

NLRB Vastly Expands Joint Employer Definition

A Practical Guidance® Article by Todd H. Lebowitz, Baker & Hostetler LLP



Todd H. Lebowitz
Baker & Hostetler LLP

This article addresses a new final rule issued by the National Labor Relations Board that changes the test for determining who is a joint employer.

Key Takeaways:

- The National Labor Relations Board has issued a Final Rule that changes the test for determining who is a joint employer.
- The Final Rule rescinds the Rule enacted in 2020 and adopts a test that will vastly expand the circumstances under which a company is a joint employer of the employees of another company.
- The new rule may cause absurd results, including creating joint employment from the application of worksite safety rules to everyone onsite, including a vendor's employees. The new rule requires joint employers to participate in the collective bargaining process.

On October 26, the National Labor Relations Board (NLRB or Board) announced a new [Final Rule](#) that changes the test for determining who is a joint employer.

The rule drastically expands the scope of joint employment, overriding and rescinding the test published by the Board in its [2020 rule](#). Under the new rule, a business is a joint employer if it has the right to exercise control over any of seven enumerated terms or conditions of employment,

even if it never exercises such control, and even if the only way it could exercise such control would be through an intermediary.

The impact of joint employment differs under different laws. This rule affects joint employment under the National Labor Relations Act (NLRA) only. It does not affect determinations of joint employment under federal wage and hour law or any state laws. Under the NLRA and under this rule, joint employers have a duty to bargain, and joint employers can be held accountable for unfair labor practices involving workers they did not think were their employees.

The new rule injects new types of uncertainty into labor relations. The rule will alter the rights and obligations of businesses when dealing with other companies' employees. The results will often seem unfair or illogical to businesses, and enforcement of the new rule is likely to be selective, sporadic, and inconsistent.

The rule is scheduled to take effect on December 26 – if the rule survives judicial review. And it surely will be tested.

What Is the New Joint Employer Test?

The rule starts with a basic principle that sounds reasonable: *Two or more employers are joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment."* 29 C.F.R. 103.40(b). That's not controversial.

But then the Board defines those terms in subparts (c) and (d). And that's where we see a substantial change from the current test:

(c) To “share or codetermine those matters governing employees’ essential terms and conditions of employment” 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), one or more of the employees’ essential terms and conditions of employment.”

(d) “Essential terms and conditions of employment” are

(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 Board then explains what it all means in subparts (e)(1) and (e)(2):

(1) Possessing the authority to control one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether control is exercised.

(2) Exercising the power to control indirectly (including through an intermediary) one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly.

When these sections are read together, here are some of the implications:

First, under (e)(1), a business is *automatically* a joint employer if it has the *authority* to control any of the seven topics listed above, *even if it never does so*. In other words, reserved but unexercised control is not merely probative of joint employer status; it is determinative of joint employer status.

Second, the inclusion of the seventh essential term and condition, “*working conditions related to health and safety of employees*,” creates absurd and impractical outcomes. All businesses have site safety rules. For example, you must wear steel-toed shoes to enter the manufacturing floor. Or, you must not enter this high-voltage area without permission. Or, you must walk only on designated pathways to avoid the risk of being hit by a forklift.

As written, the inclusion of “health and safety” would mean that if your business has health and safety rules that apply to everyone who enters the site, including vendors’

employees, you would be exercising control over an essential term of employment of the vendors’ employees, thereby making your business a joint employer. The combination of maintaining a safe worksite and allowing another business’s employees onto the site to perform work would make your business a joint employer of those workers. Nonsensical.

The addition of health and safety rules to the list of essential terms and conditions is one of the most controversial aspects of the new rule, and it is sure to be a focal point of ongoing criticism.

How Might It Affect Your Business to Be Named a Joint Employer Under the New Rule?

How big is your bargaining table? You might be wise to go buy some more chairs.

All joint employers are not only invited to the party, but they must attend. And they can’t just be a wallflower. They have to dance.

