NLRB/DOL Updates

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NLRB Updates

Single Employer status

Principal factors which the Board weighs in deciding whether sufficient integration exists include the extent of:

1. Interrelation of operations;
2. Centralized control of labor relations;
3. Common management; and
4. Common ownership or financial control.

None of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show “operational integration,” particularly centralized control of the labor relations.

The Board has declined in several cases to find integration merely upon the basis of common ownership or financial control.

New NLRB Joint Employer Rule

On Friday, October 27 the National Labor Relations Board issued its long-awaited explanation and justification for its new final Rule with regards to determining whether one entity is the "joint employer" of the employees of a second entity.

In 229 pages of administrative rationalization (and a detailed dissent), the NLRB not only adopted its new Rule, but it also added guidance that makes the new Rule even more one-sided.

The Board modified the proposed rule to:

1. Clarify the definition of "essential terms and conditions of employment,"
2. Identify the types of control that are necessary to establish joint-employer status and the types of control that are irrelevant to the joint-employer inquiry; and
3. Establish the bargaining obligations of entities found to be joint employers.

Under the old Rule established in 2020, an entity could only be considered a joint employer if it actually exercised "substantial direct and immediate control" over the essential terms and conditions of another company's employees.

An unexercised or potential right to control was not sufficient to establish joint employer status.

The New Rule

1. An **unexercised** right to control the essential terms and conditions of employment will be sufficient to establish joint employer status.

The new Rule rescinded the old Rule and provides that an entity may be a joint employer if it "possesses the *authority* to control (whether directly, indirectly, or both), or to exercise the power to control … one or more of the employee's essential terms and conditions of employment" and that an entity that has such direct or indirect control can be considered a joint employer, "regardless of whether the [entity] exercises such control."

The “essential terms and conditions of employment” under the new Rule are:

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.

Control and/or potential control over matters that are not included in this list of seven (7) essential terms and conditions of employment is not relevant.

2. Direct or indirect control through an intermediary will also be sufficient to establish joint employer status.

The NLRB will also determine joint employer status based on indirect control/right to control through an "intermediary," potentially opening employers up to unanticipated downstream joint employer liability through entities with which they do not have a direct relationship such as second tier subcontractors.

3. Even the presence of a single factor can be enough to establish joint employer status.

The NLRB will not use a balancing test or require that the alleged joint employer exercise control or have the potential to exercise control over more than one of the seven listed essential terms.

The presence of one factor – particularly the first factor (control over wages, benefits and other compensation) can be used to establish joint employer status.

4. Joint employers have a broad duty to bargain.

The new Rule requires a joint employer to bargain collectively with the representative of the joint employees over any term or condition of employment that it has the authority to control, regardless of whether that term or condition is one of the 7 listed essential terms or condition of employment under the new Rule.

However, a joint employer is not required to bargain over any term or condition of employment that it does not possess the authority to control.

5. Employers should give their contracts careful review immediately.

Employers need to review their contract boilerplate very carefully.

Contractual boilerplate and fine print that gives a company the authority to control one of the seven (7) specified terms and conditions of employment is evidence of joint employer status, even if the company has never exercised such authority.

6. Certain actions have been excluded from the category of things that provide evidence of joint control.

Some actions will not provide evidence of joint employer status.

- Requiring compliance with the law in a contract does not equate to exercising control or reserving control
- Incorporating regulatory requirements into a contract is not the same as exercising control or reserving control.
- Contracts that set expectations or requirements with regard to the result of the work do not exercise control in the joint employer context unless they reserve the authority or exercise the power to control the details of the manner or methods by which the work is performed.

The NLRB will not treat a general contractor as the joint employer of a subcontractor's employees solely because the general contractor has overall responsibility for overseeing operations on the jobsite…

… unless the general contractor possesses or exercises control over particular employees' essential terms and conditions of employment.

7. Most of the new Rule is already in effect.

The new Rule is scheduled to take effect on December 26, 2023 will be applied to all cases filed after that date.

However, the NLRB has taken the position that the old Rule exceeded the Board's authority (and was therefore presumptively invalid).

This sets the stage for the retroactive application of the new Rule.

In addition, the NLRB's rescission of the old Rule and the passage of the new Rule are treated as separate, which means that even if the new Rule is invalidated by the courts, the old Rule will no longer be in effect and the NLRB will revert to the test that pre-existed the old rule – which is pretty much the same as the test under the new rule.

