COLLECTIVE INTELLIGENCE

What the New Joint-Employer Standard Interpretation Means for Business

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The National Labor Relations Board (NLRB) on October 26 published a rule that significantly expands the "joint-employer" standard. This makes it much more likely that two or more companies can be considered joint employers of a group of workers under federal labor law.

The new standard, which takes effect on December 26, will affect a wide range of industries that use the franchise model, staffing services or contract workers. For companies that the standard could apply to, it is critical to understand employee sentiment and effectively address gaps or issues that could drive employees to organize. Companies should also think about how they would communicate with their workforces about union representation as the timeline between a request for union recognition and a union election has shortened in the past years.

Given the profound consequences of joint-employer status in terms of liability for labor disputes and collective bargaining with unions, companies should prepare to act now.

The new joint-employer scope

The new standard states that two or more employers would be considered joint employers if they "share or codetermine" essential terms or conditions of employment, such as pay, scheduling and working conditions. There are several key changes from the 2020 standard:

- The NLRB's focus is on an employer's authority to control another entity's workers, even if it is indirect. "Share or codetermine" means that an entity possesses the authority to control (directly, indirectly or both), or exercises the power to control (directly, indirectly or both), one or more of the employees' essential terms and conditions of employment.
- The new standard expands what constitutes essential terms or conditions of employment to include compliance with workplace rules as well as health and safety.
- The standard applies even if a company doesn't exercise its ability to set employment conditions.

This broadened definition is expected to impact a variety of industries including technology, healthcare, hospitality, logistics, retail and construction that rely on:

- A franchise business model – including many quick-service restaurant brands and hotels.
- Staffing services – including many of the largest technology companies.

- Contractors and subcontractors – including hospitals, health systems and construction companies.

With the new rule, the NLRB rescinds the joint-employer standard that has been in place since 2020, which required a business to have "direct and immediate control" over the essential terms and conditions of another company's workforce for the joint-employment status to apply.

Trends and implications

Get ready to act. Within the context of labor law, joint employers can be held liable for one another's labor law disputes and be obligated to collectively bargain with a group of union-represented employees.

Expect increased union activity. Unions are likely to increase organizing activity among contracted and franchisee workers. As joint employers are required to bargain with the union that represents the workforce, the expanded definition provides unions with the opportunity to bring some of the biggest US companies to the negotiating table – many for the first time.

What's next?

While the NLRB's rulemaking is specific to the federal labor laws that the board oversees, including union organizing, contract negotiations and labor practices, the new rule might over time influence other employer-liability issues like harassment and discrimination.

The new standard has so far been opposed by several major business and industry groups, such as the US Chamber of Commerce, National Association of Manufacturers and International Franchise Association, with the latter group preparing to challenge the new rule in court.

There is a path for Congress to act if it chooses to do so. The Congressional Review Act allows Congress to overturn rulemaking with a simple majority vote in the House and Senate, an approach discussed by a bipartisan group of senators including Mike Braun (R-Indiana), Susan Collins (R-Maine), Angus King (I-Maine), James Lankford (R-Oklahoma), Joe Manchin (D-West Virginia) and Kyrsten Sinema (I-Arizona). If passed by Congress, President Joe Biden would have the option to exercise his veto power.

The outcome of the 2024 presidential election might also impact the new standard. The board's position has gone back and forth as control of the White House – and thus control of the board – has shifted. President Biden's pro-worker majority has now reestablished the broad Obama administration standard, which was narrowed down during the Trump presidency. A new GOP administration would likely appoint a more business-oriented NLRB that would – once again – amend this rule.

Is your organization ready?

With the new rule taking effect before the end of the year, business should speak with labor counsel and develop an action plan with the following questions in mind:

- Does your company use contractors, freelancers, staffing services or the franchise model? If so:
    - Are there certain terms and conditions of employment that the NLRB could consider your company sharing control over (whether directly, indirectly or both)? (E.g., training or team support services.)
    - Is there a history of unions trying to organize your company or industry?
    - Are there active unions looking to organize your company or industry?

    - How would the company respond to a union claiming that your company is a joint employer?
- Are you a staffing services company? If so:
    - Are you aware of any teams looking to organize?
    - How would you assess current employee/team sentiment?
    - Do you anticipate any significant changes for teams – including return-to-office mandates – that could motivate employees to organize?
    - Are team managers respected and effective? Would they be prepared to talk to teams about choices when it comes to representation in the workplace?

This note should not be considered legal advice.

To continue the conversation

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