May 8, 2024

Updated: NLRB's Proposed Joint Employer Rule Is Still in Flux

UPDATE (7/26/24): On July 19, the National Labor Relations Board (NLRB) voluntarily dismissed its May 7 appeal of the U.S. District Court for the Eastern District of Texas' decision vacating the NLRB's 2023 joint employer rule (Chamber of Commerce v. NLRB). In its Unopposed Motion for Voluntary Dismissal of its appeal filed with the U.S. Court of Appeals for the Fifth Circuit, the NLRB reiterated its belief in the legality of its 2023 joint employer rule, which would have resulted in significantly more entities being considered to be joint employers. It further stated that it wished to "further consider the issues in the district court's opinion," noting that there were several joint employer rulemaking petitions on its docket. It is unclear what effect the NLRB's withdrawal of its appeal will have on two other pending appeals of joint employer rule cases in the U.S. Court of Appeals for the District of Columbia Circuit that were previously stayed or held in abeyance. Given the NLRB's withdrawal of its appeal, for now, the more employer-friendly 2020 joint employer rule, and not the 2023 rule, is the applicable standard. However, the NLRB may proceed with additional rulemaking on this issue or may attempt to change the rule through case law, as was the NLRB's traditional approach prior to its 2020 joint employer rule.

The October 2023 Joint Employer Test proposed by the National Labor Relations Board (NLRB), which would make it easier for two entities to be deemed joint employers, was struck down by a Texas federal court and Congress passed a resolution to block it. The proposed rule, however, is not yet dead since within the last few days, the NLRB has appealed the Court's decision and Congress was unable to override President Biden's recent veto of its resolution. Given the significance of a joint employer finding, businesses should pay attention to the status of the proposed rule.

Background

The determination of whether two businesses are joint employers under the National Labor Relations Act (NLRA) is analyzed under the Joint Employer Test, codified at 29 C.F.R. § 103.40. Joint employment presents a significant risk to businesses because when businesses are deemed joint employers under the NLRA, both must bargain with the union that represents the jointly employed employees, both may be held liable for unfair labor practices committed by either, and both are subject to union picketing in the event of a labor dispute. In October 2023, the NLRB proposed a new rule seeking to replace the 2020 Joint Employer Test with a standard that makes it much easier to find joint employment.

2020 Joint Employer Test

The 2020 Joint Employer Test requires an entity to *actually* possess and exercise "substantial direct and immediate control" over essential terms and conditions of employment of another entity's employees to warrant a joint employment finding. The 2020 Joint Employer Test made clear that "indirect control over essential terms and conditions of employment" of another entity's employees may be considered but is insufficient to establish joint employer status. The 2020 rule listed eight discrete categories constituting essential terms and conditions of employment: wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction. The 2020 rule disregarded sporadic, isolated or de minimis control over another employer's workforce as insufficient to establish joint employer status.

2023 Proposed Joint Employer Test

Believing the 2020 Joint Employer Test was too restrictive, on October 27, 2023, the NLRB issued the proposed rule, which sought to change the 2020 Joint Employer Test in three ways. First, "reserved and indirect control" would demonstrate joint employment, meaning that businesses would be deemed joint employers if one business simply contractually reserves the right to control another business's workers, but does not actually exercise any control. Second, two new categories were added to the list of essential terms and conditions of employment: performance work rules and safety and health conditions.

Third, sporadic, isolated, or de minimis control would sufficiently demonstrate joint employment. The delayed effective date of the proposed rule was March 11, 2024.

Legal Challenge to Proposed Rule

Given the significant impact the proposed rule would have on businesses, employer groups sued the NLRB, arguing that the NLRB's rescission of the 2020 Joint Employer Test was arbitrary and capricious because the proposed rule contradicted the common law interpretation of the Joint Employer Test, ignored serious practical problems, and failed to articulate a clear standard.

On March 8, days before the delayed effective date of the proposed rule, the United District Court for the Eastern District of Texas agreed that the proposed rule was arbitrary and capricious and, as a result, vacated it in its *Chambers of Commerce of the U.S. v. NLRB* decision. The Court found the proposed rule was unlawfully broad because it allowed for a joint employment finding even when a business had only indirect control of one essential term of employment. According to the Court, the proposed rule "would treat virtually every entity that contracts for labor as a joint employer" and would "likely promote labor strife rather than peace." The Court also took issue with the NLRB's failure to reasonably address the disruptive impact the proposed rule would have on various industries, including the franchise industry and any businesses that rely on subcontractors or staffing agencies. Accordingly, the Court reinstated the 2020 Joint Employer Test.

On May 7, the NLRB filed a notice to appeal the District Court's decision to the Fifth Circuit Court of Appeals. The appeal does not preclude the NLRB from proposing a new rule to resolve the issues flagged by the Court in the event its appeal is unsuccessful.

