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Considerations for Parent Companies and Subsidiaries Under the NLRB's Proposed Joint Employer Rule

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Executive Summary

The National Labor Relations Board's ("NLRB") Proposed October 2023 Joint Employer Rule would make it easier for two entities to be deemed joint employers. While originally anticipated to take effect on March 11, 2024, challenges prevented that from occurring. For instance, Congress passed a resolution to block the proposed rule and the U.S. District Court for the Eastern District of Texas issued a decision enjoining it. President Biden subsequently vetoed Congress' resolution and while the NLRB had appealed the referenced court decision enjoining such rule, the NLRB reversed course and withdrew its appeal. It appears that the NLRB is still considering its options at this time. While the future of the proposed rule remains to be seen, the following is a brief overview of the joint employer doctrine, the NLRB's current and proposed rules, and recommended best practices for employers.

THE MEANING OF JOINT EMPLOYER STATUS AND ITS LEGAL IMPACT

It is no secret that certain legal obligations flow from an employer-employee relationship and that employers must comply with various federal, state, and local labor and employment laws. However, a single entity may be deemed sufficiently affiliated with one or more other entities to be characterized as a joint employer and subject to the same legal obligations as the primary employer, even if the employer-employee relationship is not necessarily clear and obvious. Under certain employment laws, joint employer status may also be used to determine whether an employer meets the minimum threshold for coverage, such as under Title VII of the Civil Rights Act of 1964 ("Title VII") or the Family and Medical Leave Act ("FMLA").

Under the National Labor Relations Act ("NLRA"), a finding of joint employer status could have further unintended consequences that are especially significant for company groups. For example, with a finding that a parent or holding company is a joint employer with its subsidiaries or affiliated companies, all may be held liable for unfair employment and labor practices committed by any entity in the company group, and all of the companies and properties in the chain of ownership or operation (union or non-union) might be required to recognize a union, engage in collective bargaining or be bound to the terms of a union contract.

JOINT EMPLOYER TESTS

The tests for determining joint employer status vary by statute and jurisdiction. Notably, the NLRA's joint employer analysis frequently forms the basis for joint employer tests under other statutes.

NLRB's 2020 Joint Employer Test (Current Rule)

The NLRB's 2020 Joint Employer Test (the "2020 Rule") requires an entity to actually possess and exercise "substantial direct and immediate control" over essential terms and conditions of employment of another entity's employees to warrant a joint employment finding. "Indirect control over essential terms and conditions of employment" of another entity's employees may be considered but is not sufficient to establish joint employer status. The 2020 Rule lists eight discrete categories that constitute the "essential terms and conditions of employment," which include the categories of (1) wages, (2) benefits, (3) hours of work, (4) hiring, (5) discharge, (6) discipline, (7) supervision and (8) direction. The 2020 Rule treats sporadic, isolated or *de minimis* control over another employer's workforce as insufficient to establish joint employer status.

NLRB's October 2023 Joint Employer Test (Proposed Rule)

In October 2023, the NLRB proposed a new rule seeking to replace the 2020 Rule with a significantly revised standard that makes it much easier to determine joint employment exists (the "2023 Rule"). Specifically, the proposed 2023 Rule (1) provides that "reserved and indirect control" would demonstrate joint employment; (2) changes the categories within the list of "essential terms and condition of employment;" and (3) provides that isolated or *de minimis* control would sufficiently demonstrate joint employment. Under the 2023 Rule, a company would be deemed a joint employer if it merely possessed the authority to control (whether directly or indirectly, or both) one or more of the employees' essential terms and conditions of employment, whether or not the company actually exercises such control. Additionally, the 2023 Rule revises the eight discrete categories of what constitutes "essential terms of employment" to add broader categories, including "work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline" and "working conditions related to the safety and health of employees." The 2023 Rule would potentially result in entities that utilize staffing agencies for labor being characterized as joint employers because most have terms that impact, at least indirectly, one or more of the specified "essential terms and conditions of employment."

On March 8, 2024, the U.S. District Court for the Eastern District of Texas, in *Chamber of Commerce v. NLRB*, No. 6:23-CV-00553, 2024 WL 1161125 (E.D. Tex. Mar. 18, 2024), struck down and vacated the 2023 Rule. Separate from the litigation, the U.S. House of Representatives and the Senate passed resolutions in January and April 2024, respectively, to repeal the 2023 Rule under the Congressional Review Act. However, this measure was vetoed by President Biden on May 3, 2024. While the House of Representatives attempted to override the President's veto on May 7, it fell short of the required two-thirds vote to overturn the President's veto.

For now, the Texas District Court's decision preserves the 2020 Joint Employer Test and it currently remains in effect as the operable standard. The NLRB has withdrawn its appeal of the Texas District Court's decision, but in its legal filing the NLRB stated that it would like to " to further consider the issues identified in the district

court's opinion" and that the NLRB "has several rulemaking petitions on its docket regarding the joint employer issue raising similar issues."

BEST PRACTICES AND TAKEAWAYS

For obvious reasons, companies typically want to avoid a joint employer finding and the additional potential liability, bargaining obligations, and other consequences. Given the uncertainty of the NLRB's enforcement position, possible revision to the 2023 Rule, or new rule making, employers should take steps to minimize their risks of being deemed a joint employer. Specifically, parent companies should:

- Avoid treating employees from a subsidiary or affiliate as their own employees, such as by not providing employees with business cards displaying the parent company's name and by not branding company policies and offer letters with the parent company's name.
- Clearly document that the decision-making and implementation of employment polices remains within the subsidiary or affiliated company.
- Ensure that hiring, firing, employee discipline and supervision of subsidiary or affiliate employees is conducted by the subsidiary or affiliate company and refrain from providing other input about the hiring and firing process, or reserving the right to hire or fire employees of the subsidiary or affiliate in certain circumstances.
- Conduct an audit of the entire company group to assess the concrete risks of a joint employer status finding under applicable law.

Please contact Naureen Amjad, Riebana E. Sachs or any member of the Employment, Labor and Benefit Group with any questions about these developments and how they may impact your workplace.

Masuda Funai is a full-service law firm with offices in Chicago, Detroit, Los Angeles, and Schaumburg.