

NLRB ALERT: Board Broadens “Joint Employer” Test (Again)

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Political vicissitudes at the National Labor Relations Board (NLRB) continue to cause substantial changes in federal labor law. The latest change relates to whether and how entities other than a direct employer may be considered “joint employers” under labor laws. This “joint employer” test is significant: it determines, among other things, whether an entity must bargain with a set of workers about the terms and conditions of their employment.

This week, the NLRB issued a new final rule on the “joint employer” test, one which reverses a rule passed under the Trump administration in 2020 and restores a rule passed under the Obama administration in 2015.

The crux of the conflict between these shifting rules centers on the nature and degree of control that an entity must have or exercise over workers to be deemed a “joint employer” of said workers. Generally, an entity is a “joint employer” under either test if it “shares or codetermines” the terms and conditions of employment. However, the similarities between the “old” and “new” rules mostly end there.

Under the new rule, an entity may be deemed a “joint employer” even if its control over the terms and conditions of employment are not, in fact, exercised. In other words, the “new” test considers indirect or reserved control or rights to control as indicative of “joint employer” status.

Critics and commenters on this “new” rule predict that one of its effects will be “more frequent joint-employer findings in the staffing, healthcare, and franchise industries.” Will this bear out? Only time will tell but the prediction seems reasonable given the substance of the 229-page summary of and commentary on the new rule.

If you want to learn more about this maze of “joint employer” rules and guidance, contact us now. Our Labor & Employment Team at Sandberg Phoenix stands ready to help you understand and take immediate action to ensure legal compliance and mitigate against business risks implicated by this new rule.