NEWS

NLRB Adopts Expanded Joint Employer Rule

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The National Labor Relations Board (NLRB) released a **final rule - (https://www.federalregister.gov/public-inspection/2023-23573/standard-for-determining-joint-employer-status)** Oct. 26 to provide a broadened standard for when two employers that conduct business together are considered to be joint employers and thus liable for one another's unfair labor practices.

If two entities are **joint employers** under the National Labor Relations Act (NLRA), both must bargain with the union that represents the jointly employed workers, both are

potentially liable for unfair labor practices committed by the other, and both are subject to union picketing or other economic pressure if there is a labor dispute.

This final rule will replace an **older rule** that took effect on April 27, 2020. Under that rule, an employer could be a joint employer of another entity if it had direct and immediate control over the essential terms and conditions of employment, such as wages, benefits, work hours, hiring, discharge, discipline,

supervision and direction.

Rule's Provisions

The new rule states that two entities are considered joint employers if they share or co-determine the employees' essential terms and conditions of employment. It will take effect 60 days after it's published in the *Federal Register*, which means late December.

"The board's new joint employer standard reflects both a legally correct return to common-law principles and a practical approach to ensuring that the entities effectively exercising control over workers' critical terms of employment respect their bargaining obligations under the NLRA," said NLRB Chairman Lauren McFerran.

Indirect control over terms and conditions of employment is enough to establish joint employer status, even if the company never exercises a contractual right to exert that indirect control, according to Mark Kisicki, an attorney with Ogletree Deakins in Phoenix.

"The extent of control no longer matters," said Ryan Funk, an attorney with Faegre Drinker in Indianapolis.

Businesses like to know "hard and fast" legal rules they can follow, but "what this does is make the joint employer status more murky," said Paul Woody, a franchise attorney at Greensfelder in St. Louis. "It will be very important for our franchisor clients to go through their policies with a fine-tuned comb."

The new rule "removes the clarity the 2020 rule was intended to provide, leaving it unclear how much indirect control is going to be deemed sufficient," Kisicki said. There are "a number of bases on which this rule will be challenged and can be successfully challenged by the employer community."

"I think it's going to have a big impact. I think it will be challenged in court right away," said Steve Swirsky, an attorney with Epstein Becker Green in New York City. "I think it's a big deal. The [board's] goal is to make it easier to unionize."

U.S. Senators Bill Cassidy, R-La., and Joe Manchin, D-W.Va., immediately announced they will introduce a Congressional Review Act resolution to overturn the rule. In a press release, they said the rule will jeopardize the franchise business model and create uncertainty for small businesses. Franchisees usually handle hiring, firing, work schedules and pay decisions, while franchisors do not.

The rule could increase costs for employers because unions tend to boost wages and benefits, and participating in collective bargaining carries administrative costs for employers, said Tami Culkar, an attorney with Fisher Phillips in Denver.

Adding a third party into collective bargaining will shift the balance of power toward unions and away from employers, Kisicki said.

Corporate Resistance

Business groups quickly expressed their strong opposition to the new rule.

"It defies common sense to say that businesses can be held liable for workers they don't employ at workplaces they don't own or control, yet that is exactly what the new NLRB joint employer rule does. This rule will create chaos and more legal confusion that will harm both employers and workers," said Glenn Spencer, a senior vice president with the U.S. Chamber of Commerce in Washington, D.C.

"This overreaching and unworkable joint employment policy is designed to change the rules in the middle of the game for hundreds of thousands of franchise owners and turn them into middle managers in their own businesses," said Michael Layman, senior vice president for government relations and public affairs for the International Franchise Association, headquartered in Washington, D.C. "What's worse, we have seen this misguided policy before, and it resulted in hundreds of thousands in lost job opportunities, billions in increased costs for franchised business, and a doubling of lawsuits." He was referring to a broader joint employer standard that was in place from 2015 to 2017, similar to what the new final rule entails.

Likewise, David French, senior vice president of government relations for the National Retail Federation in Washington, D.C., said the new rule will create ambiguity within the employer-employee relationship and inhibit job growth and free enterprise. "The new standard is unclear, unnecessary and harmful to thousands of retail employers and the millions of Americans they employ," he said.