THE REGULATORY AGENCIES ARE BUSY!

By: Paul M. Finamore
Halle P. Gray
Pessin Katz Law, P.A.
J. Chadwick Hatmaker – Woolf, McClane, Bright, Allen & Carpenter, PLLC

With each passing day, there are new developments from the federal regulatory agencies that keep employers jumping. It seems that a week does not go by without seeing new regulations appearing in the Federal Register or new cases coming out challenging them. As of the writing of this paper, the following updates are "current," but there are numerous new developments that have occurred between drafting and publishing that make such an article obsolete before it is presented in Toronto.

Enjoy the ride because if the party in power changes in Election 2024, the pendulum could swing just as far or farther in the opposite direction.

NLRB FINAL RULE – JOINT EMPLOYER TEST

The long-held joint employer standard required a business to have direct and immediate control over the terms and conditions of workers' employment. In 2016, a democratic majority abandoned this joint employer standard and put forth a test in which a business could be deemed a joint employer if it exhibited indirect control or had the ability to exert such control. The Trump era set forth a higher threshold to be deemed a joint employer - an employer must exhibit substantial direct and immediate control over essential terms of condition of employment. Recently, under a Biden led Board, the Final Rule announced in 2023 expanded the circumstances under which a company will be deemed a joint employer.

The Final Rule states "two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing

employees' essential terms and conditions of employment." 29 C.F.R. 103.40(b). At first glance, it seems reasonable. However, an employer will meet these criteria easily because the authority and/or power to control essential terms and conditions of employment can be direct, indirect, or both. 29 C.F.R. 103.40(c). The Rule sets forth seven essential terms and conditions of employment to be evaluated, regardless as to whether that control is exercised. 29 C.F.R. 103.40(d). This is of particular concern because the Board would apply the same standard when an entity is using intermediaries or third parties, such as staffing agencies. The Final Rule purports to follow common-law agency principles when determining whether an employer possesses authority to control, or exercises the power to control one or more essential terms and conditions of employment. 29 C.F.R. 103.40(e). A Federal Court in Texas disagreed and struck this expansive joint employer rule down. The Court reasoned this rule reached beyond the common-law boundaries that define employer status under the NLRA. *See Chamber of Com. of United States v. NLRB*, No. 6:23-CV-00553, 2024 WL 1045231 (E.D. Tex. Mar. 8, 2024). The inclusion of indirect and even potential control could include any business that contracts for labor. *Id*. The Texas ruling is positive for employers, but it is anticipated that this fight is not over, and the NLRB will exercise its right to appeal.

NLRB AND CONFIDENTIALITY & NONDISPARAGEMENT

In March of 2024, the NLRB filed a complaint against SpaceX alleging that SpaceX's severance agreement that included confidentiality and non-disparagement clauses violated federal labor law. NLRB contends that SpaceX's severance agreement did not allow workers to make any "oral or written derogatory or negative comments about the company concerning your employment with the company or separation of employment." Further, the agreement did not allow workers to help "any current, former, or future SpaceX employee" with complaints or litigation against the company unless compelled by a subpoena or court order.

This complaint aligns with the NLRB's efforts to go after employers' severance agreements following the *McLaren Macomb* decision. Following the *McLaren Macomb* decision, general counsel for the NLRB stated that the decision will be applied retroactively. A hearing on this matter is scheduled to occur on October 29, 2024. It is anticipated that the NLRB will continue to file complaints against employers to further their *McLaren Macomb* success against severance agreements.

FLSA INDEPENDENT CONTRACTOR TEST

On March 11th, DOL's final rule for determining independent contractor or employee status under the FLSA went into effect. A six-factor balancing test is set forth, which was traditionally applied by the courts and DOL. However, the DOL attempts to alter the scale to push each factor toward a finding of employee status. DOL returned to "a totality-of-the-circumstances analysis of the economic realities test in which the factors do not have predetermined weight and are considered in view of economic reality of the whole activity."

