Consequences of the NLRB's Proposed New "Joint Employer" Rule

Sep 21, 2022

Categories:

Publications

Authors:

Brice C. Smallwood
Jeffrey S. Shoskin
Catherine F. Burgett
John T. Lovett
Richard S. Cleary

During the Labor Day week, the National Labor Relations Board ("NLRB" or "Board") announced a proposed rule ("Proposed Rule") that, if adopted, will broaden the standard for defining when two independent entities can be deemed joint employers under the National Labor Relations Act (the "Act").

Current Rule

The Proposed Rule seeks to rescind and replace the current Board rule ("Current Rule") (effective April 27, 2020) that limited joint-employer status to situations where an entity exercises "substantial direct and immediate control" over the essential terms and conditions of another entity's employees. The Current Rule injected welcome clarity into this decade-plus joint-employer standard political tug of war (the checkered history of which is beyond the scope of this Legal Update.)

The Current Rule embodied common sense flexibility for modern corporate relationships by stating an employer may be considered a joint employer of a separate employer's employees only if the two employers "share or codetermine the employees' essential terms and conditions of employment." See § 103.40 of the Board's Rules and Regulations. To establish this "share or codetermine" standard, a putative joint employer's control over employment must be direct and immediate such that the putative joint employer meaningfully affects matters relating to the employment relationship with those employees. Indirect control, or an unexercised contractual reservation of a right of control, was insufficient.

The Current Rule also defined a closed and comprehensive set of "essential terms and conditions of employment," specifying how "direct and immediate control" would be determined with respect to each such terms and conditions. Certainty, of course, is a valued commodity.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons

Proposed Rule

Far from providing certainty, the Proposed Rule would rescind the Current Rule and its clear and concise "direct and immediate" control standard. Instead, two or more entities would be considered joint employers if they "share or codetermine those matters governing employees' essential terms and conditions" such as "wages, benefits, and other compensation, work and scheduling, hiring and discharge, discipline, workplace health and safety, supervision, assignment, and work rules". As the Board further explained in its September 6 announcement, "[t]he Board proposes to consider both direct evidence of control and **evidence of reserved and/or indirect control** over those essential terms and conditions of employment when analyzing joint-employer status" (emphasis added.) The Proposed Rule also broadens what is considered an "essential term and condition of employment" by including control over workplace health and safety, supervision, assignment of work, and "work rules and directions governing the manner, means, and methods of work performance" in its non-exclusive and open-ended list.

Dissenting View

In a lengthy and scathing dissent, Board Members John Ring and Marvin Kaplan emphasized the Proposed Rule's failure to provide a clear and comprehensive standard. They noted "[a] fuzzier standard with no bright lines would make it difficult for the Board to distinguish between arm's length contracting parties and genuine joint employers." The dissent is worth the read.

Potential Impact

The Proposed Rule still is in its administrative infancy stages. Public comments must be received by the NLRB on or before November 7, 2022. Submitted comments will be considered before a final rule is issued. Until it is finalized, the Current Rule remains in effect.

If enacted (in whole or substantial part) in 2023 as we anticipate, the Proposed Rule will radically expand the number of entities deemed to be "joint-employers" under the Act. That designation, in

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

turn, carries several significant consequences.

- A joint employer may be required to collectively bargain with a union representing "jointly" employed employees.
- A joint employer also may be jointly and severally liable for unfair labor practices committed by the other joint employer and could be a target of labor picketing that otherwise would be illegal.
- While not an exhaustive list, the following entities or business arrangements that are particularly vulnerable to this expanded joint-employer standard include: temporary staff companies; franchisor-franchisee arrangements; and companies hosting onsite contractor employees subject to certain work rules of that host company. The above employers, in particular, should anticipate adoption of a final rule and assess the risks of associating with third-party entities. Such review should include a careful analysis of their third-party commercial contracts that require the third-party entity's employees to maintain certain levels of quality, quantity, productivity, and/or safety. The exercise (or non-exercise) of otherwise generic commercial terms could trigger the "indirect control" that could bestow joint-employer status.

Looking Ahead

Before the Proposed Rule goes into effect, employers should review their contractual and other business relationships to determine where they may be considered a joint employer under the expansive Proposed Rule. The nature of certain relationships may not lend themselves to change. In other situations, a careful review of possible changes may reduce the chance of being considered a joint employer. It will be worth the effort.

Frost Brown Todd will continue to monitor and update the regulatory status of this proposed joint-employer standard. For more information, any attorney in Frost Brown Todd's Labor and Employment practice group.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.