

"Who's My Employee?" Navigating the NLRB's Expansive Joint Employer Definition

The National Labor Relations Board (NLRB) [released a final rule](#) broadening the standard for determining whether two employers are joint employers of particular employees within the meaning of the National Labor Relations Act. This rule will replace the Trump-era regulation, significantly expand the NLRB's joint employer doctrine, and affect many common business arrangements.

Under the new rule, an entity may be considered a joint employer of another employer's employees "if the two share or codetermine the employees' essential terms and conditions of employment." The 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 Definition of "Essential Terms and Conditions of Employment" – Broad and Undefined

The new rule expands the definition of joint employer significantly. Unlike the previous rule, the new rule may result in a joint employer finding where the alleged joint employer simply sets performance standards for the hiring entity *regardless of if the entity actually supervises* the employees performing the work.

The use of an open-ended, non-exhaustive list of "essential terms and conditions of employment" raises concerns about how parties covered by the Act will successfully comply with their potential obligations as joint employers without more clarity. Because "essential terms and conditions of employment" sweeps broadly, there is a risk of exposing small business owners to substantial new liability or finding joint-employer status based on ambiguous language in work rules and policies.

Beware of Indirect Control Sufficient to Establish a Joint-Employer Status

The old rule required an alleged joint employer to have exercised substantial

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direct and immediate control over employment terms. The new rule states that an employer possessing the authority to control terms of employment is sufficient to establish a joint employer relationship *regardless of whether that control is ever exercised*, which the NLRB refers to as “indirect control.”

Although not expressly defined, the new rule does give some indication of the breadth of “indirect control.” According to the rule, indirect control is not established if an entity does nothing more than memorialize legal requirements in its contracts for goods and services, *without otherwise reserving any authority to control terms or conditions of employment*. This prevents situations where an employer inherently has the authority to control essential terms or conditions of employment because it is required to do so by law (*i.e.*, minimum wages, driving time limits for truck drivers). Employers seeking to avoid a joint employer finding with another entity should scrutinize their contracts and agreements for any language that may unintentionally reserve control over conditions of employment beyond what they are required to control by law.

Joint Employer Responsibilities Include Mandatory Bargaining Obligations and New Liability

The new rule explains that once an entity is found to be a joint employer, it has a collective bargaining obligation over any mandatory subjects of bargaining that it possesses or exercises the authority to control. Aside from joint employers sharing a legal obligation to participate in collective bargaining, they likely will also share liability for unfair labor practices committed by either employer.

Put simply, the new rule makes a joint employer finding much easier. The new standard takes effect **February 26, 2024**. Before then, employers—especially franchisors—should review their management procedures, agreements, and policies to ensure they are not exercising “indirect control.” If you have questions or concerns regarding the new rule, please contact [Robert S. Driscoll](#), [Abigail J. Aswege](#) or your Reinhart attorney.

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