



NLRB'S FINAL JOINT-EMPLOYER RULE RETURNS TO MORE EXPANSIVE DEFINITION OF JOINT EMPLOYMENT UNDER THE NLRA

On October 26, 2023, the National Labor Relations Board (“the Board”) issued its Final Rule restoring the common law standard for joint-employer status under the National Labor Relations Act (“the Act”). A joint employer may be: (1) required to bargain with a union representing jointly employed workers; (2) subject to joint and several liability for unfair labor practices; and (3) subject to labor picketing that would otherwise be unlawful.

Under the new standard, two or more entities may each be considered a “joint employer” of a group of employees if each entity has an employment relationship with the employees and they share or codetermine one or more the employees’ essential terms and conditions of employment, including: (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 2023 final rule effectively repeals and rescinds the final rule promulgated in 2020 by the Trump Labor Board, which made it easier for actual joint employers to avoid a finding of joint-employer status, as it set a higher threshold such that a putative joint employer had to “possess and exercise...substantial direct and immediate control” over essential terms and conditions of employment. This rule significantly reduced the role of indirect and reserved control and was not grounded in common law principles.

The 2023 final rule restores the control standard first but forth in the Board’s 2015 *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599, decision. The standard under

this final rule considers the alleged joint employers' authority to control essential terms and conditions of employment, whether or not such control is exercised, and without regard to whether any such exercise of control is direct or indirect. The Board defined "sharing" and "codetermining" to mean "possess the authority to control (whether direct, indirectly, or both) or to exercise the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment."

Under this broader standard, one company will be deemed the joint employer of a second company's employees both where it directly or immediately exercises control over the second company's workforce and also where the first company's putative control is indirect or reserved but not ever actually exercised. The final rule notes that a joint employer must bargain collectively over those terms of employment that it controls or has authority to control, even where that term or condition may not be "essential" in determining joint-employer status and provides extensive guidelines to parties regarding their rights and responsibilities in situations where joint-employer status has been established.

The new rule is effective December 26, 2023 and the new standard will only be applied to cases filed after the effective date.

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