

NLRB ADOPTS NEW RULE EXPANDING JOINT EMPLOYER STATUS

On October 26, 2023, the National Labor Relations Board (“NLRB”) published its highly anticipated final rule, “[Standard for Determining Joint Employer Status](#),” set to take effect December 26, 2023. The new rule rescinds and replaces the NLRB’s previous 2020 rule, establishing a new standard to determine whether two employers are considered “joint employers” within the meaning of the National Labor Relations Act (the “Act”).

Generally, the new rule provides that an entity may be considered a joint employer of another entity's employees if the two employers share or codetermine the employees' essential terms and conditions of employment. At face value, this would not seem to alter the previous standard in a significant or meaningful way; however, the new rule goes on to drastically expand the underlying standard for determining joint employer status.

Under the previous rule, the NLRB applied common-law agency principles to determine joint employer status. Specifically, in order to establish a joint employer relationship, the NLRB’s previous 2020 rule required proof of “**direct and immediate control**” being exercised over the “essential terms and conditions” of a person’s employment by two or more employers.

Conversely, and most notably, the NLRB’s new rule provides a joint employer relationship can be established if “the employer **possesses the authority** to control (whether directly, **indirectly** or both) **or exercises the power** to control (whether directly, **indirectly** or both) **one or more** of the employees’ essential terms and conditions of employment, **regardless of whether the employer exercises such control or the manner in which such control is exercised.**” (emphases added). The new rule goes on to provide “an exclusive, closed list of [essential] terms and conditions of employment that may serve as the objects of control necessary to establish joint employer status.” The list includes the following categories:

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.

Practically speaking, the new rule undoubtedly broadens the previous standard of joint employer status, and opens employers up to the potential for unforeseen liability based on the actions or decisions of another entity. More significantly, under the Act, joint employers must bargain with the union that represents the jointly employed workers, and joint employers are potentially liable for one another's unfair labor practices. Moreover, both joint employers are subject to union picketing or other economic pressures if a labor dispute arises. This not only increases costs associated with collective bargaining for an employer, but also potentially shifts the balance of power in those negotiations away from employers and toward the unions by adding a third party into collective bargaining negotiations.

The impact of the NLRB's new rule will likely vary by industry. One industry of particular concern is the franchise industry and the franchisor/franchisee relationship. Even if a franchise agreement reserves only limited or indirect control over the essential terms and conditions of a franchisee's employee (*i.e.*, through provisions regarding preserving brand integrity that only indirectly affect the employee's day-to-day job functions), and even if the day-to-day authority to dictate the terms and conditions of employment is held by the individual franchisee, there is now room for an employee relationship to form simply by the franchisor contractually reserving certain oversight considerations.

For more information regarding the NLRB's new rule, please reach out to [Tara Stingley](#), [Henry Wiedrich](#), or another member of the [Cline Williams' Labor and Employment Law Section](#) at www.clinewilliams.com.

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