The factors are:

1. Opportunity for profit or loss depending on managerial skill,
2. Investments by the worker and the potential employer,
3. The degree of permanence of the work relationship,
4. The nature and degree of control,
5. The extent to which the work performed is an integral part to the potential employer's business, and
6. The worker's skill and initiative.

These 6 factors are nonexhaustive and "additional factors which indicate that the worker is economically dependent on the potential employer for work in business for themselves can be considered." The vague nature of these nonexhaustive factors will result in fewer workers being safely labeled independent contractors.

Notably, the DOL specified that the new final rule "only revises the Department's interpretation under the FLSA." Employers must adhere to the relevant standards across federal,

state, and local levels, ensuring compliance with the standard that provides the greatest protection to the worker.

Opportunity for profit or loss depending on managerial skill

When evaluating the opportunity for profit or loss facts such as "whether the worker determines or can meaningfully negotiate the charge for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space." Meaning whether the worker is acting if it is their own business. The DOL clarified that "decisions by a worker to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status." In short, an overtime request is indicative of an employee.

Investments by the worker and the potential employer

Are the worker's investments capital or entrepreneurial – that is, whether they "support an independent business and serve a business-like function, such as increasing the worker's ability to perform different types of or more work, reducing costs, or extending market reach" and how they compare relative to the employer's investment in the overall business. Investments should be compared not only on a quantitative basis, but also qualitatively. If a potential contractor is marketing their services and/or products to the public, this classifies as a contractor.

Degree of permanence of the work relationship

Typically, employee relationships are indefinite in duration, continuous or exclusive. On the other hand, if the working relationship is fixed in duration, project-based, or sporadic, it is

indicative of an independent contractor. DOL cautions that mere "seasonal or temporary work by itself would not necessarily indicate independent contractor classification."

Nature and Degree of Control

In examining this factor, the DOL says it will look at the business's control over the worker such as whether "the potential employer sets the worker's schedule," as an independent contractor should generally be able to work when they choose, and the DOL will look to see who is controlling the economic aspects of the working relationship, including control over prices or rates for services provided by the worker.

The extent to which the potential employer "supervises the performance of the work" is considered to be substantial evidence of an employer/employee relationship. On the other hand, an independent contractor is generally able to perform work as they desire with the only consequence that the business may not choose to contract with the independent contractor for future business. An exclusive relationship weighs in favor of a employment because the level to which the business "explicitly limits the worker's ability to work for others" is evidence of employer/employee relationship.

Integral Part of the Potential Employer's Business

Whether the function of the worker – in a general sense and not the individual worker – performs an integral part of the business, i.e., whether the function the worker performs is "critical, necessary, or central" to the company's primary business. Where the work is not critical or necessary for the company's primary business, such as a landscaper, this factor favors classification as an independent contractor.

Skill and Initiative

Where the worker does not use a specialized skill in performing the work or where the worker is dependent on training from the potential employer to perform the work, it indicates employee status. However, the DOL cautions that both employees and independent contractors may be skilled workers and workers who lack specialized skills may still be independent contractors.

NLRB AND EMPLOYEE HANDBOOKS

The NLRB, subsequently dubbed "Handbook Police", made it harder for employers to lawfully implement and justify certain workplace rules. The *Boeing* Standard evaluated the nature and extent of a handbook rule's potential impact on NLRA rights and the employer's legitimate justifications in enacting the rule. The Board created three categories when evaluating workplace rules: (1) Category 1, rules are always lawful; (2) Category 2, rules are sometimes lawful; and (3) Category 3, rules that are always unlawful. Generally, workplace rules were found lawful.

In *Stericycle, Inc.*, the "Handbook Police" overturned *Boeing* in favor of a modified *Lutheran Heritage* standard because the former standard adopted "overboard work rules that chill employees' exercise of their [Section 7] rights." The *Stericycle, Inc.* rule is burden shifting and the Board will consider the rule from the perspective of the employee because the employee is economically dependent on the employer. The workplace rule will be analyzed on a case-by-case basis and will be deemed unlawful if it is able to be shown that the rule has a "reasonable tendency" to chill employees from exercising their Section 7 rights or otherwise had a coercive meaning. If this low bar is met, the burden shifts to the employer to prove that the rule "advances a legitimate and substantial business interest," which cannot be accomplished with a "more narrowly tailored rule."

