Cos. Must Stay On Alert With Joint Employer Rule In Flux

By **Francine Esposito, Rachel Gonzalez and Daniel Pierre** (May 29, 2024)

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The October 2023 joint employer test proposed by the National Labor Relations Board, which would make it easier for two entities to be deemed joint employers, was struck down by a Texas federal court and Congress passed a resolution to block it.

The proposed rule, however, is not yet dead. The NLRB has recently appealed the court's decision, and Congress was unable to override President Joe Biden's recent veto of its resolution in order to prevent the new test from taking effect.

Given the significance of a joint employer finding, businesses should close pay attention to the status of the proposed rule.

Background

The determination of whether two businesses are joint employers under the National Labor Relations Act is analyzed under the joint employer test, codified at Title 29 of the Code of Federal Regulations, Section 103.40.

Joint employment presents a significant risk to businesses because when businesses are deemed joint employers under the NLRA, both must bargain with the union that represents the jointly employed employees, both may be held liable for unfair labor practices committed by either business, and both are subject to union picketing in the event of a labor dispute.

In October 2023, the NLRB proposed a new rule seeking to replace the 2020 joint employer test with a standard that makes it much easier to find joint employment.

2020 Joint Employer Test

The 2020 joint employer test requires an entity to actually possess and exercise "substantial direct and immediate control" over essential terms and conditions of employment of another entity's employees to warrant a joint employment finding.[1]

The 2020 joint employer test made clear that "indirect control over essential terms and conditions of employment" of another entity's employees may be considered but is not sufficient to establish joint employer status.

The 2020 rule listed eight discrete categories constituting essential terms and conditions of employment: wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction. The 2020 rule disregarded sporadic, isolated or de minimis control over another employer's workforce as not sufficient to establish joint employer status.

2023 Proposed Joint Employer Test

Believing the 2020 joint employer test was too restrictive, on Oct. 27, the NLRB issued the new proposed rule, which sought to change the 2020 joint employer test in three ways.

First, "reserved and indirect control" would demonstrate joint employment, meaning that businesses would be deemed joint employers if one business simply contractually reserves the right to control another business's workers, but does not actually exercise any control.

Second, two new categories were added to the list of essential terms and conditions of employment: performance work rules and safety and health conditions.

Third, sporadic, isolated or de minimis control would sufficiently demonstrate joint employment. The delayed effective date of the proposed rule was March 11.

Legal Challenge to Proposed Rule

Given the significant impact the proposed rule would have on businesses, the Chamber of Commerce and employer groups sued the NLRB in the U.S. District Court for the Eastern District of Texas.

They argued that the NLRB's rescission of the 2020 joint employer test was arbitrary and capricious because the proposed rule contradicted the common law interpretation of the joint employer test, ignored serious practical problems, and failed to articulate a clear standard.

On March 8, days before the delayed effective date of the proposed rule, the U.S. District Court for the Eastern District of Texas agreed that the proposed rule was arbitrary and capricious and, as a result, vacated it in its Chamber of Commerce v. NLRB decision.

The court opined that the 2023 joint employer test was arbitrary and capricious because it neglected to establish a "definite, readily available standard" that enables employers and labor unions to comply with the NLRA.

As the court noted, changes in agency rules must be reasoned, without factual or legal error and account for the relevant interests affected by the change in the rule — which the NLRB did not do when issuing the 2023 joint employer test.

In addition, the court found the proposed rule was unlawfully broad because it allowed for a joint employment finding even when a business had only indirect control of one essential term of employment.

According to the court, the proposed rule "would treat virtually every entity that contracts for labor as a joint employer" and would "likely promote labor strife rather than peace." Significantly, such a rule would also exceed the common law definition of a joint employer.

The court also took issue with the NLRB's failure to reasonably address the disruptive impact the proposed rule would have on various industries, including the franchise industry and any businesses that rely on subcontractors or staffing agencies. Accordingly, the court reinstated the 2020 joint employer test.

On May 7, the NLRB filed a notice to appeal the district court's decision to the U.S. Court of Appeals for the Fifth Circuit. The notice of appeal does not set specifically forth the NLRB's

grounds for appeal, but it is expected that the NLRB will argue that the 2023 joint employer test is not arbitrary, capricious or overbroad.

The appeal does not preclude the NLRB from proposing a new rule to resolve the issues flagged by the court in the event its appeal is unsuccessful.

The NLRB may reevaluate the 2023 joint employer test in light of the fact that the court highlighted in its opinion that the NLRB struggled to come up with answers as to the application of its two-step process, noting that the 2023 joint employer test conflicts with the common law joint employer standard.

Congressional Action

Separate from the litigation, the U.S. House of Representatives and U.S. Senate passed resolutions in January and April, respectively, to block the proposed rule's implementation.

On May 3, Biden vetoed the resolution, stating that without the proposed rule, "companies could more easily avoid liability simply by manipulating their corporate structure, like hiding behind subcontractors or staffing agencies."

Notably, this statement does not address the district court's finding that the proposed rule goes way beyond the issue Biden seeks to correct and instead could link wholly unrelated entities in arm's length transactions as joint employers.

While the House attempted to override the president's veto on May 7, it fell short of the required two-thirds vote to overturn the veto.

Takeaway

The recent events relating to the NLRB's proposed rule on the joint employer test provide a sigh of relief for employers — at least for now, pending the NLRB's appeal, enforcement position and potential issuance of a new proposed rule.

Indeed, businesses typically want to avoid a joint employment finding and the resulting additional liability, bargaining obligations, a finding that an entity is a primary employer for strike purposes, and other consequences related to workplaces they do not control or workers they do not employ or directly influence.

While the joint employment test remains in flux, businesses must continue to be mindful that even under the 2020 joint employer test currently in effect, they may be considered a joint employer of another entity's employees if they actually exercise substantial direct and immediate control over those employees' essential terms and conditions of employment.

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[1] https://www.law.cornell.edu/cfr/text/29/103.40.