information memo, please contact Gianelle M. Duby, any attorney in Bond's labor and employment practice or the Bond attorney with whom you are regularly in contact.

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