In section (h), the rule provides that a joint employer “*must bargain collectively*” over any term and condition of employment that it has the authority to control. This obligation to bargain applies “*regardless of whether that term or condition is deemed to be an essential term and condition of employment*”

In other words, a business will be deemed a joint employer merely by reserving the right to exert control over one of the seven essential terms and conditions of employment for another company’s employee, even if that right is never exercised. The joint employer, then, *must* participate in collective bargaining with the other employer’s unionized employees.

The impracticalities of this requirement are obvious. Under the new rule, the joint employer net is much too vast. Most companies caught in the net will not realize they are caught in the net. Whether they realize they are caught in the net or not, they are unlikely to participate in collective bargaining. Every time this occurs, it’s a potential unfair labor practice. Enforcement activity by the Board will obviously be selective, uneven, and inequitable.

Here’s another scenario to consider. Looking back at section (e)(2) and considering again that “health and safety” is one of the seven essential terms, the rule would require a business that has site safety rules applicable to everyone onsite to be at the bargaining table alongside its vendor,

if the vendor's employees (a) are unionized, (b) sometimes work at your worksite and (c) must follow the worksite safety rules (e.g., wear steel-toed shoes on the plant floor). Those three conditions are likely to exist. Often. .

The impracticalities of the rule are mind-boggling.

Dissenting Member Kaplan, in the text preceding the rule, points out many of the absurdities that are seemingly mandated by the new text.

For example, he points out that the breadth of the rule "will frustrate national labor policy by placing at the bargaining table a second 'employer' that has never exercised any control over the employment terms of another entity's employees" but merely retains the authority to do so. Member Kaplan then offers this example of how applying the rule as written will lead to absurd results:

Imagine a scenario in which an undisputed employer has exercised complete control over every aspect of its employees' essential terms and conditions and that a second entity possesses, but has never exercised, a contractual reservation of right to codetermine the employees' wages. Under the majority's final rule, that second entity will be deemed a joint employer, but given that it has never exercised its contractually reserved authority, it makes little if any sense to seat it at the bargaining table. Doing so will have little if any benefit, while creating a substantial risk of frustrating agreement between the undisputed employer and the union because the interests of the undisputed employer and the second entity might well be in conflict. What if the two employer-side entities were each to insist, in good faith, on different wage rates?

Of course, it remains to be seen how the Board will interpret the rule. But the Board wrote the rule, so presumably it meant what it wrote.

What Are Other Consequences of Being a Joint Employer, Other Than Mandatory Bargaining?

Joint employment may also affect the determination of a proper bargaining unit. A union may be able to organize a group of workers that includes your direct employees and a vendor's or staffing agency's employees.

If a vendor's employees strike or picket and your business is a joint employer, they can strike or picket your business too, and they're fully protected under the National Labor Relations Act. If the picketers were not your joint employees, the picketing would be illegal secondary picketing, and you could take action. But if you are a joint employer, you'll have to grin and bear it.

How Does the Final Rule Differ from the Proposed Rule?

In September 2022, the Board issued a Notice of Proposed Rulemaking in which the Board proposed a new joint employer rule. The Board received almost 13,000 comments – some praising the proposed rule and some criticizing it.

The Final Rule largely tracks with the proposed rule, but there are a few critical differences.

First, the Board changed its definition of "essential terms and conditions of employment." The proposed rule included an illustrative list of terms and conditions of employment that could be deemed essential. The Final Rule contains an exhaustive list of seven essential terms and conditions. These seven terms are the complete list.

Second, the Final Rule clarifies that the relevant object of control (whether exercised or reserved) must be one of the seven essential terms and conditions of employment.

Third, in the proposed rule, evidence of an employer's control over matters immaterial to the existence of a common-law employment relationship or control over matters not bearing on employees' essential terms and conditions of employment is not relevant to the joint-employer inquiry. In the Final Rule, evidence of control is excluded only if it is immaterial to *both* the common-law employment relationship and an employer's control over employees' essential terms and conditions of employment. The Final Rule also clarifies that there is no presumption of joint employment for an entity that possesses or exercises control over nonessential terms of employment.

Finally, the Final Rule describes the bargaining obligations of joint employers. The rule requires their participation in the collective bargaining process. The proposed rule did not address the bargaining obligations of joint employers.

