Labor Board's Finalized Joint Employer Rule Ensures More Workers Will Seek Union Membership: Your 10-Step Plan

Insights
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The National Labor Relations Board just released its final joint employer rule that makes it easier for workers to be considered employees of more than one entity for labor relations purposes – a move that will result in increased union organizing and collective bargaining efforts across the country. The controversial rule released today establishes joint employment not only when one company has 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 includes not only obvious situations like hiring and firing but also such other conditions as wages, benefits, scheduling, supervising, directing, and disciplining. What are the 10 steps you should consider taking in order to prepare for this new standard? **[Editor's Note: A federal judge in Texas struck down the rule right before it was set to take effect. You can read more here. We will continue to follow the court battles and provide updates as warranted.]**

How Did We Get Here?

You might feel a bit of whiplash given the changes that have occurred in this area over the past few decades and the past 8 years in particular.

- For over 30 years, the NLRB had held that two companies would only be considered "joint employers" — equally responsible for certain labor and employment matters — if they shared or codetermined those matters governing the essential terms and conditions of employment, and *actually exercised* the right to control.
- In 2015, the Board renounced this decades-old test in the controversial *Browning-Ferris* decision, eliminating any requirement that the employer actually exercise direct control. Instead, the NLRB decided that businesses need only retain the contractual right to potentially control to be considered a joint employer — even if they had never exercised it. Further, the Board held that indirect control (e.g., control through an intermediary) would be sufficient to find joint employment.
- In 2020, the NLRB switched things up again by issuing a rule saying an employer must possess and *actually exercise substantial direct and immediate* control over the employees' essential terms and conditions of employment in a manner that is not sporadic and isolated in order to be found to be a joint employer.

- And now, thanks to today's finalized rule, we are once again in a place where the standard is broad, unwieldy, and difficult to manage.

The seemingly perpetual pendulum swing we've endured has subjected employers to a great deal of uncertainty when it comes to engaging in long-term strategic planning on topics such as ascertaining exposure to liability within the context of organizing activity, bargaining obligations, unfair labor practices, and general staffing decisions.

What Does the New Rule Say?

- Two or more employers will now be considered joint employers merely by sharing or co-determining matters governing essential terms and conditions of employment, such as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.
- More importantly, the Board will once again consider *evidence of reserved and/or indirect control* over these essential terms and conditions of employment when analyzing joint-employer status. This means that – instead of requiring *actual direct control* – even potential retained (but unexercised) *indirect control* over working conditions could be deemed sufficient to render a business a joint employer for labor relations purposes.
- There is no mathematical precision when it comes to applying the new rule. Joint employer status will be determined on the totality of relevant facts in each particular employment setting, meaning employers will find it difficult to predict the outcome of any examination of their status.
- If there is any consolation to be found, it's that the party asserting that an entity is a joint employer retains the burden of proof in making this determination.

What Does This Mean For Employers?

Any employer that retains indirect control over the working conditions of temporarily placed employees runs a risk of being deemed their joint employer. Businesses generally want to avoid sharing joint-employer status – equal responsibility for certain labor and employment matters – for various reasons. Now, the rule will have implications obligating both businesses to potentially bargain with a duly certified union as exclusive bargaining representative – at least with respect to those working conditions over which they share control, while exposing both companies to joint unfair labor practice liability. The same is true for franchisor-franchise arrangements and other business models where employees of one company perform services benefitting another employer.

What's Next?

The rule will be published in the Federal Register and is subject to Congressional review. It is currently slated to take effect on December 26, 2023, unless there is an extension, or in the unlikely event the rule is withdrawn or otherwise sidetracked or blocked by a court order.

We can expect employer advocacy organizations to take legal action in an attempt to derail or block the rule. In the past several years, this strategy has effectively been used to stop finalized regulations related to all manner of workplace-related (and other) issues from taking effect as scheduled. However, you cannot count on this procedural mechanism to be successful given the uncertainties of litigation. You should therefore assume that the agency will enforce this new standard for the foreseeable future.

What Should Employers Do Now? Your 10-Step Guide

1. Employers and temporary service providers alike should scrutinize the parameters within **your written service agreements and their underlying practices** for any reservation of the right to control (both indirect and direct) and evaluate the risks of retaining such language (particularly where it is likely to go unexercised). Your analysis should examine all essential employment terms and conditions with a particular focus on pre-employment qualification and hiring standards, assignment and removal of individual temporary employees, shift schedules, workload and pace of work, and wages and benefits.
2. No doubt the complete elimination of many of these factors may be impractical in many cases. But to the extent that **their presence can be minimized**, you can at least develop and preserve viable arguments against a possible finding of joint employer status.
3. **Staffing companies and other alternative employer service providers** should pay particular attention when examining their 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 models, adding yet another layer of complexity to the analysis. Even when rights of control must be reserved, the wording and scope of the reservation of rights will be important in the joint employer analysis.
4. **Joint employer principles can also apply to workers paid as independent contractors if the workers meet the definition of employee under the NLRA.** Misclassified contractors might be provided through a third-party staffing provider in the same way temporary employees are provided. If you use that model, you should consult with counsel regarding the terms and conditions utilized by the provider from the standpoint of joint employer risk in the event independent contractor status is challenged. The mere fact that the contractors are provided by a third party does not offer an independent defense in the event of a challenge.
5. 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). Make sure you reexamine your practices and controlling agreements closely to adjust as necessary.
6. No matter which business model you use, you should begin **working closely with 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. The scope of review should go beyond explicit references to control. For example, a contract provision requiring post-accident drug testing of workers does not refer to control, but it could be viewed as a right of control.

7. It stands to reason that unions will likely attempt to exploit this situation, especially given their declining numbers and the current state of the economy. We expect unions to return to traditional organizing tactics targeting temporary employees with promises of "regular" status and all the perceived perks that come with it in an effort to secure their signatures, and ultimately their votes. This could allow unions to gain a toehold that may ultimately extend to organizing direct employees. If you have not recently **worked with your labor counsel** to assess your vulnerability to union organizing efforts, now is the time to do so.
8. You should also consider **training** your managers to ensure they understand the implications of the new rule and are clear about the legal boundaries surrounding both direct and indirect control. You should inform them of the potential risks and best practices in dealing with third-party staff, franchisees, and contractors.
9. Review – or create – **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.
10. You'll want to **stay up to speed** as the contours of this standard are shaped by developments in the coming months. The best way to do so? Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information.

Conclusion

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.

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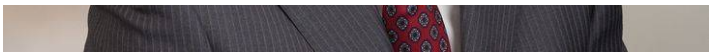

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