

LEGAL NEWS FOR YOUR BUSINESS

November 2023

Employment Alert

NLRB FINAL RULE ON JOINT EMPLOYER STATUS

Are you an “employer” under the National Labor Relations Act notwithstanding your engagement with another company (e.g., a staffing firm) to supply workers? As 2023 begins to wrap up, the National Labor Relations Board (“**NLRB**”) is upping their standards for deciding whether an entity meets the definition of a joint employer. The NLRB, which enforces the National Labor Relations Act (“**NLRA**”) issued a final rule for determining joint-employer status on October 26, 2023, introducing a much stricter approach.

Differences From the Previous Rule

Under the previous joint employer rule, which was issued in 2020, an entity had to both possess and actually exercise control over the essential terms and conditions of employment. **Now, however**, the NLRB will only assess whether an entity **merely possesses** control over the essential terms and conditions, regardless of whether the entity actually exercises that control. Essential terms and conditions specifically include:

1. Wages, benefits, and other compensation;
2. Hours of work and scheduling;
3. Assignment of job duties;
4. Supervision of job duties;
5. Work rules and discipline;
6. Hiring and discharge; and
7. Safety and health conditions.

Effects on Employers

Under the new standard, a much larger number of entities will likely meet the definition of joint employer. Now, even if entities choose not to exercise control over another entity's employees, they may still be subject to liability under the NLRB standard. Entities that share employees with other entities, such as contractors and subcontractors, companies using temporary employees, and franchisors and franchisees are likely to see the greatest effects from the new rule, and will be subject to greater risk of liability.

Steps Employers Should Take

Entities that share employees with other entities should take steps to determine their potential liability under the new rule by evaluating their control over each of the essential terms and conditions. Employers that do exercise control over essential terms and conditions should review their policies and procedures and take steps to ensure full NLRA compliance.

If you have questions about your liability under the new joint employer rule, please do not hesitate to reach out to any member of Gardner Skelton's employment team.

Healthcare Alert

OCR'S TELEHEALTH RESOURCES FOR PATIENTS AND PROVIDERS

As we all know, since the beginning of the COVID-19 pandemic, telehealth has “virtually” transformed the meaning of healthcare for both patients and providers. Telehealth has made healthcare more available and accessible for a wide variety of patients and provided a safe alternative for those in need of medical care during the pandemic. ***While telehealth brings a number of benefits, it can also create privacy concerns and legal uncertainties.*** In response, the Department of Health and Human Services' Office for Civil Rights (“OCR”) recently issued resources for providers to use to educate their patients about the interaction between telehealth and HIPAA to promote transparency and trust.

The resources, which were published in an ***OCR newsletter***, address the basic definitions and components of telehealth, and include recommendations for discussing patients' telehealth options, risks to personal health information (PHI) when using telehealth, and explanations regarding the applicability of HIPAA and other civil rights laws when using telehealth.

Helpfully, the resources include tips safeguarding PHI when using telehealth, including conducting appointments in private locations, using multi-factor authentication (MFA) when possible, using encryption when available, and avoiding public WIFI networks when accessing health information and conducting appointments. The resources also provide information about common telehealth scams that may create risks for patients' privacy and information security.

Providing telehealth resources to patients can increase trust and strengthen the provider-patient relationship. Additionally, providers can use OCR's resources to evaluate their own telehealth policies, impacts, and billing procedures and learn more about best practices recommended by OCR.

If you have questions about HIPAA requirements for telehealth or your current telehealth practices, please do not hesitate to reach out to any member of Gardner Skelton's healthcare team.



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