

A RECENT PROPOSED CHANGE IN THE LAW EMBRACES A BROADER STANDARD FOR DETERMINING WHO IS AN 'EMPLOYER' IN KENTUCKY

Insights
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More businesses in Kentucky may be considered “joint employers” if a proposed change that appears to broaden the test for an employment relationship is finalized. In recent years, courts and administrative agencies have used various multi-part tests and analyses to determine whether two separate entities “jointly” employ one or more workers. The ultimate touchstone, however, in many of these cases is the concept of **control**. Thus, as a practical matter, if an employment agency provides some of its workers to perform services at another company, the amount of control that company exercises over such workers often determines whether it may also be found to jointly employ them. A proposed change to the Kentucky Administrative Regulations — which was filed on December 14 — would tilt the balance even further in favor of a finding of joint employment. What do you need to know about the proposed change?

The New Language

The new language would amend [the Kentucky Administrative Regulations](#) to provide that “[t]he principal test for determining whether an employment relation exists is whether the possible employer controls or has the right to control the work to be done by the possible employee to the extent of prescribing how the work shall be performed.”

Why is this proposed change significant? The language would seemingly allow for an entity using another entity’s employees to be considered a joint employer of those workers simply because the user entity will almost certainly

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prescribe how the work is to be performed. This would likely result in a larger number of entities being found to be joint employers, and it could have impact on certain industries and outsourced services.

Control has been a touchstone of employer status under many laws for decades. However, the proposed change goes one step further and states that just reserving the right to control the work is sufficient, even if that right is not exercised. The regulation further proposes another new sentence stating that “where the facts clearly establish that the possible employee is the subordinate party, the relation is one of employment.”

Part of a Broader Trend

This proposed change is part of a broader trend.

- In September, [the Biden administration's NLRB proposed rescinding a 2020 rule promulgated by the Trump administration](#). The current standard offers flexibility for modern working relationships by only deeming joint employment to exist when two businesses share or co-determine the employees' essential terms or conditions of employment and when they actually exercise control over them. The NLRB's new proposed rule, however, would set that aside in favor of a broader standard through which evidence of even potential, unexercised, and indirect control over any working conditions could be deemed sufficient to confer joint employer status in the context of labor relations.
- Meanwhile, the employer community is awaiting the inevitable rule that takes the same approach for joint employment in the wage and hour law context. The Department of Labor is expected to soon issue a broad standard after [a federal appeals court cleared the runway for the agency to proceed in late 2021](#).

What's Next?

Regulations take effect in Kentucky through a notice and comment process, similar to how new regulations are enacted on the federal level. Proposed or amended administrative regulations filed by noon on the 15th day of the month are published in the next month's Administrative Register of Kentucky. Given that process, the regulations were published on January 1, 2023.

Next, the Kentucky Labor Cabinet will need to hold a public hearing and conduct a public comment period. The public hearing must be held between the 21st and last day of the month following publication in the Administrative Register of Kentucky. Notably, however, the agency may cancel the hearing if no letter of intent to attend the hearing is received.

The public comment period ends on the last day of the month following publication, and the regulation may take effect after a few additional steps in the process are completed, including consideration of public comments.

Kentucky employers potentially affected by this change may wish to comment on these proposed regulations before they take effect, and they may do so at by following the directions set forth on the Kentucky Legislature's [website](#) now that the January update is published.

Conclusion

We will continue to monitor developments in this area, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, any Fisher Phillips attorney in our [Louisville](#) office, or any attorney in our [PEO and Staffing Industry Team](#).