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LABOR BOARD MAKES BUSINESS-FRIENDLY JOINT EMPLOYER RULE OFFICIAL AGAIN: KEY TAKEAWAYS FOR BUSINESS LEADERS

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Labor Board Makes Business-Friendly Joint Employer Rule Official Again: Key Takeaways for Business Leaders

The National Labor Relations Board officially restored a business-friendly joint-employer rule on February 26 in the latest chapter of a saga that has spanned the last decade. The new final rule makes it more difficult for businesses to be held legally responsible for alleged labor law violations by staffing companies, franchisees, and other related organizations. A Texas federal court judge had struck down a Biden-era rule in March 2024 that would have made it far easier for workers to be considered employees of more than one entity – and the Board dropped its appeal a few months later. While the 2020 rule from President Trump's first term was already effectively back in place due to the court ruling, the NLRB's latest move formally reverts back to it. While we expect legal challenges to the new rule, the latest move is good news for businesses. How did we get here and what can you expect next?

Back and Forth and Back Again

You might feel a bit of whiplash given the changes that have occurred in this area, especially over the last decade. Here's a quick recap on how we got here:

- For over 30 years, the NLRB had held that two companies would only be considered "joint employers" – equally

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responsible for certain labor and employment matters – if they shared or co-determined 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 to *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 (such as control through an intermediary) would be sufficient to find joint employment.

- In 2020, the NLRB switched things up again by issuing a rule saying a company 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.

- The pendulum swung back yet again in 2023 when the Biden administration released a new rule making it easier for workers to be considered employees of more than one entity for labor relations purposes. The controversial rule established 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.

- A 2024 court ruling that struck down the Biden rule – combined with the Board's decision to drop its appeal – led to the Trump administration's 2020 version of the joint employment standard remaining in effect.

- Now, the latest final rule on February 26, 2026, officially restores the 2020 standard (more on that below).

Key Factors Under Restored Standard

While businesses have been operating under the 2020 standard since the Texas federal court struck down President Biden's rule, now is a good time to review the details and how they impact your operations. As we covered in 2020, here are the key factors:

Substantial Direct and Immediate Control

Under the new rule, 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. Here's a deeper dive into what *substantial control* does and does not look like in specific circumstances:

- **Wages**: A business would need to actually determine the wage rates, salary, or other rate of pay that is paid to another employer's individual employees or job classifications to be found to be levying sufficient control to sustain a joint employment finding. Entering into a cost-plus contract (with or without a maximum reimbursable wage rate) will not suffice.

- **Benefits**: Similarly, a business would need to actually determine the fringe benefits to be provided or offered to another employer's employees. This includes selecting the benefit plans (such as health insurance plans and pension plans) and/or level of benefits provided to another employer's employees. Permitting another employer, under an arm's-length contract, to participate in its benefit plans will not suffice.

- **Hours of work**. A business would need to actually determine work schedules or the work hours (including overtime) of another employer's employees in order to be found to be exerting sufficient control to sustain a joint employment finding. Establishing an enterprise's operating hours or when it needs the services provided by another employer will not trigger such a finding.

- **Hiring**. A business would need to actually determine which particular employees will be hired and which will not. Requesting changes in staffing levels to accomplish tasks, or setting minimal hiring standards such as those required by government regulation, will not be enough.

- **Discharge**. A business would need to actually decide to terminate the employment of another employer's employee. Simply bringing misconduct or poor performance to the attention of another employer that makes the actual discharge decision by expressing a negative opinion of another employer's employee,

refusing to allow another employer's employee to continue performing work under a contract, or setting minimal standards of performance or conduct such as those required by government regulation, will not suffice.

- **Discipline**. A business would need to actually decide to suspend or otherwise discipline another employer's employee. Bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision by expressing a negative opinion of another employer's employee or by refusing to allow another employer's employee to access its premises or perform work under a contract, would not cut it.

- **Supervision**. A business would need to actually instruct another employer's employees how to perform their work or actually issue employee performance appraisals in order to be found to be levying sufficient control to sustain a joint employment finding. If its instructions are "limited and routine," and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it, it will not be considered sufficient control.

- **Direction**. Finally, a business would need to assign particular employees their individual work schedules, positions, and tasks. Simply setting schedules for completion of a project, or describing the work to be accomplished on a project, will not be considered sufficient control.

Totality of Circumstances

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.

Certain Practices "Probative" But Not Necessarily Determinative: Certain common business practices will be considered "probative" of joint employer status, but only if they supplement and reinforce evidence of the business's exercise of direct and immediate control over a particular essential term and condition of employment. They include:

- evidence of "indirect control" over essential terms and conditions of employment of another employer's

employees;

- the contractually reserved but never-exercised authority over the essential terms and conditions of employment of another employer's employees; and
- control over mandatory subjects of bargaining other than the essential terms and conditions of employment.

Burden of Proof: According to the NLRB, the party alleging that a certain business is a joint employer has the burden of proof of making such a claim in any legal proceeding.

What's Next?

Under the Trump administration's rule, fewer businesses are likely to be deemed a joint employer by a court or agency when it comes to matters relating to labor relations under the National Labor Relations Act. Therefore, we expect fewer labor charges brought against businesses, and limited success of broad-based union organizing efforts.

The current administration has ensured that the legal standards are balanced to take into account the interests of management as well as labor, whether it is related to confidentiality in workplace investigations, the use of company electronic equipment for union purposes, union election procedures, the termination of union dues collections, or any number of other developments.

You should consult with your labor counsel to determine whether to adjust any of your business practices to better align with the new standard. There may be opportunities for you to reformulate your model and revisit your interactions with staffing companies and other businesses.

You'll also want to track new developments. If the past is any indication, litigation challenging this latest rule remains a distinct possibility. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

Conclusion

We will continue to monitor NLRB developments and provide updates as 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.