

November 21, 2023

The “Joint Employer” Pendulum Swings Again. Or Does It?



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For the third time in eight years, employers again face uncertainty as to whether they may be considered a “joint employer” with another business. This question is not academic and can have real world consequences.

What if, for example, your company suddenly receives a union’s petition to represent workers that you thought were the employees of the staffing agency that supplied them, supervised them and agreed in writing to be their sole employer? If you’re found to be a “joint employer,” then you’ll have the duty to bargain over the terms and conditions of their employment – an obligation (and costs) that you hadn’t planned for – along with facing joint liability if the staffing agency engages in unfair labor practices that gets you both sued.

That was the basic scenario in the 2015 Browning-Ferris case, where the National Labor Relations Board (NLRB) overturned the standard (since 1984) that a joint employer not only had to “possess the authority to control employees’ terms and conditions of employment, but also exercise that authority.” Instead, the employer’s “indirect or potential control over terms and conditions of employment” would also be considered.

In 2020, after the NLRB changed composition (as it does with every flip of the president’s political party), it reverted to the rule that a joint employer “must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment” like hiring, firing, discipline, supervision and direction.

You know where I’m going next: On October 26, 2023, the current NLRB rescinded the 2020 rule and issued its “final rule” that “considers the alleged joint employers’ authority to control essential terms and conditions of employment, whether or not such control is exercised, and without regard to whether any such exercise of control is direct or indirect.” In apparent recognition of prior criticism that the Browning-Ferris version of the rule is difficult to apply in practice, the NLRB expressly limited consideration of the “essential terms of employment” to:

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 employment, including hiring and discharge; and
7. working conditions related to the safety and health of employees.

But while the rule was set to take effect on December 26, 2023, the NLRB has announced the date will be extended to February 26, 2024, “to facilitate resolution of legal challenges with respect to the rule.” That extension could also get extended depending on how

long those “legal challenges” take, and we can only wait and see the outcome.

If history is any guide, then we might expect the pendulum to swing again. And keep in mind that joint employment also arises in other contexts, like wages and overtime (FLSA), workplace safety (OSHA) and civil rights (Title VII). The agencies that enforce those laws have their own standards that may resemble but are not identical to the NLRB's.

So how can a business that might find itself in a joint employment situation manage this continuing state of legal whiplash? We can also look to history to see that, no matter the composition of the NLRB, the particular facts of a situation remain critical to the analysis. That means employers should take a close look at the nature of their relationship with workers being supplied from outside their organization. Are the workers indistinguishable from direct hire employees, or performing specialized services isolated from normal operations, or something in between? The answer may inform how the contract should be written to allocate risk.

A member of Gould & Ratner's Human Resources and Employment Law Practice is available to discuss any questions you may have.