Kelley Drye

# Indirect Control Of Another Companies' Employee Makes You A Joint Employer

Mark A. Konkel

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October 26, 2023, the NLRB issued new rule effective December 26, 2023, expanding the scope of the joint employer standard to encompass relationships where a company holds indirect and unexercised control over the terms and conditions of another company's employee. As we previously reported, the NLRB issued a notice of proposed rule-making on September 7, 2022, and the new rule largely mirrors the proposed rule.

The new rule specifically provides that a company may be considered a joint employer if it has authority to control the essential terms and conditions of employment, *whether or not such control is exercised*. Significantly, the control may be direct *or indirect*. The new rule broadens the definition of "essential terms and conditions of employment" to include "work rules and directions governing the manner, means, or methods of work performance." Essential terms and conditions of employment also include wages, hours of work, assignment and supervision of duties, discipline, hiring and firing, and working conditions.

## Background

By adopting this new standard, this rule reverts from the NRLB's 2020 rule which had narrowed the joint-employer test to include only those situations where the company exercises *direct* control over the conditions of employment. The 2020 rule had reversed an employee-friendly, Obama-era decision, *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015), which held that a company could be considered a joint employer where the company indirectly controlled the essential working conditions of another company's employer. Now, in another reversal by the NLRB, the new rule marks a return to a broad, employee-friendly standard akin to the *BFI* standard.

## What it means for employees

As the new rule broadens the definition of joint employer, companies should evaluate whether their business structure means they could be considered joint employers due to any "indirect" control over another company's employers. This change is particularly important for companies who outsource staffing, employee management, or human resources or those who are considering entering into such relationships. As both traditional outsourcing and managed services providers have grown into multi-billion-dollar industries, large and small businesses often outsource to fill skill gaps, cut costs, and maintain flexibility. Common sectors for outsources include payroll, IT, cybersecurity, human resources, and customer service. Given this increasing trend of utilizing outsourcing, companies should pay special attention to the NLRB's new rule in analyzing their

business relationships. With that backdrop, companies should take a fresh look at any staffing and third party agreements to determine whether they contain reserve control provisions, which are likely probative of joint-employer status.

Companies should recognize that status as a joint employer gives them a role in the following areas:

- The Bargaining Table: Joint employers are required to bargain over the employment terms over and conditions as well as all other mandatory subjects of bargaining that it possesses or exercises the authority to control. As such, companies should identify if there are any forthcoming bargaining sessions and prepare with counsel accordingly.

- Liability: Joint employer status subjects a company to liability for lawsuits and other administrative claims. Companies should take preemptive steps to ensure their compliance with employment laws and develop best practices to avoid a potential increase in claims.