

Human Resources BULLETIN



NLRB Issues New Joint-Employer Rule

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On October 27, 2023 the National Labor Relations Board (NLRB) published a final rule establishing new criteria for determining joint employer status. The new standard will become effective December 26, 2023 and replaces the current NLRB rule that has been in place since April 27, 2020. The new rule increases the likelihood of a business being deemed a joint employer of another business's employees under the National Labor Relations Act and the additional responsibilities and risks associated with that designation.

NLRB Joint-Employer Final Rule

Under the new joint-employer rule, two or more employers will be deemed to be joint employers if they *share* or *codetermine* one or more of the employees' essential terms and conditions of employment. The NLRB defines share or codetermine to mean that the joint employer possesses the authority to control, or to exercise the power to control, one or more of the employees' essential terms and conditions of employment. Under this standard an employer will be determined to meet this control definition regardless of whether they actually exercise such control.

The NLRB's new joint-employer rule takes a broad view of the essential terms of employment that they will examine to determine whether employers should be deemed joint employers. These terms and conditions are discussed later in this bulletin.



How the New Joint-Employer Standard Differs from the Previous 2020 Standard

The new rule rejects the 2020 joint-employer rule's focus on *direct and immediate control* by changing the control standard used in determining whether two or more employers are joint employers to include *indirect and reserved control*, in addition to direct control. This is fundamentally a return to the standard that came from the NLRB's 2015 *Browning-Ferris* decision which was used to determine joint employment before the 2020 rule was issued. The *Browning-Ferris*' joint-employment analysis was viewed unfavorably by employers because its criteria was both less predictable and brought a greater likelihood for a business to be found to share employment responsibility for another business's employees.

In contrast to the new rule, the 2020 rule required that a joint employer "possess and exercise *substantial direct and immediate control*" over essential terms and conditions of employment. The essential terms in the 2020 rule were also more limited than in the new rule. This more restrictive standard provided more certainty to employers as to the existence or absence of a joint employment relationship and a reduced likelihood joint employment would be determined to exist.

The new 2023 joint-employer standard relies on common law agency principles in determining the control element. The application of these principles will make it harder for businesses to predict the outcome of the joint-employer analysis than under the previous rule. The NLRB has stated that, in applying the new rule, it will "conduct a fact-specific analysis on a case-by-case basis to determine whether two or more employers meet the standard of joint employment."

The new standard is likely to lead to more business staffing relationships being deemed joint employment. As a result, more employers will be required to share employment related risks and responsibilities for the workers of another business including potential union organizing efforts and concerted activity.

Determining the Essential Terms and Conditions of Employment

The new 2023 joint-employer standard provides a list of the exclusive *essential terms and conditions of employment* that will be used in determining whether an employer has sufficient control over a primary employer's workers to be deemed a joint employer.

These essential terms and conditions of employment include:

- Wages, benefits, and other compensation
- Hours of work and scheduling
- Assignment of duties to be performed
- Supervision of the performance of duties

- Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline
- Tenure of employment, including hiring and discharge
- Working conditions related to the safety and health of employees

If a business has the authority to control at least one of these essential terms and conditions of employment they may be considered a joint employer. Although these terms and conditions of employment are the only ones that would give rise to a finding of joint employment under the new rule, it is apparent that they cover a wide range of actions. Direct, indirect or even reserve control of any of these terms or conditions of employment may be sufficient to find that the employer is a joint employer under the new rule. *Reserve control* can be found where an employer has the authority to control essential terms or conditions of employment even where the control is not exercised.

Impact of the New Rule for Employers

The effect of the new rule will be to make it significantly more likely for a business to be deemed a joint employer of another business's employees under the National Labor Relations Act (NLRA) which is an impactful development.

The NLRA applies to nearly all private-sector employers including both unionized and non-unionized workforces. Joint employers are equally liable for unfair labor practices committed by other joint employers; required to bargain with any union that represents jointly employed workers; and subject to union picketing or other economic pressure if there is a labor dispute.

The new rule will impact a wide range of businesses but is expected to be especially impactful to franchise businesses, staffing companies and their clients and other businesses that utilize contractors and sub-contractors in support of their operations. These businesses will need to closely examine their current contracts and management practices with staffing partners and analyze how the new rule may impact them. They also should determine actions for managing their business relationships to mitigate the risk of being viewed as exercising control, including indirect or reserve control, over the designated and expansive terms and conditions of employment of any other business employer's staff they work with.

Conducting appropriate reviews and subsequently eliminating identified joint employment risks will best position organizations to reduce the likelihood of being deemed joint employers under the NLRB's new standard.

Next Steps

There will likely be future legal challenges to the new joint-employment rule in the upcoming months but employers need to be prepared for the rule's enforcement and the corresponding business impact. The time for proactive review of employment arrangements, modification of contracts, if necessary, and adjustment of management practices to reduce the likelihood of being considered a joint employer is limited, as the rule will become effective December 26.

ADDITIONAL RESOURCES

[NLRB Standard for Determining Joint Employer Status](#)