Congressional Action

Separate from the litigation, the House of Representatives and the Senate passed resolutions in January and April, respectively, to block the proposed rule's implementation. On May 3, President Biden vetoed the resolution, stating that without the proposed rule, "companies could more easily avoid liability simply by manipulating their corporate structure, like hiding behind subcontractors or staffing agencies." While the House of Representatives attempted to override the President's veto on May 7, it fell short of the required two-thirds vote to overturn the President's veto.

Takeaway

The recent events relating to the NLRB's proposed rule on the Joint Employer Test provide a sigh of relief for employers – at least for now, pending the NLRB's appeal, enforcement position and/or potential issuance of a new proposed rule. Indeed, businesses typically want to avoid a joint employment finding and the resulting additional liability, bargaining obligations and other consequences related to workplaces they do not control or workers they do not employ or directly influence. While the Joint Employment Test remains in flux, businesses must continue to be mindful that even under the 2020 Joint Employer Test currently in effect, they may be considered a joint employer of another entity's employees if they actually exercise substantial direct and immediate control over those employees' essential terms and conditions of employment.

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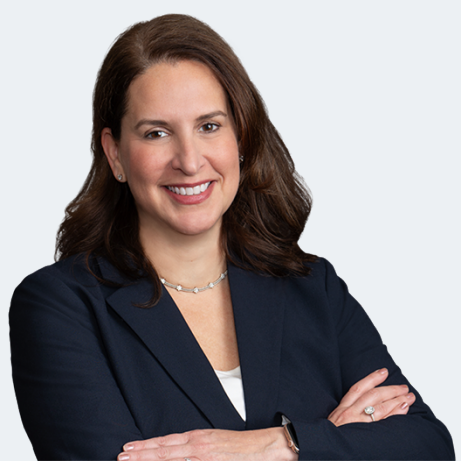

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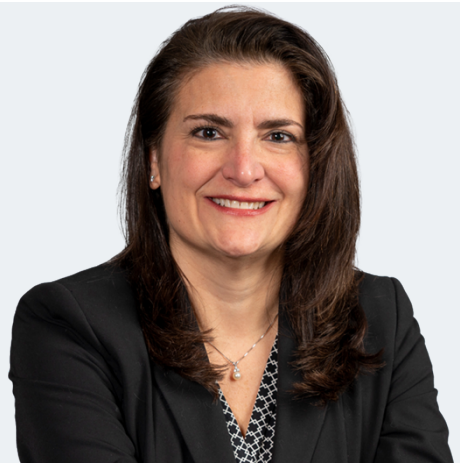

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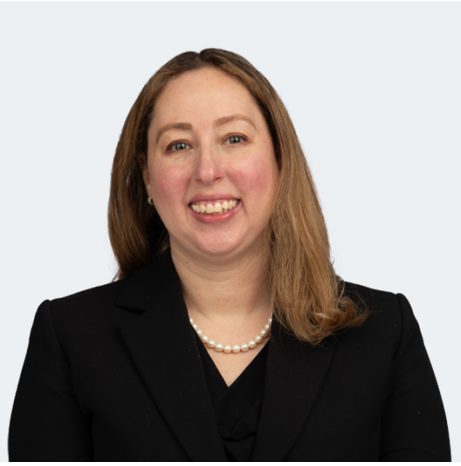

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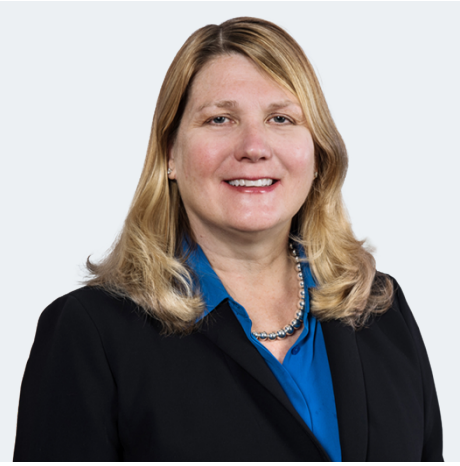

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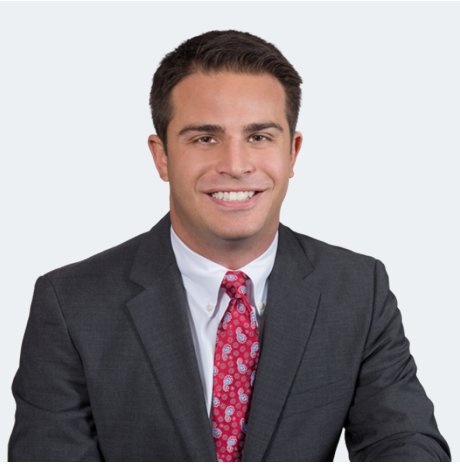

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