The National Labor Relations Board's new Rule is facing three court challenges, one that seeks to broaden the rule and two that could block it.

The Service Employees Internal Union filed a lawsuit with the D.C. Circuit to expand the rule's scope to cover all terms and conditions of employment (not just 7).

The other court challenges seek to overturn the new Rule and return to the old test.

A coalition of business groups is also pushing to Congress to disapprove the new Rule under the Congressional Review Act.

Protecting employee misconduct

Under the old rule, in any case where an employer claims to have disciplined an employee for engaging in abusive conduct - regardless of the setting in which the conduct occurred -- the employer only violated the NLRA if the employer took such action because it was motivated by animus against the employee for their engaging in protected activity.

This allowed employers to discipline employees for disorderly conduct, regardless of the employee's reason for the conduct.

Protecting employee misconduct

Under the new rule, discipline for abusive conduct is judged under a four-part test which looks at:

1) the place of the discussion;
2) the subject matter of the discussion;
3) the nature of the employee's outburst; and
4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."

Employee abusive conduct targeting employers on social media or during coworker discussions will be adjudicated under a totality-of-the-circumstances test.

In cases involving employee abusive conduct toward employers on picket lines, the Board considers whether, under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by the picket-line conduct."

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The NLRB increases damages against Employers

Old Rule – “make whole” remedies included:

- Back pay
- Interest
- Back benefits
- Reinstatement with full seniority

The NLRB increases damages against Employers

The new Rule allows for consequential damages.

Examples of new remedies include:

- Compensation for health care expenses that an employee incurs as a result of an unlawful termination of health insurance.
- Compensation for credit card late fees incurred.
- Compensation for loss of a home or a car that an employee suffered as a result of an unlawful discharge.
- Employer sponsorship of work authorizations for the firing of undocumented workers.

The NLRB increases damages against Employers

For an employer's unlawful failure to bargain with a union, remedies can include:

- Compensation for losses sustained by employees.
- Mandating bargaining schedules.
- Submission of periodic detailed progress reports to the board.
- Reinstatement of proposals that the board finds to have been unlawfully withdrawn.
- Reimbursement of collective bargaining expenses -- including lawyer fees.
- Cease-and-desist orders.

The NLRB Limits Employer Past Practices

The Old Rule – Employers could make discretionary changes to wages, hours, and working conditions when those changes were "similar in kind and degree" to actual past practices during negotiations.

For example, if an employer has an established practice of granting annual raises, then the policy of regularly increasing wages becomes a term and condition of employment. Discretionary aspects of a policy or practice could be as much a part of the status quo as non-discretionary ones so long as such actions are consistent with – *i.e.*, are similar in kind and degree to – a pattern of pre-existing past practice.

The NLRB Limits Employer Past Practices

The New Rule – Past practices exist only when the practice is longstanding and does *not* involve "a large measure of discretion."

Practices developed under a management rights clause are no longer a defense.

Employers acting on a past practice without providing advance notice to the union and extending an opportunity to bargain will be at risk, regardless of how well-established the past practice has been.

This also applies to discipline and discharge.

The
New Davis Bacon Rule

On August 8, 2023, the United States Department of Labor finally published its long-awaited Davis Bacon rule.

The DOL's 812 pages of rule justifications and explanations contain many substantial changes which will both expand the scope of work covered by Davis Bacon and which will change the way that the DOL administers the Act.

Unless blocked by pending legal action, the new rule took effect in October 2023.

These changes fall within 1 of 3 general categories:

1. Changes that expand the scope of Davis Bacon to cover locations and workers not previously covered.

2. Changes that will affect the way the prevailing wage is calculated and applied.

3. Changes that will increase employer's responsibilities with regard to complying with Davis Bacon and increase the severity of failing to comply.

Expanding the Coverage of Davis Bacon

Davis Bacon requires that prevailing wages must be paid to "all mechanics and laborers employed on the site of the work" and defines laborers and mechanics as those workers whose duties are manual or physical in nature. The "site of work" is generally defined as the physical place or places where the building or work will remain.

Materials suppliers are only exempt if they meet certain tests. Material suppliers were normally exempt from Davis Bacon requirements. However, this is no longer always the case, and to be exempt from Davis Bacon under the new Rule, a material supplier must meet all of the following criteria:

1. Its obligation for work on the contract or project must be strictly limited to **only** the delivery of materials, supplies or equipment and incidental activities such as loading or unloading. This can include the pickup of those materials/supplies/equipment from the jobsite, but an employer that only picks up materials without also engaging in delivery is not considered to be a material supplier exempt from Davis Bacon.
2. The material supplier must have facilities that manufacture the materials, supplies or equipment used for the contract or project.
3. The material supplier cannot be located on the primary or secondary construction site.
4. The material supplier was either established before the opening of bids on the contract or is not dedicated nearly exclusively to the performance of the contract.
5. The material supplier does not engage in any covered work on the site.