The Board declined to rule on the sufficiency of a "safe harbor" provision. It is important to note that this standard will be applied retroactively. Employers should consider including

disclaimers in the handbooks that the handbook is meant to provide guidance and not interfere with any rights available to employees under any law or regulation, including the right to engage in protected concerted activity under the NLRA.

NLRB AND "PROTECTED, CONCERTED ACTIVITY"

MILLER PLASTIC PRODUCTS, INC.

In a recent ruling in *Miller Plastic Products, Inc.,* the NLRB rejected a standard that has been in place since 2019. In *Miller Plastic Products, Inc.*, an employee stated, in a group meeting, that he and his coworkers should not be working during the COVID-19 crisis. After this meeting, the employee was terminated. The Board overruled the 2019 case of *Alstate Maintenance, LLC*, which set forth five factors that narrowed the assessment when single employee activity is protected under Section 7. In *Alstate*, an employee made a comment about poor tips to his manager with colleagues nearby. The Board found the employee was raising a personal grievance under the *Alstate* standard. The Board rejected this standard in *Miller Plastic* because it "imposed significant and unwarranted restrictions on what constitutes concerted activity" by introducing a rigid checklist of factors. *Miller Plastic* reaffirmed *Meyers Industries*, which held that "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." The Board held that the *Miller Plastic* test is a more holistic fact-based approach because it provides more protection to employees seeking to improve their working conditions. This decision makes it difficult for employers to differentiate a personal gripe from a complaint that is considered protected activity under the NLRA.

SOCIAL MEDIA

Section 7 of the NLRA guarantees that all employees have the right to engage in "concerted activities," meaning that all employees have the right to discuss the terms and conditions of employment and wages with their fellow workers. Section 8 of the NLRA protects employees that

engage in concerted activities from employer retaliation. The NLRA has become more aggressive to spread awareness about employee's rights under these sections.

Under the *Boeing* rule, employer policies restricting employees from speaking to the media and/or on their social media on behalf of the company were valid. However, under the *Lutheran Hertiage* rule, these policies have been deemed invalid because the policies can be construed to prevent an employee from speaking about the terms and conditions of their employment. Employees are allowed to discuss working conditions, wages, management, employment disputes, and whether or not the workplace is unionized on social media.

The NLRB went one step further in *Lion Elastomers* and added an extra layer of protection to employees who use offensive language and engage in union organizing activities and/or other protected activity. The Board returned to *Pier Sixty, LLC,* setting a specific standard when addressing social media in this context. The Board will look at the following factors: (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. The lines are blurred for employers when addressing misconduct because employers will have to decide whether to maintain workplace civility or violate the NLRA.

As noted in the dissent of *Lion Elastomers*, times have changed and employees are much less tolerant of aggression, racism, sexism, and threatening behavior in the workplace. Employers are obligated to address discrimination and harassment in the workplace. This decision will welcome conflict between federal and state agencies, including the EEOC and other related agencies.

FLSA'S SALARY THRESHOLD

Under current law, employees can be exempt from the FLSA's overtime requirements if they qualify for one of the three main white-collar overtime exemptions – executive,

administrative, or professional ("EAP"). Employees qualify for an EAP exemption and do not need to be paid overtime, if the following conditions are met: (a) paid on a salary basis, earning a minimum salary of $684 ($35,568 per year); and (b) primarily perform certain EAP duties as defined by DOL regulations and courts. Highly compensated employees ("HCE") are exempt from overtime rules if they: (a) earn at least $107,432 per year; and (2) regularly perform one or more of the exemption responsibilities identified in the EAP exemption.

