

HR COMPLIANCE BULLETIN



Overview of the NLRB's 2023 Joint-employer Standard

On Oct. 27, 2023, the National Labor Relations Board (NLRB) [published](#) a final rule that establishes new criteria to determine joint-employer status. Joint employment situations can happen when two or more employers share personnel hiring, supervision and management practices. When a joint employment status exists, joint employers are equally responsible for compliance with applicable laws and regulations.

Originally, the final rule was to become effective 60 days after publication, on Dec. 26, 2023. However, the NLRB recently extended the effective date to Feb. 26, 2024. This final rule applies to labor issues related to the [National Labor Relations Act](#) (NLRA) and focuses on the amount of control an employer exerts over the employment relationship.

Whether joint employment is by design or unintentional, joint employers are equally:

- Liable for unfair labor practices committed by other joint employers;
- Required to bargain with the union that represents jointly employed workers; and
- Subject to union picketing or other economic pressure if there is a labor dispute.

Action Steps

Employers, particularly contractors and subcontractors, should become familiar with the new rule and determine whether a more inclusive joint-employer standard would reclassify them as joint employers in their operations by the rule's effective date. Employers affected by the new standard should also take precautionary steps to ensure other joint employers comply with regulations regarding labor and employment laws for joint employees.

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Highlights

- Two or more employers are joint employers if they share or codetermine essential terms and conditions of employment for two or more employees.
- To share or codetermine means to possess the authority to control or exercise the power to control.
- Whether an employer possesses the authority to control or exercises the power to control is determined under common-law agency principles.

Important Dates

Oct. 27, 2023

The NLRB published a new final rule that replaces the 2020 joint-employer standard with a more inclusive version.

Feb. 26, 2024

The effective date of the 2023 joint-employer standard.





The 2020 Joint-employer Standard

The NLRB adopted the current joint-employer standard on April 27, 2020. This standard will expire once the 2023 final rule becomes effective. The NLRB will review cases filed before the new rule's effective date under the 2020 joint-employer standard.

The 2020 standard considers the “substantial direct and immediate control” employers have over essential terms and conditions of employment for individuals who are employed by another organization. Specifically, the 2020 joint-employer standard indicates that a business is a joint employer of another employer's employees only if the degree of joint control is of sufficient magnitude to lead to the conclusion that the joint employer meaningfully affects matters relating to the employment relationship.

In addition, under the 2020 rule, other evidence may suggest (but not prove) the existence of joint-employer status, particularly when the evidence points to indirect control or the right to exert control through contract or agreement (especially when control is never exercised).

The 2023 Joint-employer Final Rule

The new rule rescinds the 2020 joint-employer standard and is based on common-law agency principles as applied in the particular context of the NLRA. Specifically, the 2023 final rule:

- Clarifies the definition of “essential terms and conditions of employment;”
- Identifies the types of control that are necessary to establish joint-employer status and the types that are irrelevant to the joint-employer inquiry; and
- Describes the bargaining obligations of joint employers.

Employers should pay particular attention to the fact that the 2023 rule was drafted to be more inclusive than the 2020 rule. This means it will become easier for employers to be classified as joint employers. The 2023 rule created this more inclusive standard for determining joint-employer status by removing the requirement that joint employers must “possess and exercise ... substantial direct and immediate control” over essential terms and conditions of employment. Specifically, the rule considers the alleged joint employers' authority to control essential terms and conditions of employment, regardless of whether such control is exercised.

Finally, the NLRB also stated that “the new rule also provides extensive guidance to parties regarding their rights and responsibilities in situations where joint-employer status has been established.”

Joint Employers

Under the 2023 final rule, two or more employers are joint employers if they share or codetermine the essential terms and conditions of employment for two or more employees. Employers share or codetermine the essential terms of employment when they possess the authority to control or exercise the power to control one or more of the employees' essential terms and conditions of employment. Employers may have the authority to control or exercise this power directly, indirectly (through an intermediary) or both.

Whether an employer possesses the authority to control or exercises the power to control one or more essential terms and conditions of employment is determined under common-law agency principles. Specifically, the 2023 final rule explains that:



- Possessing the authority to control one or more essential terms and conditions of employment is sufficient to establish status as a joint employer regardless of whether the control is exercised; and
- Exercising the power to control indirectly (including through an intermediary) one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether the control is exercised directly.

However, the 2023 rule recognizes that evidence of an entity’s control over employment matters is not relevant to a joint-employer determination if the evidence:

- Is immaterial to the existence of an employment relationship under common-law agency principles; and
- Does not bear on the essential terms and conditions of employment.

The IRS [describes](#) common-law agency principles as follows:

Under common-law rules, anyone who performs services for you is your employee if you can control what will be done and how it will be done. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed. If you have an employer-employee relationship, it makes no difference how it is labeled. The substance of the relationship, not the label, governs the worker’s status. It doesn’t matter whether the individual is employed full time or part time. To determine whether an individual is an employee or an independent contractor under the common-law rules, the relationship of the worker and the business must be examined. In any employee-independent contractor determination, all information that provides evidence of the degree of control and the degree of independence must be considered. Facts that provide evidence of the degree of control and independence fall into three categories: [behavioral control](#), [financial control](#), and the [type of relationship](#) of the parties.

Essential Terms and Conditions of Employment

The final rule limits 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.

NLRA Compliance for Employers

The NLRA applies to workplaces with labor unions. However, certain provisions of the NLRA also apply to nonunionized workplaces. For this reason, joint-employer situations can present a complicated scenario when evaluating compliance with the NLRA.

Among other things, the NLRA protects workers from employer retaliation when workers engage in protected concerted activities. Workers engage in protected concerted activities when they join together to improve their wages and working conditions. The key to determining whether an employee has engaged in a protected concerted activity is whether the

HR COMPLIANCE BULLETIN



worker was acting for the benefit or on behalf of others and not solely for his or her personal interest. Workers do not need to formally agree to act as a group or designate a representative to participate in concerted activities.

Concerted activities can include spontaneous, noneventful actions, such as discussing working conditions and wages or questioning a supervisor on a company policy. In that sense, the NLRA protects any employee who:

- Addresses group concerns with an employer;
- Forms, joins or helps a labor organization;
- Initiates, induces or prepares for group action; or
- Speaks on behalf of or represents other employees.