If an employer fails to meet all of these criteria, they are not a material supplier exempt from Davis Bacon's requirements.

More truck drivers will be covered by Davis Bacon. Normally, the transportation of materials or supplies to or from the site of work is not covered by Davis Bacon. This will change under the new Rule, which expands the categories of transportation work that will be covered to include:

1. Transportation of one or more significant portions of the building or work between a secondary construction site and the primary construction site.
2. Transportation between an adjacent or virtually adjacent dedicated support site and either the primary construction site or secondary construction site.
3. Time spent on the site loading, unloading, or waiting for materials to be loaded or unloaded - if the driver's time aggregated on a daily or weekly basis is more than de minimis.

A "significant portion" of a building or work is a section or segment of a building or work which will only require minimal construction work to complete other than the installation or final assembly at the place where the building will remain. This definition does not include materials or prefabricated component parts such as prefabricated housing components.

Under the *de minimis* standard, all time spent by truck drivers on a work site during a workday or work week will be aggregated for purposes of determining if that on site time is *de minimis*.

This new rule (which the Department of Labor mischaracterizes as a “clarification”) will bring a significant number of truck drivers under Davis Bacon and require their employers to keep track of their time actually spent on site on a daily basis.

Truck owner-operators who are bona fide independent contractors are not subject to the requirements of Davis Bacon, although it is important to note that:

Any employees hired by truck owner-operators are covered by Davis Bacon, and

Owner-operators of other construction equipment such as bulldozers are also covered by Davis Bacon.

A “secondary” construction site is defined as a site where:

1. A significant portion of the building or work is constructed if the construction is for a specific use,
2. the site is not being used for the manufacture or construction of a product made available to the general public, and
3. the site was either established specifically for the performance of the contract or project or if it is dedicated nearly exclusively to the performance of the contract or project for a specific period of time.

Under the new rule, the “site of work” will be expanded to include any site where:

1. A significant portion of a building or work is constructed.
2. If the site is dedicated exclusively or nearly exclusively to the performance of a covered project or contract for a period of time.

This means that if a significant portion of the structure under construction is prefabricated at a dedicated site, then the fabrication of the module or component would be work covered by Davis Bacon and the location where the module is being completed would be considered part of the site of work.

Many survey workers would be covered by Davis Bacon. –Whether or not a specific survey crew member is covered by Davis Bacon is a question of fact which takes into account the actual duties performed by the worker and whether the duties are manual or physical in nature, including the use of tools or work of a trade".

A survey crew member who spends most of their time taking or assisting in taking measurements would likely be covered by Davis Bacon (if they do not meet the test for an exempt professional) if their work is:

1. Performed on site.
2. Immediately prior to or during construction.
3. In direct support of construction crews.

Given the broad definition of subcontractor, it does not seem to matter whether they are performing these duties as an employee of a construction contractor or as the employee of a professional survey company.

Flaggers are covered. Safety flaggers are considered to be working on the site of construction and covered by Davis Bacon if they are working virtually adjacent to the primary construction site – a flagger working a “short distance down a highway” from a project would be covered.

Periodic adjustments (increases) of non-collectively bargained prevailing wage rates

In many cases, prevailing area wage rates are closely tied to collective bargaining agreements.

In areas where the prevailing wage rates were not based on collectively bargained contracts, 46% of the rates were 10 or more years old.

In areas where collective bargaining agreements are not used to establish the prevailing area wage rate (because they do not cover a majority of the relevant workers), the new rule would update the prevailing wage rates every three years based on the general wage determinations made by the Bureau of Labor Statistics in its ECI wage data.

The ECI (Employment Cost Index) measures the change in the hourly labor cost for both wage and benefits to employers over time by using a fixed “basket” labor to produce a pure cost change.

The ECI increased by 1% from March 2023 to June 2023 and increased by over 4.5% the year ending June 2023.

This change will have the effect of providing regular and potentially substantial increases to the prevailing area wage for non-collectively bargained (non-union) areas.

Because it will be done on a three-year basis, these increases are likely to be substantial.

