KUTAKROCK

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NLRB Issues Employer-Friendly Final Rule on Joint Employer Standard

The National Labor Relations Board ("NLRB") recently finalized its long-awaited rule regarding joint-employer status, which goes into effect April 27, 2020. The NLRB has stated that the rule is intended to provide certainty and consistency to businesses in determining whether they would be considered a joint employer under the National Labor Relations Act ("NLRA").

Under the new rule, a business will be considered a joint employer only if the business has "substantial direct and immediate control" over at least one of the eight specified "key terms or conditions" of another company's worker. Key terms or conditions of employment are wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction.

The rule also provides guidance regarding the kind of control that is considered "substantial." Specifically, an entity has "substantial" control over the key terms or conditions of employment where it has a "regular or continuous consequential effect." In other words, direct control that is sporadic, isolated or de minimis will not warrant a finding of joint employment. Under this new standard, indirect control or unexercised control will be considered as part of the analysis, but will not be sufficient on its own to create joint employment.

Furthermore, the NLRB rule indicates that common elements of third-party contracts will not be enough to make businesses joint employers. Examples of these common elements include a party mandating "minimal standards for hiring, performance or conduct" for third-party workers or requiring maintenance of workplace safety or sexual harassment policies, or a franchiser taking steps to protect its trademarks.

This stricter "substantial direct and immediate control" standard replaces the prior worker-friendly test, under which it was easier to determine that entities were jointly employing workers. Under the prior test, even indirect control was enough to find joint employment. Where entities are considered joint employers, both are required to bargain in good faith with workers over the terms and conditions of employment. On the other hand, an entity that is not considered a joint employer may refuse to accommodate workplace changes requested by the entity that actually employs the workers.

The NLRB's new rule is similar to the DOL's new rule (which was discussed in our earlier Client Alert), as both tend to limit the reach of joint employer status, which almost certainly will lead to fewer findings of joint employment by these agencies. The Equal Employment Opportunity Commission ("EEOC") is similarly expected to issue amendments that will clarify when an entity is covered under the federal equal employment opportunity laws as a joint employer based on the definitions of "employee" and "employer." Please stay tuned for another Client Alert about the EEOC's new amendments once they are released.

The NLRB's new rule takes effect soon, so if you have any questions related to how this new rule affects your enterprise please contact your Kutak Rock attorney, or any of the attorneys in the Employment Law Group, and we would be happy to discuss this with you.