

Small Entity Compliance Guide

Joint Employer Status Under the National Labor Relations Act

29 C.F.R. § 103.40

Released April 1, 2020

This Guide is prepared in accordance with the requirements of section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities comply with the rule adopted in the above-referenced National Labor Relations Board (NLRB or Board) rulemaking docket (Regulation Identifier Number 3142-AA13). This Guide is not intended to replace or supersede that rule, but to facilitate compliance with the rule. Although we have attempted to cover all parts of the rule that might be especially important to small entities, the coverage may not be exhaustive. This Guide cannot anticipate all situations in which the rule applies. Furthermore, the Board retains the discretion to adopt case-by-case approaches, where appropriate, that may differ from this Guide. Any decision regarding a particular small entity will be based on the National Labor Relations Act (NLRA or Act) and any relevant rules.

The Board may decide to revise this Guide without public notice to reflect changes in the Board's approach to implementing a rule, or it may clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to:

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I. OBJECTIVES AND SUMMARY OF THE RULE

The rulemaking referenced above established the standard for determining whether two employers, as defined in Section 2(2) of the Act (29 U.S.C. § 152(2)), are a joint employer under the Act. The joint-employer standard under the Act is consequential because it determines whether a business is an employer of employees directly employed by another employer altogether. If two entities are joint employers, both must bargain with the union that represents the jointly employed employees, both are potentially liable for unfair labor practices committed by the other, and both are subject to union picketing or other economic pressure if there is a labor dispute.

The Board engaged in the rulemaking to foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby enhancing labor-management stability. The guidance furnished by the final rule will enable regulated parties to determine in advance whether their actions are likely to result in a joint-employer finding.

Under the final rule, an entity may be considered a joint employer of a separate employer's employees only if the two share or codetermine the employees' essential terms and conditions of employment, which the rule exclusively defines as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. More specifically, to be deemed a joint employer under the final rule, an entity must possess and actually exercise substantial direct and immediate control over essential terms and conditions of employment of another employer's employees. Evidence of (1) an entity's indirect control over essential terms and conditions of employment of another employer's employees, (2) an entity's contractually reserved but never exercised authority over the essential terms and conditions of employment of another employer's employees, or (3) an entity's control over other mandatory subjects of bargaining not considered essential terms and conditions of employment is probative of joint-employer status, but only to the extent that it supplements and reinforces evidence of direct and immediate control over a particular essential term and condition of employment. Under the rule, joint-employer status must be determined on the totality of the relevant facts in each particular employment setting, and the party asserting that an entity is a joint employer has the burden of proof. Importantly, the final rule also clarifies that the routine elements of an arm's-length contract cannot turn a contractor into a joint employer.

II. ENTITIES SUBJECT TO THE RULE

The Board does not have jurisdiction over all employers. Under Section 2(6) and (7) of the Act (29 U.S.C. § 152(6) and (7)), the Board has statutory jurisdiction only over private-sector employers whose activity in interstate commerce exceeds a minimal level. To this end, in general, the Board asserts jurisdiction over employers in the retail-business industry if they have a gross annual volume of business of \$500,000 or more. Shopping-center and office-building retailers have a lower threshold of \$100,000 per year. And the Board asserts jurisdiction over

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non-retailers generally where the value of goods and services purchased from entities in other states is at least \$50,000.

Additionally, the following employers are excluded from the NLRB’s jurisdiction by statute:

- Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations (29 U.S.C. § 152(2));
- Employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery (29 U.S.C. § 152(3)); and
- Employers subject to the Railway Labor Act, such as interstate railroads and airlines (29 U.S.C. § 152(2)).

If the Board does not have jurisdiction over an employer, then the final rule will not apply to that employer. The following discussions regarding compliance, recordkeeping, and reporting requirements apply only to “covered entities”—i.e., employers and labor organizations to which the respective amendments in the final rule apply. Further, the rule will apply only when businesses are alleged to be joint employers in an NLRB proceeding; it does not apply to other agency proceedings, such as those of the Department of Labor or the Equal Employment Opportunity Commission.

III. REPORTING, RECORDKEEPING, AND OTHER COMPLIANCE REQUIREMENTS

The rule does not impose any reporting or recordkeeping requirements. Further, although not a compliance requirement under the rule, the Board expects that covered entities will review the rule and ensure that they correctly understand the substantive changes to the Board’s existing joint-employer standard. The rule does not impose any other compliance requirements.

IV. IMPLEMENTATION DATE

The rule adopted in 29 C.F.R. § 103.40 will become effective April 27, 2020.

V. INTERNET LINKS

More information about this rule may be found on the NLRB’s website at:

<https://www.nlr.gov/about-nlr/what-we-do/national-labor-relations-board-rulemaking/standard-determining-joint-employer>

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The Federal Register notice publishing the final rule may be found here:

<https://www.govinfo.gov/content/pkg/FR-2020-02-26/pdf/2020-03373.pdf>

The NLRB press release announcing the issuance of the final rule may be found here:

<https://www.nlr.gov/news-outreach/news-story/nlr-issues-joint-employer-final-rule>

A fact sheet accompanying the press release may be found here:

<https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7581/fact-sheet-joint-employer-final-rule.pdf>

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