

Small Entity Compliance Guide

Standard for Determining Joint Employer Status Under the National Labor Relations Act

29 C.F.R. § 103.40

Released October 31, 2023
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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-AA21). 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. Please direct your comments and recommendations, or calls for further assistance, to:

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1-844-762-NLRB (1-844-762-6572) (toll-free number) *Spanish language option available*

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SMALL ENTITY COMPLIANCE GUIDE

JOINT-EMPLOYER STANDARD FINAL RULE

I. OBJECTIVES AND SUMMARY OF THE RULE

The rulemaking referenced above established the standard for determining whether an employer, as defined in Section 2(2) of the Act (29 U.S.C. § 152(2)), is a joint employer of particular employees 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 because it possesses the authority to control or exercises control over one or more of those employees' essential terms or conditions of employment. If two entities are joint employers, each may be required to bargain with the union over matters within its control with a union that represents the jointly employed employees, each may potentially be held liable for unfair labor practices committed by the other, and each may be subject to union picketing or other economic pressure brought to bear by and on behalf of its jointly employed employees.

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 contractually reserved or actually exercised control over another employer's employees is likely to create a joint-employer relationship under the Act.

Under the final rule, an entity may be considered a joint employer of another employer's employees if it is an employer of the employees under common-law agency principles and the two share or codetermine the employees' essential terms and conditions of employment, which the rule defines 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 the terms of hiring and the grounds for discharge; and (7) working conditions related to the safety and health of employees.

An entity is a joint employer under the final rule if it is a common-law employer of the employees and possesses the authority to control or exercises the power to control one or more essential terms and conditions of employment of another entity's employees (regardless of whether control is exercised or whether it is exercised indirectly, including through an intermediary). However, evidence of an entity's control over matters that do not bear on particular employees' essential terms and conditions of employment is not relevant to the joint-employer analysis. 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. The final rule also clarifies that a joint employer must bargain collectively with a representative of jointly employed employees with respect to

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any term or condition of employment that it possesses the authority to control or exercises the power to control. However, a joint employer is not required to bargain with respect to any term or condition of employment that it does not possess the authority to control or exercise the power to control.

II. ENTITIES SUBJECT TO THE RULE

The Board does not exercise 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. The Board generally asserts jurisdiction over nonretailers 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:

- a. 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));
- b. 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
- c. Employers subject to the Railway Labor Act, such as interstate railroads and airlines (29 U.S.C. § 152(2)).

If the Board does not exercise 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 or to any other claim not arising under the Act.

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

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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 on February 26, 2024.

V. INTERNET LINKS

More information about the NLRB's final rule regarding the standard for determining joint employer status may be found on the NLRB's website at:

<https://www.nlr.gov/about-nlr/what-we-do/the-standard-for-determining-joint-employer-status-final-rule>

The Federal Register notice publishing this final may be found here:

[Federal Register :: Standard for Determining Joint Employer Status](#)

A pdf version of the Federal Register notice publishing the final rule may be found here:

[2023-23573.pdf \(govinfo.gov\)](#)

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

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

A Joint-Employer Fact Sheet accompanying the press release may be found here:

<https://www.nlr.gov/sites/default/files/attachments/pages/node-9558/joint-employer-fact-sheet-2023.pdf>

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