



The U.S. District Court for the Eastern District of Texas vacated the National Labor Relations Board's (the Board or NLRB) final rule addressing the standard under which two entities may be considered joint employers under the National Labor Relations Act (NLRA), on March 8, 2024.

Chamber of Commerce of the United States of America, et al. v. National Labor Relations Board, et al., Case No. 6:23-CV-00553, 2024 WL 1045231 (E.D. Tex. Mar. 8, 2024).

The test used to determine whether an entity should be considered a joint employer is important; 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 of employment. They can be subject to labor picketing that would otherwise be illegal in the absence of joint employer status and can be found liable for unfair labor practices committed by the other employer.

In October 2023, the NLRB issued a final rule (the New Rule) that rescinded a rule adopted in 2020 (the 2020 Rule) by the Trump-era Board. 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 will consider two entities to be 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. The New Rule also stated 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 was a departure from the 2020 Rule, which required direct or immediate control.

Before the New Rule could go into effect, a number of host of organizations, including the U.S. Chamber of Commerce, filed suit in the Eastern District of Texas challenging the New Rule, alleging that it was inconsistent with the common law and arbitrary and capricious. The court agreed and issued a final judgment "vacating the 2023 Rule, both insofar as it rescinds the [2020 Rule] and insofar as it promulgates a new version of that regulation." *Id.*

Following the court's ruling, the Board Chairman Lauren McFerran stated, "The District Court's decision to vacate the Board's rule is a disappointing setback but is not the last word on our efforts to return our joint-employer standard to the common law principles that have been endorsed by other courts. The agency is reviewing the decision and actively considering next steps in the case."

Given this statement, we can expect additional litigation or attempts by the Board to revamp its joint employer test. In the meantime, employers should closely examine their relationship with other companies' employees and contact experienced counsel with questions.

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