

Client Alert **Employment and Labor**

New NLRB Rule Expands Who Is a “Joint Employer”

In a new rule issued on October 26, 2023, the National Labor Relations Board (“Board” or “NLRB”) greatly expanded its definition of “joint employer” to include any business that merely possesses the authority to control an essential term and condition of employment of another business’s employees – even if it never exercises that control. Under the Board’s prior rule, an entity would only be deemed a joint employer if it directly and regularly exercised some control over another business’s employees with respect to such matters as their hiring, firing, wages, and benefits, or over the manner those employees performed their work. While the Board’s new, expansive definition technically applies only to those rights provided to employees under the National Labor Relations Act (“NLRA”), it could potentially be used to support arguments that businesses that are deemed “joint employers” under this rule are also joint employers under other employment laws such as discrimination, harassment, and wage laws. All employers, therefore, should take heed of this important change.

According to the Board’s new rule, whenever an entity controls, or has the authority to control, any of the following seven “essential” job terms of another business’s employees, it will be deemed the employees’ joint employer: “(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 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.”¹

¹ Importantly, a recent court filing indicates that the Board’s rule might expand even further. On November 6, 2023, the Service Employees International Union (“SEIU”), which generally supports the rule, filed a challenge to it, purportedly seeking to have businesses deemed joint employers whenever they have the authority to control any “mandatory subject of bargaining” – not just one of the above-listed, seven “essential” terms. As there are numerous mandatory bargaining subjects, such as parking, clothing allowances, and bulletin boards, such a rule would bring many more businesses under its purview.

N o v 1 0
2023

This Client Alert has been prepared by Sills Cummis & Gross P.C. for informational purposes only and does not constitute advertising or solicitation and should not be used or taken as legal advice. Those seeking legal advice should contact a member of the Firm or legal counsel licensed in their state. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. Confidential information should not be sent to Sills Cummis & Gross without first communicating directly with a member of the Firm about establishing an attorney-client relationship.

The scope of businesses that could potentially be affected by the new rule is large. The Board expressly noted that the rule likely would impact five types of businesses where it is common for one (usually larger) entity to dictate one or more aspects of another (usually smaller) entity's working conditions: contractors that retain subcontractors; franchises; temporary staffing agencies; businesses that use temporary staffing agencies; and labor unions. By way of example, therefore, a company that bolsters its workforce with a staffing agency's employees could be deemed those employees' joint employer if, as is common, it supervises their work. Similarly, a franchisor that directs its franchisee's hours of operation or work requirements could be deemed a joint employer because it is, at least indirectly (and theoretically), dictating the franchisee's employees' work schedules and the manner, means, and methods of their work.

Upon being deemed a joint employer, a business will incur significant legal obligations. Under the rule, joint employers of unionized employees will have to bargain collectively with their union representatives. Moreover, this bargaining obligation will extend to any term or condition of employment over which the joint employer has or exercises control – even those beyond one of the above-listed seven “essential” job terms. Additionally, joint employers will also have to respond to alleged unfair labor practice charges brought by employees or their union. Moreover, given the weighty influence that Board rules often have in employment matters generally, it is possible that going forward, courts may consider whether a business is a joint employer under this rule when determining whether it is liable as an employer under another employment law.

The new rule will take effect on December 26, 2023, and the new standard will apply to cases filed after that date.²

Key Takeaways

The Board's new joint employer rule is almost certain to lead to an increase in claims by persons that another business – usually a larger, wealthier business – jointly employs them along with their actual employer. Thus, we recommend that businesses review their contracts with their staffing agencies, subcontractors, vendors, and franchises, to determine whether, and to what degree, they have authority over that entities' employees. In some circumstances, it may decide to revise those contracts to remove certain control, especially when it does not need it or regularly exercise it.

² This rule has been classified as a major rule subject to Congressional review. If Congress disapproves of the rule, it will have no effect. Additionally, if the Congressional review results in a change to the rule's effective date, the Board will either establish a new effective date or withdraw the rule by notice in the Federal Register.

Client Alert Employment and Labor

Our Sills Cummis Employment and Labor Practice Group
can assist employers regarding the issues raised in this alert.

Eric Moreno, Esq.

Client Alert Issue Author; Associate, Employment and Labor Practice Group
emoreno@sillscummis.com | (973) 643-5898

Vimal K. Shah, Esq.

Client Alert Issue Editor; Of Counsel, Employment and Labor Practice Group
vshah@sillscummis.com | (973) 643-5896

Patricia M. Prezioso, Esq.

Chair, Employment and Labor Practice Group
ppezioso@sillscummis.com | (973) 643-5041

James M. Lemonedes, Esq.

Member, Employment and Labor Practice Group
jlemonedes@sillscummis.com | (973) 643-5888

Grace A. Byrd, Esq.

Of Counsel, Employment and Labor Practice Group
gbyrd@sillscummis.com | (973) 643-6792

Jill Turner Lever, Esq.

Of Counsel, Employment and Labor Practice Group
jlever@sillscummis.com | (973) 643-5691

Jordan E. Pace, Esq.

Of Counsel, Employment and Labor Practice Group
jpace@sillscummis.com | (973) 643-4295