What Happens Next?

The new rule takes effect December 26 if it is not delayed, stayed or enjoined. A court challenge is certain. Two likely bases for a court challenge are (1) that the rule is arbitrary and capricious, in violation of the Administrative Procedure Act, and (2) that the rule exceeds the Board's legal authority.

The latter argument would be based on the D.C. Circuit Court of Appeals' prior ruling that the National Labor Relations Act requires the use of a common law test to determine who is an employer. In that ruling, the Court

of Appeals made the point that the courts don't need help from the NLRB to understand the common law test. The common law test is well established and has been articulated by the U.S. Supreme Court. The Board's adoption of this broad new test, therefore, may exceed the Board's legal authority.

In explaining its rule, the Board claims (of course) that the rule adheres to common law principles. But in reality, the Board's rule goes far beyond what the common law would require when making joint employment determinations. The rule is vulnerable to being enjoined on this issue.

What Should Businesses Do?

- Prepare. Evaluate relationships with subcontractors, vendors, staffing agencies, and other third parties that might fit the new definition of joint employment.
- Consider whether to modify those relationships before the new rule goes into effect. Modifications to consider include day-to-day interactions, rules of engagement or contract terms.
- Consider amending contracts with vendors and staffing agencies to add that your business has no right to control any of the seven essential terms of conditions listed in the rule. List them in the contract.
- Follow new developments, both at the Board level and in the courts. This rule will certainly be challenged, but a legal challenge does not mean the rule will be stayed or delayed.

- Expect the Board to begin enforcing the rule as soon as it takes effect.
- Review the NLRB's [Fact Sheet](#) for the new rule. The Fact Sheet oversimplifies concepts and understates the scope of the rule. But it is still a useful reference.

BakerHostetler's Contingent Workforce team is ready to assist. Please reach out to us with any questions you may have.

Related Content

Practice Notes

- [Joint Employment Relationships: Best Practices and Risks](#)
- [Business Transactions: Labor and Employment Considerations](#)
- [National Labor Relations Board \(NLRB\): Examining the Board's Key Functions](#)

Statutes & Regulations

- 88 Fed Reg. 73946 (Oct. 27, 2023) (2023 final rule)
- [NLRB Fact Sheet, Joint-Employer Standard Final Rule](#) (effective 12/26/23)
- 85 Fed. Reg. 11184 (Feb. 26, 2020) (2020 final rule)

Todd H. Lebowitz, Partner, Baker & Hostetler LLP

Todd Lebowitz has built a practice niche helping companies nationwide answer that question. Independent contractor misclassification and joint employment claims can be costly. Todd helps businesses create common sense, customized solutions that limit risk. His in-depth understanding of the many classification tests that apply to different laws, different industries and different states has made him a go-to resource for Fortune 500 companies, regional and local businesses.

Todd leads the firm's national [Contingent Workforce](#) Practice Team. He has successfully defended misclassification claims of all sizes, obtaining outright dismissals in numerous class actions and reaching settlements as low as zero dollars, often based on programs he had developed for the same client. Todd advocates a proactive review of contracts with independent contractors, staffing agencies and other providers of non-employee labor. Steps can almost always be taken to reduce risk and create the facts needed to successfully defend a classification dispute.

Todd's award-winning blog, [WholsMyEmployee.com](#) explores issues related to independent contractor misclassification and joint employment, providing valuable information about risks, tips, trends and developments (sprinkled with vaguely related classic rock and '80s pop culture references).

Todd also serves as a trusted advisor to clients on a broad range of complex employment law issues, including background checks, hiring, disability and accommodation issues, medical leaves, discipline, terminations and reductions in force. Todd closely follows the maze of federal, state and local background check laws and has designed nationwide background check compliance programs for large national employers. His approach to employment law is to help companies solve legal problems in a way that makes business sense. He strives to be responsive, attentive and proactive, and he aims to partner with clients in understanding their business needs and helping them to anticipate problems before they arise.

This document from Practical Guidance®, a comprehensive resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis®. Practical Guidance includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practical-guidance](#). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.