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DOL Independent Contractor Rule Takes Effect & NLRB Rule Is Vacated

Client Alert

3.22.2024

As discussed in a previous alert, the Department of Labor (“DOL”) has published its final rule regarding the test for determining whether an individual is an employee or an independent contractor under the Fair Labor Standards Act. The new rule, which is really the rule that existed prior to 2021, utilizes six factors in a “totality of the circumstances” analysis. As mentioned in the previous alert, the new rule took effect on March 11, 2024.

Not to be outdone by the DOL, the National Labor Relations Board (“NLRB”) issued a final rule of its own. The NLRB’s rule related to the hotly debated joint employer analysis. Under the NLRB’s new rule, two employers may be considered joint employers of a group of employees if each entity has the ability to share or codetermine one or more of the employees’ terms and conditions of employment, which includes:

1. Wages, benefits, and other compensation;
2. Hours of work and scheduling;
3. The assignment of duties to be performed;
4. The supervision of the performance of duties;
5. Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
6. The tenure of employment, including hiring and discharge; and
7. Working conditions related to the safety and health of employees.

This was a substantial departure from the prior rule that required a company to actually exercise “substantial and direct control” over those terms and conditions of employment before there could be a finding of joint employer status. This new rule,

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which was considered controversial by many, made it much easier for the NLRB to find two entities were joint employers. This was particularly problematic for employers in the staffing industry where one entity may have the ability to codetermine the terms of conditions of employment, but traditionally does not exercise that control. Thankfully for employers, the new employee-friendly rule is already a thing of the past.

Late on March 8, 2024, a Texas federal district court vacated the NLRB's new rule. Judge J. Campbell Barker recognized the difficult results that would come from the overly broad joint employer rule. As such, Judge Barker vacated the rule in its entirety, which means the much more reasonable 2020 joint employer rule is controlling once again.

Your Butzel Labor & Employment attorneys are at the ready to provide guidance on the impact of these administrative rules or any other changes to the employment landscape. If you have any questions about the independent contractor rule, the NLRB joint employer rule, or any other related issues, please contact your Butzel Labor & Employment attorney.

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