

# NLRB's 2023 "Joint Employment" Rule OVERTURNED by Federal District Court

## Labor & Employment Law Update

By Jack Sanker on March 21, 2024

The National Labor Relations Board (NLRB) issued a controversial rule change to its longstanding "joint employer rule" in October of 2023, which dramatically lowered the thresholds by which a company could be deemed jointly liable and responsible under the National Labor Relations Act (NLRA) for another company's unfair labor practices or collective bargaining obligations. In effect, the new rule could make unrelated, separate companies jointly responsible for violations of another employer under the NLRA.

The 2023 rule was published in October and was scheduled to be implemented on December 26, 2023, though the NLRB extended the implementation date to February 26, 2024. (For details on the 2023 rule change, see our previous outline of the new rule we published when it was issued in October of 2023).

Of course, the 2023 rule change was immediately challenged by advocacy groups, including the national Chamber of Commerce, which filed a lawsuit in the Eastern District of Texas (Case No. 6:23-cv-00553), seeking to vacate the 2023 rule and injunctive relief. In a 31-page ruling filed on March 8, 2024, Eastern District Court Judge J. Campbell Barker ***granted the Chamber's motion for summary judgment.***

The court ultimately ruled that 2023 joint employer rule was overbroad, in part because joint employment could (under the 2023 rule) be ***based on indirect or reserved control***, which expressly contradicted the prior version of the rule that was promulgated in 2020, as well as the decades of jurisprudence on the topic leading to the 2020 rule. The court also found that insofar as the 2023 rule rescinded the 2020 joint employment rule, that rescission was "arbitrary and capricious" under the Administrative Procedures Act.

Ultimately, the ruling has two main immediate effects: ***first***, the 2023 joint employment rule was vacated; ***second***, the court restored the 2020 joint employment rule. This is critical, because the 2020 rule requires that would-be joint employers exercise "substantial direct and immediate control" over the terms and conditions of employment, which is a significantly higher burden than

what the 2023 rule contemplated.

**\*\*\*We now await further action by the NLRB --- which shows no sign of acquiescing.**

Outside of federal action, employers need to be aware that many states (i.e. CA, IL, NY) are passing their own laws that make establishing "joint employment" much easier in the context of wage and hour disputes, to name one example. Additionally, as we have seen in other contexts, these bills could open the door for plaintiffs' attorneys to chip away at tort liability protections usually afforded to direct employers, or to expand liability under states' Workers' Compensation systems. Staffing companies and general contractors in particular need to be aware of these changes and properly manage the associated risks in their contracts, insurance coverages, and worksite conduct. Employers who rely on another employer's employees should seek competent legal counsel to discuss these issues and closely examine relevant contracts.

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