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BREAKING: NLRB Drops Attempt to Revive 2023 Joint-Employer Rule

Labor Relations Update on **July 22, 2024**

On July 19, 2024, the National Labor Relations Board (NLRB) voluntarily dismissed a pending appeal before the United States Court of Appeals for the Fifth Circuit, which sought to reverse a decision by the Eastern District of Texas that vacated the joint-employer final rule.

As previously reported here and here, the NLRB's 2023 final rule on joint-employer status was challenged by the U.S. Chamber of Commerce. On February 26, 2024, the district court issued a stay, and later ruled against implementation of the final rule. On May 7, 2024, the NLRB filed a notice of appeal of the district court's decision. The 2023 final rule has not gone into effect.

At the same time, there were two other cases pending on the joint-employer doctrine in the D.C. Circuit, filed by the Service Employees International Union. On April 30, 2024, one of the cases was stayed by the D.C. District Court and since then, the second case was placed in abeyance by the D.C. Circuit.

In its Notice of Voluntary Dismissal, the NLRB stated that it still believes the 2023 rule meets the procedural and substantive requirements of the Administrative Procedure Act and the National Labor Relations Act—the district court held that the 2023 rule did not comply with these provisions.

However, the NLRB submitted to the court that it preferred to "further consider the issues in the district court's opinion in the first instance," and noted that there were several rulemaking petitions on its docket regarding the joint employer issue raising similar issues.

In terms of where the joint-employer rule will go from here, the NLRB's unopposed motion for voluntary dismissal under Federal Rule of Appellate Procedure 42(b) essentially makes the district court's ruling final for purposes of the parties, and the 2023 final rule will not proceed at this time. It is unclear what impact the dismissal will have on the pending cases in the D.C. Circuit (typically, a more favorable forum for the NLRB than the Fifth Circuit).

Based on the NLRB's comments to the Fifth Circuit, it may (1) proceed with additional rulemaking on this issue (incorporating the rationale of the district court in its opinion vacating the rule), and/or (2) address the joint-employer doctrine through a case decision, which had been the Board's prior approach before the 2020 rule was implemented.

The standard for joint-employer status under the NLRA remains as follows:

An employer…may be considered a joint employer of a separate employer's employees *only if* the two employers share or codetermine the employees' essential terms and conditions of employment. To establish that an entity share or codetermines the essential terms and conditions of another employer's employees, the entity must *possess* ***and*** *exercise* such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees."

In the 2020 rule, the NLRB further defined "essential terms and conditions of employment" to include "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction."

We will continue to monitor this important issue.

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