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NLRB Releases Spring Rulemaking Agenda Forecasting Changes To Joint Employer Standard and Representation Election Procedures

Labor Relations Update Blog on **June 23, 2022**

On June 21, 2022, the National Labor Relations Board ("NLRB") released its rulemaking agenda for Spring 2022, indicating the Board is considering revisions to two significant and tumultuous topics pursuant to the rulemaking process: (1) the joint-employer standard under the National Labor Relations Act ("NLRA"), and (2) representation procedures, including those relating to blocking charges, voluntary recognition and bargaining relationships in the construction industry.

Joint Employer Status under the NLRA

As foreshadowed by the Board when it announced its regulatory agenda in December 2021 (discussed here), the NLRB will engage in rulemaking on the "joint employer" standard under section 2(2) of the National Labor Relations Act, likely reverting to the standard that existed prior to the April 2020 rule.

As previously discussed (here, here, and here), the "joint employer" standard has fluctuated significantly over the past several years. This standard has important implications, often for contractors/subcontractor relationships, parents/subsidies, and the like, because joint employers have responsibilities to comply with the NLRA regarding another entity's employees. For example, joint employers must participate in collective bargaining over their employees' terms and conditions of employment, and may be jointly and severally liable for the other employer's unfair labor practices.

The current standard for "joint-employer" status was established by the NLRB through its rulemaking authority in 2020, and is codified at 29 C.F.R. § 103.40. Under the current standard, which has been in effect since April 27, 2020:

"An employer… may be considered a joint employer of a separate employer's employees *only if* the two employers share or codetermine the employees' essential terms and conditions of employment. To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, the entity must *possess* ***and*** *exercise* such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." (Emphasis added).

Further, "essential terms and conditions of employment" is specifically defined to include "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction." This standard varies from the previous standard, under which affiliated companies would be considered "joint employers" where a company **possessed** the authority to control those employees' terms and conditions of employment, even if the company **did not actually exercise** such authority. A summary fact sheet on the 2020 final rule is available here.

Since the current "joint-employer" standard was promulgated via rulemaking, it cannot be altered by a NLRB decision, but rather the Board must similarly revise the standard through rulemaking or simply rescind the April 2020 rule without replacement – in the latter scenario, the case law would immediately revert to the prior *Browning-Ferris* standard that prevailed prior to the April 2020 rule, and would once again, subject the joint-employer standard to potential alteration by some future Board decision or rule.

Representation Election Procedures

The Board will also consider revising the representation election procedures under 29 C.F.R. 103, with a "focus" on the April 1, 2020 amendments implemented by the Board. A helpful summary of the April 1 amendments is available in an NLRB-published Fact Sheet and we also reported on those amendments here.

The three major changes implemented by the April 1, 2020 amendments regarding union election and recognition procedures were as follows:

1. Replacing the blocking charge policy to expedite the election by implementing vote-and-impound or vote-and-count. Per this rule, a party may not block an election from occurring merely by filing charges. Despite a pending unfair labor practice charge, the election will proceed as scheduled, and the votes will either

be impounded (i.e., not counted), or counted, depending on the nature of the alleged unfair labor practice.

2. Reinstating *Dana Corp.*, 351 NLRB 434 (2007), challenges to voluntary recognition, which provides that where an employer voluntarily recognizes a union pursuant to NLRA Section 9(a), it must post a notice to its employees reflecting the same, and employees may challenge such recognition if they petition for a secret-ballot election within 45 days thereafter. If no petition is filed during the 45-day notice period, the voluntary recognition bar would operate for a "reasonable period of time" thereafter.
3. For construction industry employers, requiring evidence of majority-employee support for Section 9(a) recognition in addition to contractual language. Such evidence would be the same showing necessary for unions in non-construction industries to establish recognition.

It remains to be seen how the Board will revise these election procedures, including whether the April 1, 2020 amendments will be revised or rescinded altogether.

Next Steps:

To advance its agenda, the Board will likely issue a Notice of Proposed Rulemaking ("NPRM"), which opens the formal process for public comment on the proposed rules. The website for the Office of Information and Regulatory Affairs indicated that for each rule, the expected date for the NPRM is September 2022. The Board may also elect to hold public hearings at that point.

NLRB Chairman McFerran commented that the Board "encourage[s] the public to take advantage of these opportunities to share their views, and [looks] forward to getting feedback on these important issues in the future."

We will continue to monitor and report on developments with regard to these rulemaking priorities.

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