



JANUARY 16, 2023 UPDATE

UPDATE ON THE JOINT EMPLOYER RULE

Opponents of the new joint employer standard from the National Labor Relations Board scored a small victory Friday (January 12) with congressional action taken to attempt to rescind the rule. The U.S. House of Representatives voted 206-177 on a Congressional Review Act resolution, which allows legislators to reverse an agency's action. The NLRB released its rule on the joint employer standard in late October and it took effect December 26, 2023. The resolution now awaits a Senate vote. If it passes, it will go to President Joe Biden, but he has pledged to veto it.

WHAT IS THE JOINT EMPLOYER RULE?

The joint employer rule states that two entities or businesses are considered joint employers if they share or co-determine the employees' essential terms and conditions of employment, such as pay, benefits, scheduling, hiring, discharge and discipline. The previous standard implicated joint employers only when they had direct and immediate control over working conditions. But the new standard applies even when there's indirect control. Joint employers must participate in collective bargaining if employees for one of the organizations are represented by a union.

The National Labor Relations Board (NLRB) often changes its stances on certain issues when there is a change in administration. One of the higher profile areas where this has been the case over the last 15 years or so is the NLRB's standard for evaluating "joint employment." On Oct. 26, 2023, the agency reverted to the standard used by the board appointed by former President Obama.

According to an NLRB: "Under the new standard, an entity may be considered a joint employer of a group of employees if each entity has an employment relationship with the employees and they share or codetermine one or more of the employees' essential terms and conditions of employment, which are defined exclusively as: (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."

Under this new standard, it will be easier for the agency to impose joint-employer findings: "[T]he 2023 rule considers the alleged joint employers' authority to control essential terms and conditions of employment, whether or not such control is exercised, and without regard to whether any such exercise of control is direct or indirect. By contrast, the 2020 rule made it easier for actual joint employers to avoid a finding of joint-employer status because it set a higher threshold that a putative joint employer must 'possess and exercise . . . substantial direct and immediate control' over essential terms and conditions of employment, which has no foundation in common law."

The joint employment doctrine often is used by federal agencies to impose liability on two or more companies with respect to a group of employees, such as a staffing company and its client or a franchisor and franchisee. For example, the NLRB can use the doctrine to impose liability for violations of the National Labor Relations Act (NLRA) on multiple companies, and the agency has been at the forefront of changes to how joint employment is evaluated.

A finding of joint employment can have significant consequences for companies under the NLRA. From a practical perspective, each company found to be a joint-employer by the NLRB may be held liable for the unfair labor practices of their co-employers.

That is, companies not only need to account for their own compliance with the NLRA, they must also attempt to ensure compliance by any company with whom they are determined to be a joint employer. Accordingly, companies should note a new standard is in effect now that likely will make it easier for the agency to find joint-employer relationships.

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