

NLRB Issues Final Joint Employer Rule

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On October 27, 2023, the National Labor Relations Board (“NLRB”) published its anticipated [Final Rule](#) modifying the standard for determining joint-employer status under the National Labor Relations Act (“NLRA”). *See Standard for Determining Joint Employer Status*, 88 Fed. Reg. 73946 (October 27, 2023) (to be codified at 29 C.F.R. pt. 103). The Final Rule overrules the NLRB’s 2020 joint-employer rule and broadly expands the definition of joint-employer.

Under the 2020 joint-employer rule, an entity was deemed a joint-employer only if it exercised *actual and direct control* over a specified essential term of employment. The new rule eliminates the *actual control* requirement and instead provides that an employer will be deemed a joint-employer whether they have *actual or indirect* control of one or more employee’s essential terms of employment. Under the new Final Rule, 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;

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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 expands on the proposed rule, which we discussed in a [prior blog post](#), by clarifying the definition of essential terms and conditions of employment, identifying the types of control necessary for a joint-employer relationship, and including an explicit bargaining requirement if a joint-employer relationship is formed.

Member Marvin E. Kaplan dissented from the Final Rule and expressed concern that it amounted to an unwarranted expansion of the joint-employer doctrine that could lead to negative economic consequences. In particular, he noted the Final Rule's potential to frustrate national labor policy by requiring employers to bargain over terms and conditions of employment for employees they have never exercised control over.

The Final Rule takes effect on February 26, 2024 and will be applied to all cases filed after that date. Employers should be aware of the new rule, and consider having their current and pending contracts with third parties reviewed by experienced labor counsel to determine whether those agreements give rise to a joint-employer relationship under the new standard. Employers should also consider training supervisors and managers who interact with third-party contractors on the new standards.

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