

LEGAL UPDATE



NLRB Announces New Joint-employer Standard

On Oct. 26, 2023, the National Labor Relations Board (NLRB) [announced](#) a final rule that establishes new criteria to determine joint-employer status. Joint employment situations can happen when two or more employers share personnel hiring, supervision and management practices. When a joint employment status exists, joint employers are equally responsible for compliance with applicable laws and regulations.

The final rule was [published](#) in the Federal Register on Oct. 27, 2023, and will become effective 60 days after publication on Dec. 26, 2023. Employers should note that the NLRB will apply the new standard only to cases that are filed with the agency after the final rule effective date.

Joint Employment

Whether joint employment is by design or unintentional, joint employers are equally:

- Liable for unfair labor practices committed by other joint employers;
- Required to bargain with the union that represents jointly employed workers; and
- Subject to union picketing or other economic pressure if there is a labor dispute.

To determine whether a joint-employer relationship exists, employers must evaluate the degree of control they exert over “essential terms and conditions of employment.” Essential terms and conditions of employment include wages, benefits, hours of work and employee hirings, discharges, discipline, supervision and direction.

2020 Joint-employer Standard

The NLRB adopted the current joint-employer standard on April 27, 2020. This standard applies to labor issues related to the [National Labor Relations Act](#).

The current standard considers the “substantial direct and immediate control” employers have over essential terms and conditions of employment for individuals who are employed by another organization. Specifically, the 2020 joint-employer standard indicates that a business is a joint employer of another employer’s employees only if the degree of joint control is of sufficient magnitude to lead to the conclusion that the joint employer meaningfully affects matters relating to the employment relationship.

In addition, under the 2020 rule, other evidence may suggest (but not prove) the existence of joint-employer status, particularly when the evidence points to indirect control or the right to exert control through contract or agreement (especially when control is never exercised).

IMPORTANT DATES

Oct. 26, 2023

The NLRB announced a new final rule that replaces the 2020 joint-employer standard with a more inclusive version.

Dec. 26, 2023

The effective date of the 2023 joint-employer standard.

Overview of the 2023 Rule

The new rule rescinds the 2020 joint-employer standard and:

- Clarifies the definition of “essential terms and conditions of employment;”
- Identifies the types of control that are necessary to establish joint-employer status and the types that are irrelevant to the joint-employer inquiry; and
- Describes the bargaining obligations of joint employers.

Employers should pay particular attention to the fact that the 2023 rule was drafted to be more inclusive than the 2020 rule. This means it will become easier for employers to be classified as joint employers. The 2023 rule created this more inclusive standard for determining joint-employer status by removing the requirement that joint employers must “possess and exercise ... substantial direct and immediate control” over essential terms and conditions of employment.

In addition, the new standard more faithfully grounds the joint-employer rule in established common-law agency principles. Specifically, the rule considers the alleged joint employers’ authority to control essential terms and conditions of employment, regardless of whether such control is exercised.

Finally, the NLRB has also stated that “the new rule also provides extensive guidance to parties regarding their rights and responsibilities in situations where joint-employer status has been established.”

Terms and Conditions of Employment

The final rule limits terms and conditions of employment to:

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.

Impact on Employers

Employers, particularly contractors and subcontractors, should become familiar with the new rule and determine whether a more inclusive joint-employer standard would reclassify them as joint employers in their operations by the rule’s effective date. Employers affected by the new standard should also take precautionary steps to ensure other joint employers comply with regulations regarding labor and employment laws for joint employees.