crowell moring

CLIENT ALERT

NLRB Releases New Joint Employer Rule

Mar.02.2020

This week, the National Labor Relations Board (NLRB or the "Board") released its final regulation defining when two employers will be considered joint employers for purposes of the National Labor Relations Act (NLRA). It clarifies that an employer must have "direct and immediate" control of another employer's employees in order for a joint employment relationship to be formed, restoring the longstanding definition of "joint employment" that was in place before the Board's August 2015 decision in *Browning-Ferris Industries*, 362 NLRB 1599. The new rule should relieve some anxiety of certain businesses, particular companies in the franchise industry and companies that make regular use of subcontractors, because it effectively raises the threshold for what must be shown to establish a "joint employment" relationship.

The rule states that, to be a joint employer, a business must "possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment" of another employer's employees. It further defines "direct and immediate control" with respect to the key areas of wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

This rule is important for employers of both unionized and non-unionized employees. Employees of non-union businesses have broad rights to organize and engage in related protected, concerted activity under the NLRA, and Section 8 of the NLRA prohibits interference with organizing activity. A joint employer finding typically means that both employers are liable for unfair labor practices committed by the other.

The rule will take effect April 27, 2020. However, it has already faced criticism from Democratic lawmakers, labor unions, and worker advocates, and litigation to limit or block the rule seems likely. We will continue to monitor developments in this area.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Trina Fairley Barlow
Partner – Washington, D.C.
Phone: +1 202.624.2830
Email: tbarlow@crowell.com

Thomas P. Gies
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

Ira M. Saxe
Partner – New York
Phone: +1 212.895.4230
Email: isaxe@crowell.com

Jillian Ambrose
Counsel – Washington, D.C.
Phone: +1 202.624.2710
Email: jambrose@crowell.com