

LEGAL UPDATE



HIGHLIGHTS

- On **Oct. 27, 2023**, the NLRB published a new final rule that replaced the 2020 joint-employer standard with a more inclusive version.
- The new effective date of the 2023 joint-employer rule is **Mar. 11, 2024**.
- Under the new rule, an entity may be a joint employer of another entity's employees if it has the authority to control, directly or indirectly, one or more terms of conditions of employment.

Judge Delays Effective Date of NLRB's New Joint-employer Standard to March 11

On Feb. 22, 2024, a federal judge in the U.S. District Court for the Eastern District of Texas delayed the implementation of a National Labor Relations Board (NLRB) new joint-employer rule to Mar. 11, 2024. The NLRB's joint-employer rule had been set to take effect on Feb. 26, 2024.

The New Joint-employer Standard

The 2023 joint-employer standard establishes new criteria for determining joint-employer status as applied to labor issues related to the National Labor Relations Act. It will rescind the existing 2020 joint-employer standard and replace it with a more inclusive law, making it easier for employers to be classified as joint employers. Notable changes to the joint-employer standard include the following:

- A clarification of the definition of "essential terms and conditions of employment;"
- An identification of the types of control that are necessary to establish joint-employer status and the types that are irrelevant to the joint-employer inquiry; and
- A description of the bargaining obligations of joint employers.

The existing rule requires joint employers to "possess and exercise ... substantial direct and immediate control" over one or more essential terms and conditions of employment. The new rule will require only that joint employers have the authority to control one or more essential terms and conditions of employment, regardless of whether such control is exercised or whether such control is direct or indirect. This more inclusive rule may result in more employers—particularly contractors and subcontractors—being reclassified as joint employers by the rule's effective date.


Terms and Conditions of Employment

The 2023 rule limits essential terms and conditions of employment to:

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.

Legal Challenges

On Nov. 9, 2023, the U.S. Chamber of Commerce and a coalition of businesses sued the NLRB in the U.S. District Court for the Eastern District of Texas, alleging



that the new joint-employer rule is unlawful, overly broad, and contradictory to the common-law definition that limits joint employment to relationships of actual and substantial control of working conditions. It further alleges that the NLRB is acting arbitrarily and capriciously in violation of the Administrative Procedure Act. On Feb. 22, 2024, the judge overseeing the litigation issued a two-week stay to delay the effective date of the new rule to Mar. 11, 2024, and mentioned that an opinion with the court's reasoning would be issued forthwith.

In addition to the pending litigation, Senators Bill Cassidy and Joe Manchin announced they would introduce a Congressional Review Act resolution to overturn the rule.

Impact on Employers

The new joint-employer rule will only apply to cases filed after the new effective date of Mar. 11, 2024. In anticipation of the amended effective date, employers, particularly contractors and subcontractors, should become familiar with the new rule and determine whether they may be reclassified as joint employers under the new standard. Employers affected by the new standard should also take precautions to ensure other joint employers comply with labor and employment laws for joint employees.