

HRAGC LEGAL UPDATE

SEPTEMBER 20, 2018

FEDERAL

NLRB Rulemaking – Joint Employer

On September 14, 2018, the National Labor Relations Board published a proposed rule to redefine the standard utilized to determine who is a joint employer. This is the latest effort at overturning the 2015 Browning-Ferris decision and limit the reach of the standard. As the Board explained in its press release “Under the proposed rule, an employer may be found to be a joint-employer of another employer’s employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship.”

As set forth in the proposed rule “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, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees’ essential terms and conditions of employment in a manner that is not limited and routine.

There are many examples in the proposed rule of what constitutes “substantial, direct and immediate control” including the following:

Temporary Staffing Agency supplies 8 nurses to Hospital to cover during temporary shortfall in staffing. Over time, Hospital hires other nurses as its own permanent employees. Each time Hospital hires its own permanent employee, it correspondingly requests fewer Agency-supplied temporary nurses. Hospital has not exercised direct and immediate control over temporary nurses’ essential terms and conditions of employment.

Temporary Staffing Agency supplies 8 nurses to Hospital to cover for temporary shortfall in staffing. Hospital manager reviewed resumes submitted by 12 candidates identified by Agency, participated in interviews of those candidates, and together with Agency manager selected for hire the best 8 candidates based on their experience and skills. Hospital has exercised direct and immediate control over temporary nurses’ essential terms and conditions of employment.

Business contract between Company and a Contractor reserves a right to Company to discipline the Contractor’s employees for misconduct or poor performance. Company has never actually exercised its authority under this provision. Company has not exercised direct and immediate control over the Contractor’s employees’ terms and conditions of employment.

Business contract between Company and Contractor reserves a right to Company to discipline the Contractor’s employees for misconduct or poor performance. The business contract also permits either party to terminate the business contract at any time without cause. Company has never directly disciplined Contractor’s employees. However, Company has with some frequency informed Contractor that particular employees have engaged in misconduct or performed poorly while suggesting that a prudent employer would certainly discipline those employees and remarking upon its rights under the business contract. The record indicates that, but for Company’s input, Contractor would not have imposed discipline or would have imposed lesser discipline. Company has exercised direct and immediate control over Contractor’s employees’ essential terms and conditions.

Business contract between Company and Contractor reserves a right to Company to discipline Contractor's employees for misconduct or poor performance. User has not exercised this authority with the following exception. Contractor's employee engages in serious misconduct on Company's property, committing severe sexual harassment of a coworker. Company informs Contractor that offending employee will no longer be permitted on its premises. Company has not exercised direct and immediate control over offending employee's terms and conditions of employment in a manner that is not limited and routine.

NLRB Decision – When vulgar language constitutes protected concerted activity

On July 24, 2018, the NLRB, found that an employee who wrote “whore board” on an overtime signup sheet to protest the unilateral implementation of a new overtime policy, had engaged in protected activity under the National Labor Relations Act. In a 2-1 decision, the Board overturned the Administrative Law Judge’s decision upholding the employee’s termination. The evidence revealed that this phrase was used by other employees to describe the list and imply that those who signed up were disloyal to the union and their co-workers in order to benefit themselves. Supervisors also used the term. As a result, the Board determined when the employee wrote the language on the sheets, he was engaging in protected activity. The Board also relied on the evidence suggesting the employer permitted or tolerated use of vulgar language in the workplace. The case is *Constellium Rolled Products Ravenswood, LLC*.

PRACTICE POINTER

Employers should consider retooling their policies on discipline

As the workforce changes, the majority of employees have new goals, they are motivated differently, and they expect a collegial, kind and collaborative working environment. New techniques are necessary to help them feel valued and to incentivize the desired behavior. The employer’s policies on discipline should change with this new workforce. Consideration should be given to whether the policies are outdated and in need of an update, reviewing the following:

- Is the company culture where you want it to be;
- Are the disciplinary policies consistent with that culture;
- Is discipline used for punishment or training and development;
- Do the employees view the goal of discipline in line with the view of management;
- If progressive discipline is used, is it deemed to be effective;
- Should the names of documents such as “warning” be changed to be more positive;
- Are suspensions reserved for limited and extremely serious situations; and
- Can you make changes while maintaining a rule based and safety conscious environment.

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