Highway Projects

The definition of “area” for purposes of prevailing wage determinations has been expanded to address highway projects.

On multi-county highway projects, prevailing wage determinations may be based on the state department of transportation’s highway districts or similar state subdivisions rather than using the counties in which the highway is located.

This will increase the cost of highway projects that are located in multiple counties that include both metropolitan and rural counties.

Mid-Contract Increases in the Prevailing Wage Rate

Under the current regulations, prevailing wage determinations are generally applicable for the duration of a covered contract after those rates are incorporated into the contract.

Under the new rule, if a revised wage determination is issued after the contract award (or after the beginning of construction if there was no contract award), the new determination will apply to the project if:

A. The contract is changed to include substantial additional, covered work that was not within the scope of work of the original contract. This could include any significant change orders.

B. The contract is modified to require the contractor to perform work for an additional period of time not originally covered in the contract, including situations where an option to extend the term of the contract is exercised. This would not apply if a contractor is simply given additional time to complete the original scope of work.

C. The contract covers construction, alteration, or repair work over a period of time that is not tied to the completion of any particular project. Contracts of this nature must update the applicable prevailing wage determinations on the anniversary date of the contract award unless the contracting agency has obtained prior written approval from the DOL.

Mid-Contract Increases in the Prevailing Wage Rate

It is important to note that the new rule does not provide for automatic contract price adjustments when the prevailing wage determination is increased – the Department of Labor's position on this issue is "the Department believes that issues related to budgeting, pricing and cost associated with these types of contracts can be addressed between the contractor and the agency as part of the contracting process."

Adopting State and Local Prevailing Wage Rate Determinations

Under the new rule, the state/local prevailing wage rates may be adopted by the DOL if the Administrator of its Wage and Hour Division concludes that:

A. The state/local government process is open to full participation by all interested parties.

B. The state/local prevailing wage rates reflect both the basic hourly rate of pay and the prevailing fringe benefits, which must be calculated separately.

C. The state/local government determinations use relevant worker classifications can be related to the DOL's recognized workers classifications.

D. The state/local government's criteria for setting prevailing wage rates are "substantially similar" to those used by the DOL, based on a totality of circumstances.

Adopting State and Local Prevailing Wage Rate Determinations

The Administrator will have substantial discretion in making these determinations and given the current level of deference courts give to administrative agencies, it will be extremely difficult to challenge the DOL's adoption of a state/local prevailing wage rate.

Expanding the entities liable for Davis Bacon violations

Regulatory definitions can have the effect of altering the scope and interpretation of the law. With its new rule, the DOL created a new category of employer -- "prime contractor" -- which expands the scope of the business entities responsible for Davis Bacon violations.

Rather than just having the signatory entity ("signatory") liable for Davis Bacon compliance, the Department of Labor's new definition of prime contractor includes not only the signatory, but also includes the following entities:

A. The controlling shareholders/members of the signatory.

B. If the signatory is a joint venture or partnership, the individual joint venture members/partners.

C. Any contractor that has been delegated the responsibility for overseeing all or substantially all of the construction covered by the prime contract.

This new definition means that many of the entities connected directly with the signatory -- including controlling shareholders and joint venture partners -- will be liable for the signatory's failure to comply with the requirements of Davis Bacon.

In cases where two or more contractors enter into a joint venture that is the signatory on a Davis Bacon covered contract, the members of the joint venture will be separately liable for any violations.

This liability is strict liability and does not require a finding of fault on the part of any individual partner or joint venture partner.

Creating more upstream liability

Under the Department’s new rule, prime contractors and upper-tier subcontractors can be directly liable for their lower-tier subcontractors' violations.

Prime contractors will be automatically responsible for back wages owed by subcontractors, regardless of intent or knowledge.

Creating a new administrative cause of action for employees

The DOL's new rule creates a new administrative claim for retaliation under Davis Bacon, making it unlawful for an employer to "discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any manner discriminate against" any employee, former employee or applicant for:

A. Notifying any contractor of any conduct which the worker reasonably believes violates Davis Bacon.

B. Filing a complaint or asserting rights under Davis Bacon.

C. Cooperating in an investigation or other compliance action.

Creating a new administrative cause of action for employees

Employers found to have retaliated against an employee, former employee or applicant for conduct protected by the new anti-retaliation provisions would be subject to an administrative proceeding and could be liable for a full “make-whole” remedy, including reinstatement for full back wages and benefits.

There have already been two federal court lawsuits filed to block the new Rule.

They remain pending.