



NLRB FACT SHEET

Joint-Employer Standard Final Rule

NLRB Joint-Employer Standard – 2023 Final Rule

(The effective date of the new rule is on hold pending litigation)

On October 27, 2023, the NLRB published a final rule addressing the Standard for Determining Joint-Employer Status.

The final rule establishes that, under the National Labor Relations Act, two or more entities may be considered joint employers of a group of employees if each entity has an employment relationship with the employees, and if the entities share or codetermine one or more of the employees' essential terms and conditions of employment.

How does the 2023 standard differ from the 2020 standard?

The final rule rescinds and replaces the 2020 final rule that was promulgated by the prior Board and which took effect on April 27, 2020.

The 2023 rule more faithfully grounds the joint-employer standard in established common-law agency principles. In particular, the 2023 rule considers the alleged joint employers' authority to control essential terms and conditions of employment, *whether or not such control is exercised*, and without regard to *whether any such exercise of control is direct or indirect*. The common law clearly recognizes that reserved control and indirect control are relevant to the analysis.

By contrast, the 2020 rule made it easier for actual joint employers to avoid a finding of joint-employer status because it set a higher threshold of "substantial direct and immediate control" over essential terms of conditions of employment, which has no foundation in common law.

What are essential terms & conditions of employment under the 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;
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 joint-employer standard is only implicated if an entity employs the workers at issue and has authority to control at least one of these terms or conditions. Authority over other matters is not sufficient.

Why does the standard include reserved control?

The standard's inclusion of reserved control is grounded in the common law. Including reserved control is important to account for situations in which an alleged joint employer maintains authority to control essential terms and conditions of employment but has not yet exercised such control.

The reality is that an entity holding such control may step in at any moment to affect essential terms. Indeed, even when the entity remains on the sidelines, it may cast a shadow over the other employer's decision-making with respect to such terms.

Why does the standard include indirect control?

Section 2(2) of the National Labor Relations Act defines "employer" to include "any person acting as an agent of an employer, directly or indirectly." By including indirect control in the joint-employer standard, the final rule accounts for control exercised through an intermediary or controlled third parties. Indirect control is also a well-established common-law consideration.

Considering indirect control prevents an entity that has an employment relationship with employees from avoiding joint-employer status—and the bargaining obligation that goes with it—by using an intermediary to implement decisions about essential terms and conditions of employment.

What does a joint employer have to bargain over?

For the purposes of collective bargaining, once an entity is deemed a joint employer by virtue of its control over one or more essential terms and conditions of employment, it will be required to bargain over those particular essential terms and conditions as well as all other mandatory subjects of bargaining that it possesses or exercises the authority to control. It will not be required to bargain over subjects that it does not have authority to control.

How does the 2023 standard compare to the 2015 *Browning-Ferris* decision?

The 2023 standard significantly resembles the 2015 standard established by the Board's *Browning-Ferris* decision, which was endorsed in all major respects by the United States Court of Appeals for the District of Columbia Circuit.

But the new final rule also provides extensive guidance to parties regarding their rights and responsibilities when more than one statutory employer employs particular workers and controls (or has authority to control) one or more of their essential terms and conditions of employment. It also makes clear that an employer must control (or have authority to control) one or more of a specific and limited list of essential terms and conditions of employment to give rise to a joint employment relationship.

Why did the Board use rulemaking to change the joint-employer standard?

The Board has rulemaking authority under Section 6 of the NLRA. Although the Board usually sets standards through adjudication rather than rulemaking, the Board is changing a standard set by a previous 2020 rulemaking, which cannot be undone by adjudication. Rulemaking also provides better opportunity for public comment.

Did the Board consider small businesses during the rulemaking process?

Yes. The Board conducted the required small business analysis under the Regulatory Flexibility Act. In addition, Board staff voluntarily participated in an October 2022 small business roundtable convened by the Small Business Administration's Office of Advocacy. The Board also extended the public comment period from the required 30 days to three months to ensure sufficient time for all stakeholders and considered and responded to comments from all stakeholders, including the small business community.

How does the new standard affect particular kinds of businesses (e.g. franchises, temp agencies, staffing firms, etc.)?

The nature of the business-to-business relationship is incidental to the analysis established by the final rule. So, not all franchisors and their franchisees will be joint employers. Nor will all staffing or temporary agencies and their client employers.

Rather, regardless of the business model, the joint-employer analysis is driven by the alleged joint employers' relationship with the employees in question and their authority to control one or more of the employees' essential terms and conditions of employment.

The bottom line is that, while the final rule establishes a uniform joint-employer standard, the Board will still have to conduct a fact-specific analysis on a case-by-case basis to determine whether two or more employers meet the standard.

How does this compare to the Department of Labor rule?

The Board's final rule is completely separate from the DOL rule. The Board and DOL independently set joint-employer standards, consistent with their different governing statutes. The Board's rule is thus grounded in the NLRA and longstanding common-law principles. By contrast, the DOL applies an economic-realities test to interpret "employer" for the purposes of the Fair Labor Standards Act. The Board does not use the economic-realities test.

What have federal courts said on the joint-employer standard?

Decades of federal court decisions have reaffirmed the use of common-law principles in determining joint-employer status. In 2018, the DC Circuit broadly upheld the Board's 2015 *Browning-Ferris* standard, which is the foundation for the 2023 final rule. The court deemed "fully consistent with the common law" the Board's determination that "both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis."

After the prior Board promulgated the 2020 standard, the Agency was sued in federal district court over that rule. That lawsuit has been held in abeyance while the Board considered a new rule.

When does the new standard take effect?

The new standard will only be applied to cases filed after the effective date. The effective date is on holding pending litigation.