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National Labor Relations Board Addresses Joint Employer Standard



The National Labor Relations Board (NLRB) released a [final rule](#) on October 26, 2023, which addresses the standard under which two entities may be considered joint employers under the National Labor Relations Act (NLRA).

The final rule rescinds the rule adopted in 2020 (the 2020 rule) by the prior board during the Trump administration. The 2020 rule declined to extend joint employer status unless the alleged joint employer exercised "substantial direct and immediate control" over the employees' "essential terms and conditions of employment."

Under the new rule, the NLRB [states](#) that entities will be considered joint employers of a group of employees if each entity has an employment relationship with the employees, and they share or codetermine one or more essential terms and conditions of employment. To share or codetermine means for an employer "to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both)." Essential terms and conditions of employment are defined as (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.

The final rule states that merely possessing the authority to control, regardless of whether that control is exercised, as well as indirectly exercising the power to control one or more essential terms and conditions of employment is sufficient to establish joint employer status. This is a departure from the 2020 rule which, as stated above, required direct and immediate control. Under the new rule, indirect or reserved control can be the sole basis for finding a joint employer relationship, without regard to the extent of the reserved or indirect control. Franchisors and employers who use staffing agencies may be affected by this rule.

The final rule will take effect on December 26, 2023, and according to the NLRB's [fact sheet](#), it will not be applied retroactively.

Next Steps

The new final rule may have labor implications for businesses. This includes that an employer found to be a joint employer can be required to collectively bargain with its union-represented joint employees over the essential terms and conditions it possesses (whether exercised or not) or exercises (indirectly or directly) the authority to control. Joint employers may also be subject to labor picketing that would otherwise be illegal in the absence of joint employer status and liable for unfair labor practices committed by the other employer.

Employers should closely examine their relationship with other companies' employees and contact experienced counsel with questions.

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