LITCHFIELD CAVO LLP
ATTORNEYS AT LAW

Kathleen J. Collins, Partner
Licensed in NJ, PA and IL
D | 856.382.2270
E | Collins@LitchfieldCavo.com

Recently Issued Notice of Proposed Rulemaking by NLRB Will Expand the Standard for "Joint Employer"

By: Kathleen J. Collins, Esq.

Background

The National Labor Relations Board (NLRB) recently issued a Notice of Proposed Rulemaking (NPRM) addressing the standard for determining whether there is a "joint employer" status under the National Labor Relations Act. The standard for joint employment has been a highly disputed issue over the last three administrations.

Details

The proposed rule rescinds a 2020 Final Rule, which replaced a 2015 definition that defined a joint employer as an employer that exercises "substantial direct and immediate control" over the essential terms and conditions of employment. The change will significantly broaden the definition in such a manner as to encompass more businesses and business relationships such that certain industries and employers will need to prepare for the changes and reassess how they address joint employees moving forward.

For example, the proposed standard may result in increased liability for businesses:

- using contract workers from staffing agencies;
- entering into independent contractor relationships;
- engaging in a contractor/subcontractor relationship;
- operating under franchise agreements;
- operating under a master contract;
- requiring a contractor to adhere to a code of conduct;
- joint ventures;
- which operate via employees of subsidiaries or affiliates; or
- which use employees from labor unions.

Many of the above, such a franchisors, are not typically involved in franchisee day-to day business but under the proposed Rule may be determined to be a joint employer.

The 2020 Final Rule was favored by businesses whereas the new Rule is a return to and expansion of the NLRB's 2015 *Browning-Ferris* ruling, which held that an entity that retained the power to control an individual's conditions of employment was a joint employer even if that entity never actually used that power. See *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015).

Summary

Under the new Rule, two or more employers will be considered "joint employers" if they "share or codetermine" an employee's "essential terms and conditions of employment." The NLRB defines "share or codetermine" to mean the employer:

Kathleen J. Collins, Partner
Licensed in NJ, PA and IL
D 856.382.2270 | Collins@LitchfieldCavo.com

(1) possesses the authority to control (whether directly or indirectly), or
(2) exercises the power to control one or more of an employee's essential terms and conditions of employment.

The proposed rule provides a non-exhaustive list of essential terms and conditions of employment "generally include, but are not limited to: wages, benefits, and other compensation, hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance." This expands on the current regulations' exhaustive list, which includes only "wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction."

Employers may read and comment on the proposed Rule in the Federal Register. Comments on this proposed rule are due on November 7, 2022, either by mail to NLRB, electronically, or at Regulations.gov. Comments replying to comments submitted during the initial comment must be received by the Board on or before November 21, 2022.

Litchfield Cavo attorneys understand the complexities and concerns these types of matters have on business. If you would like to discuss the impact this proposed rule may have on your workplace, a Litchfield Cavo attorney can analyze your state-specific case and learn how these statutes may impact your filing. Please visit LitchfieldCavo.com.

Kathleen J. Collins has more than 25 years' experience in complex commercial litigation involving employment, mass toxic tort and environmental matters. She defends employers, hospitality groups, commercial businesses, retail establishments and manufacturing entities with a world-wide presence.