On September 8, 2023, DOL released its proposed rule to raise the exempt salary threshold. This proposed change is the DOL's attempt to revive its 2016 raise of the salary threshold for white-collar exempt employees, which was subsequently blocked with the change in administration. The new rule proposed the following raises: (1) for EAP exemption increase from $684 per week to $1,059 per week; and (2) increase the HCE exemption from $107,432 per year to $143,988 per year. The proposal also sought to automatically update these salary thresholds every three years. At that time, DOL planned to finalize this rule by April 2024.

On April 23, 2024, DOL released the final rule on overtime exemptions. In the final rule, the salary basis was increased in two phases. In Phase One: (1) for EAP exemption increase from $684 per week to $844 per week; and (2) for the HCE exemption from $107,432 per year to $132,964 per year. Phase One takes effect on July 1, 2024. In Phase Two, the exemptions will be as follows: (1) for EAP exemption increase from $844 per week to $1,128 per week; and (2) for the HCE exemption from $132,964 per year to $151,164 per year. Phase Two is scheduled to take effect on January 1, 2025. The final rule also includes a mechanism to automatically increase the thresholds every 3 years to be determined by DOL based on data supplied by the Bureau of Labor Statistics.

It is anticipated that opponents of this proposed rule intend to rely on the analysis laid out by Justice Kavanaugh in his dissent in the *Helix Energy* case. Justice Kavanaugh questioned the legal basis for salary regulations under the FLSA.

FTC AND NON-COMPETE AGREEMENTS

Last year, the FTC proposed a complete ban on noncompete agreements, which would be a crushing blow to employers. On April 24, 2024 the FTC announced its long anticipated final rule on noncompete agreements. The final rule largely follows the previously published version and bans noncompete agreements in most circumstances for employees, independent contractors and other "workers." There are, however, some exceptions. Furthermore, the rule is not yet law and may not become law.

Under the final rule a noncompete agreement is impermissible except for noncompetes entered into pursuant to a bona fide sale of: a business entity; all or substantially all of the entity's assets; or the person's ownership interest in the entity. In a change from the prior version there no longer must be a sale of at least 25% of an ownership interest.

The rule also does not apply to existing noncompete agreements with "senior executives." "Senior executive" means a worker who, at the time the noncompete was signed, was in a policy-making position and received total annual compensation of at least $151,164 in the preceding year, or when annualized if the worker was employed during only part of the preceding year. Salary, commissions and nondiscretionary bonuses count towards the total, but the cost of lodging, board and fringe benefits do not. Since the bonus must be nondiscretionary an employer cannot pay a large discretionary bonus in an effort to make an existing noncompete enforceable against a departing employee.

Policy-making position means president, CEO or equivalent, or any other officer who has policy-making authority. Policy-making authority is defined as final authority to make decisions

that control significant aspects of a business entity or common enterprise. This does not include those executives who have authority for policy decisions for only a subsidiary or affiliate of a common enterprise.

A "non-compete clause" means a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (a) seeking or accepting work in the United States with a different person; or (b) operating a business in the United States.

The rule does not specifically refer to non-solicitation provisions. Additionally, in a change from the previously published version, broad confidentiality provisions are no longer specifically included in the definition of noncompetes. However, this does not mean that overbroad nonsolicit and confidentiality provisions would automatically survive a challenge under the FTC final rule.

Unless one of the exceptions applies, it is illegal to enter into or attempt to enter into a noncompete clause, to enforce or attempt to enforce a noncompete clause or to represent that the worker is subject to a noncompete clause. The final rule does not apply to existing causes of action.

The final rule was published in the Federal Register on May 7th. Within 120 days from publication employers must give notice to non-senior executives subject to a noncompete that the noncompete is no longer in effect and will not be enforced. That means notice must be sent on or before September 5, 2024, absent judicial relief prior to that date. The final rule contains a model notice for employers to copy or use as a guide.

Will the rule become law? To be determined. There are already two lawsuits pending in Texas seeking to enjoin the rule from becoming law. The U.S. Chamber of Commerce and The Business Roundtable are two of the plaintiffs. Seeking declaratory and injunctive relief the

plaintiffs argue that the FTC exceeded its authority to regulate anticompetitive conduct. More litigation could follow.