Controversial Joint Employer Rule Struck Down Just Before Taking Effect: Your Blueprint For Navigating Months Ahead

Insights
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In an eleventh-hour decision, a federal court judge in Texas just struck down the Labor Board's controversial joint employer rule right before it was set to take effect on Monday. The NLRB had aimed to make it far easier for workers to be considered employees of more than one entity for labor relations purposes – a move that would have resulted in increased union organizing and collective bargaining efforts across the country – but Friday's decision halted it in its tracks. The fight will continue, however, as there is little doubt the agency will appeal the decision in hopes of resurrecting the rule in the near future – and a whole separate court battle over the same issue takes place in D.C. While employers will once again be left to navigate an uncertain future while the court battles wage, we have a blueprint to guide you through the tumultuous times ahead.

Status Quo Remains: Current Standard Summarized

You can read about the joint employer saga that employers have been forced to endure over most of the past decade by reading our recap Insight here. Suffice it to say, the pendulum has swung back and forth multiple times when it comes to defining "joint employment" status since 2015, and you might feel confused as to where we stand now. So let's start there.

Friday's court ruling confirmed that the 2020 version of the joint employment standard remains in effect.

- Under this status quo, an employer is only considered a joint employer of a separate employer's employees if the two businesses **share or co-determine the employees' essential terms and conditions of employment**. These include wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.
- Equally as important, a business must possess **and actually exercise substantial direct and immediate control** over the employees' essential terms and conditions of employment in order to be considered a joint employer – and in a manner that is **not sporadic and isolated**.

Court Decision in a Nutshell

The NLRB wanted to switch things up in a big way. It released a revised rule in October that would have scrapped that standard and instead establish joint employment much more frequently.

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- A business would have been considered a joint employer not only when it had the *right* to exert control over terms and conditions of another company's employees, but also when evidence exists of *reserved*, unexercised, or *indirect control* over *any* working conditions.
- This would have included obvious situations like hiring and firing – but also such other conditions as wages, benefits, scheduling, supervising, directing, and disciplining.
- As you can imagine, this would have led to a tidal wave of new union activity involving all sorts of businesses – including those involved in franchising, contracting, and supply chains. Non-unionized businesses might have found themselves forced to engage in collective bargaining if they were found to be joint employers with a unionized employer, as just one example.

A consortium of business groups led by the U.S. Chamber of Commerce filed a court action to block the rule. Late Friday night, a federal judge in Texas issued a 31-page opinion striking down the new rule right before it was set to take effect on March 11. In part, the judge said that the NLRB Board "failed to reasonably address the disruptive impact [that] the new rule [would have] on various industries."

What's Next?

The NLRB will have about a month to file an appeal, and it seems likely the agency will go down that path to try to breathe new life into its rule. After all, revising the joint employment standard has been one of the agency's priorities since first announcing the proposal a year-and-a-half ago.

Any such appeal would be heard by judges from the conservative Fifth Circuit Court of Appeals. Given the high-stakes nature of this issue, it is also possible that the entire panel of Fifth Circuit judges (an *en banc* sitting) could decide the case – which could happen as the next step in the process or after a three-judge panel takes the first shot and issues a decision.

Complicating matters further, the SEIU union has filed a parallel lawsuit in the liberal Washington, D.C., federal court system – this one arguing that the rule doesn't go far enough. So we may soon see a contrary order from a federal court clearing the rule for takeoff. Which could lead to the case being consolidated and handed to a separate appeals court via a lottery selection system, and of course the issue could eventually wind its way all the way up to the U.S. Supreme Court.

There is a lot of uncertainty ahead, but one fact we feel comfortable noting is that this entire process will take time. Typical appeals can take a year or more, and any *en banc* hearing or Supreme Court intervention might mean that we might not have final resolution of this issue until 2025 or even 2026. Even if the process is somehow accelerated, the soonest this new rule could take effect would be late in 2024.

Your Blueprint for Navigating Times Ahead

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Employers might feel like they have dodged a bullet here, but again – there is a chance this rule could be resurrected again by the end of this year. If you've had your head buried in the sand up until now, you may want to use this reprieve as an opportunity to tighten up some business practices and minimize chances of legal exposure.

- If you have not yet done so, this might be a good time to work with your legal counsel to **evaluate service contracts and related documents** for language reserving the right of (direct or indirect) control over workers staffed by third parties when it comes to their employment terms and conditions.
- **Host employers** relying upon employees furnished by a third parties might want to examine service contracts and corresponding procedures governing such arrangements. Give particular focus on language reserving the contractual and practical right to control (both directly and indirectly) essential employment terms and conditions.
- **Staffing companies and other alternative employer service providers** might also want to conduct similar exercises from the perspective of their own services and contractual arrangements. While reservation of rights language can be a significant factor in determining joint employer status, it may be required by law in certain staffing models, adding yet another layer of complexity to the analysis.
- Similar issues arise in **franchisor-franchisee arrangements and other business models** in which employees of one entity perform services benefitting another (such as Business Process Outsourcing vendors providing services in the facilities of another employer or multiple employers working on a common construction site). If you fall into this category, work with your counsel to discuss your business model and any associated practices and key documents.
- Finally, you should consider **reviewing – or creating – clear policies regarding the role and authority of third-party vendors** with respect to your business practices, especially in their interactions with direct employees. This clarity will help in avoiding any unintended joint employer issues, regardless of which standard is in effect.

Conclusion

You'll want to stay up to speed as the contours of this standard are shaped by developments in the coming months. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. We will continue to monitor the situation and provide updates as more information becomes available. Any questions may be directed to your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Labor Relations Practice Group or PEO and Staffing Industry Team.

Related People

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