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Federal Court Invalidates National Labor Relations Board Joint Employer Regulations

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The U.S. District Court for the Eastern District of Texas invalidated the National Labor Relations Board's (NLRB) recent joint employer regulations on March 8, 2024. As things stand, the new regulations will not be put into effect. The new regulations could have significantly lowered the bar for a "joint employer" finding. The regulations could have had major consequences for franchisors or businesses that used outsourced labor. If found to be a joint employer, such companies would have to bargain with a union if the employees of the other employer chose to unionize.

The NLRB's Joint Employer Regulations

Under the NLRB's current joint employer rule, which was established through regulations in 2020, the agency will find joint employer status only where a company exercises "direct" and "immediate" control over another employer's employees when it comes to at least one of the following working conditions: (1) wages; (2) benefits; (3) hours of work; (4) hiring; (5) discharge; (6) discipline; (7) supervision; and (8) direction of work. Under the current rule, theoretical (or reserved) authority to control these subjects is not sufficient, nor is indirect control. To give one example, under the current rule a "cost-plus" staffing contract is not sufficient to result in a joint employer finding. Similarly, if an employer has the right to order that a staffing agency remove an employee from its premises, that will not be sufficient to show that the employer controls the disciplinary practices of the staffing agency.

In October 2023, the NLRB announced that it was replacing its joint employer regulations and adopting a new rule dictating that a joint employer finding must be made in situations where an employer exercised control (either direct or indirect) over, or reserved to itself the right to control, the eight (8) above categories of working conditions, as well as: (1) "[w]ork rules and directions governing the manner, means, and methods of the performance;" and (2) "[w]orking conditions related to the safety and health of employees." Under these new regulations, the exercise of indirect control (such as a cost-plus contract or generalized work instructions) may have been sufficient to result in a joint employment finding. Additionally, language in a franchise or staffing contract stating that an employer had the right to control the above working conditions, even if they were not exercised, likely would have been enough to result in a joint employer finding. Of note to the court, the addition of control over "health and safety" matters could have made it a near certainty that all businesses using outsourced labor were joint employers.

The Chamber of Commerce's Lawsuit

The NLRB announced that the new regulations would take effect on December 26, 2023. The Chamber of Commerce filed a lawsuit in the U.S. District Court for the Eastern District of Texas. Pending the resolution of that case, the implementation date was delayed (first by the NLRB, and then by the court). Thus, these regulations have not, to date, been implemented.

In the decision issued on March 8, the court agreed with the Chamber of Commerce that the new regulations were invalid because they simultaneously purported to be based on the common law test for joint employer status and undercut and contradicted that test. Because the NLRB could not explain this internal inconsistency, the court found that the regulations were impermissible and should be invalidated. The Chamber of Commerce also attacked the regulations on the grounds that they are arbitrary and capricious, but the court did not find it necessary to reach that issue.

What Happens Now, and What Should You Do?

This decision is a significant development that affects employers nationwide. Because of the court's ruling, the NLRB's revised joint employer regulations will not become effective – for now, at least. The NLRB can appeal the case to the Fifth Circuit Court of Appeals, which could reverse the trial court. Additionally, the Service Employees International Union filed an action "challenging" the regulations with the U.S. Court of Appeals for the District of Columbia. (In case you are wondering why a union challenged these regulations, this was done as a tactical matter in the hopes that the appellate court would uphold the NLRB's rulemaking.) That case remains pending, and it is unclear what might result from a finding from that court that the regulations are valid.

Employers would be best served to treat this positive development as an additional reprieve – possibly permanent, but also possibly temporary – from the NLRB's new joint employer regulations and think about whether they need to change their operations or business relationships in the event either the Fifth Circuit or D.C. Court of Appeals makes these new regulations the law of the land.

We will continue monitoring these developments and will keep our clients updated. If you have any questions about these recent developments, contact Louis J. Cannon Jr., Cassandra L. Horton, or any member of Baker Donelson's Labor & Employment Team.