Eye On Compliance: A Brief History Of Joint Employer Rules

By **Bruno Katz and Robert Curtis** (June 28, 2024)

This article is part of a monthly column that provides guidance on employers' top compliance concerns. In this installment, we discuss the joint employer rule.

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In October 2023, the National Labor Relations Board attempted to modify its joint employer rule to make it easier for one business to be deemed a joint employer of another business's employees, which could expose employers to collective bargaining obligations for employees they do not directly control. The NLRB last modified its joint employer rule in February 2020.

The U.S. District Court for the Eastern District of Texas struck down the 2023 rule in March, holding in U.S. Chamber of Commerce v. NLRB that (1) the rule unlawfully goes beyond common-law agency limits and (2) the 2020 rule will remain in place because the NLRB's rationale for rescinding the rule is arbitrary and capricious.[1]

Given this decision is currently being appealed to the U.S. Court of Appeals for the Fifth Circuit, a more detailed explanation of the history of these two rules follows to foster a better understanding of the dispute.

The 2020 Rule

To be a joint employer under the 2020 rule, the general contractor or employer "must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of [the employees'] employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees."[2]

The 2020 rule provides that indirect control and purely reserved control can be considered; however, they are not in and of themselves sufficient to show joint-employer status.

"Essential terms and conditions of employment" are defined under the rule as "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction." The rule specifies, for each term of employment, what counts as direct control and what does not. For example, a "cost-plus" contract is indirect control, while determining wages paid to another employer's employees is direct control.

The 2023 Rule

In contrast, the 2023 rule's definition of joint employment is far broader and embraces the concept of indirect control, even if the control is never in fact exercised. The 2023 rule changes the definition of "sharing and codetermining the employees' essential terms and conditions of employment," as follows:

To "share or codetermine those matters governing employees' essential terms and conditions of employment" means for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment.[3]

The 2023 rule added the following "essential terms and conditions of employment": (1) "work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline"; and (2) "working conditions related to the safety and health of employees."[4]

The 2023 rule broadens the definition of joint employment by (1) allowing employers who only exercise indirect control to be considered joint employers and (2) allowing employers who exercise control over only one "essential term and condition" to be considered joint employers.[5]

Thus, while the 2023 rule still uses the common-law definition of agency to define the joint-employment relationship, it significantly broadens the scope of joint employment beyond the common-law definition. Unlike the 2020 rule, indirect control over only one essential term, such as wages, will create a joint-employment relationship. The practical effect is many employers who do not exercise actual control over another entity's employees could still be deemed a joint employer but just reserving the right to exercise some control.

As an example, a fast-food franchisee has employees and the franchisor has "reserved authority," which it never exercises over working conditions such as the amount of staffing or where to order supplies. The NLRB receives an unfair labor practice claim from an employee about a reduction of the employee's hours based on sexual orientation. Under this scenario, the board could try to impose liability for the ULP against the franchisee, the actual employer and the franchisor just because of indirect but not exercised authority.

In another example, a construction company uses a temporary placement agency for the placement of individuals for the cleaning of its facilities. The temporary agency is responsible for its employees' wages and hours, provides a W2, and retains the ability to hire or fire its cleaning employees. However, the construction company sets work rules for safety purposes for the staffing agency employees to follow. No other direction is given to the agency employees as to how and when to clean.

Even in these unusual circumstances, the 2023 rule could likely make both the franchisor and the construction company joint employers under the 2023 rule's new provisions.

Summary

Joint employment can have significant consequences for employers as they could be required to bargain with employees over which they exercise only indirect control, including indirect control the employer never exercises. If determined to be a joint employer, the other entity could be subject to traditional labor issues: (1) potential NLRB election, (2) collective bargaining requirements, (3) labor picketing or (4) unfair labor practices charges.

Under the National Labor Relations Act, the NLRB cannot assess penalties. The agency may seek (1) make-whole remedies, such as reinstatement and back pay for discharged workers or voiding a work rule, or (2) informational remedies, such as the posting of a notice by the employer of a violation of the act and promising to not violate the law. The NLRA gives the NLRB authority to investigate charges of unfair labor practices filed by employees and

makes it illegal to retaliate against employees who participate in that process.

If the NLRB's Fifth Circuit appeal of the decision of the Eastern District of Texas is successful and the 2023 rule is made law, virtually every employer who contracts for labor likely could be deemed a joint employer because every contract for third-party labor has some terms that could potentially indirectly impact at least one of the specified "essential terms and conditions of employment."

Businesses will have to be cognizant of hiring temporary workers across many industries, including but not limited to hospitality, construction and warehousing, or face the risk of classification as a joint employer.

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[1] Chamber of Commerce of United States v. NLRB, No. 6:23-cv-00553 (E.D. Tex. Mar. 8, 2024).

[2] 29 C.F.R. § 103.40(a) (2020).

[3] 29 C.F.R. § 103.40(c) (2023).

[4] 29 C.F.R. § 103.40(d) (2023).

[5] 29 C.F.R. § 103.40(e) (2023).