Proposed NLRB Rule Would Vastly Expand Joint Employment

By **Todd Lebowitz** (September 12, 2022)

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When I was 5 years old, and my sister was 3, the rule was that we had to be in our rooms by 8 p.m.

We followed that rule, but in our own way. We'd put on our pajamas, say good night and go into our rooms. But then we would lie down on the carpet at the very edge of our rooms, with our bodies still in the room and our heads in the hallway so we could talk.

In the strictest sense, we followed the rule. But we did it in our own way, to serve our own purposes. In essence, we chose to define what it means to be in our rooms.

The same sort of rulemaking is happening at the National Labor Relations Board on the subject of defining joint employment.

At the federal and state levels, there are different tests for determining who is an employee under different laws. The test for determining joint employment under the National Labor Relations Act is a "right to control" test — always has been, always will be. Federal courts have repeatedly ruled that's the test. The board has consistently agreed that's the test, regardless of whether Democrats or Republicans controlled the board.

But agreeing that a right-to-control test applies is sort of like saying you've got to be in your room by 8 p.m. It leaves lots of space for interpretation.

Last week, the Democratic-controlled board issued a notice of proposed rulemaking, along with a proposed new rule for determining when joint employment exists under the NLRA.

The new rule, if adopted, would rescind and replace the rule that the Republican-controlled board adopted in 2020. The 2020 rule rejected and replaced the test adopted by the Democratic-controlled board in 2015 in its Browning-Ferris Industries decision. The 2015 decision in Browning-Ferris rejected and replaced the standard that had been in effect for decades.

Each new version of the joint employment test has purported to follow the right-to-control test. And now you can see where this is going.

The first two subparts of the board's proposed new rule[1] are uncontroversial. Subpart (a) says to follow the common law rule. Subpart (b) says that two or more employers are joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment."

So far, so good. But then the board starts sticking its head into the hallway. Subpart (c) defines the phrase "share or codetermine those matters governing employees' essential terms and conditions of employment," and this is where the fun begins.

Subpart (c) would define this phrase expansively, saying that it means any of the following:

> for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment.

Let's break it down.

First, actual control would not be required. The authority to control would be enough. Possessing the power to control would be enough. It would make no difference whether the authority to control was ever exercised.

Second, direct control would not be required. Possessing the authority to exercise indirect control would be enough. Possessing the authority to act through an intermediary, such as a third-party liaison, would be enough.

Third, the control would not need to be substantial. The rule makes no mention of the amount of control required.

Before we get into the meaning of "essential terms and conditions," let's compare that expansive interpretation with the 2020 rule.

The 2020 rule starts in the same place: Two or more employers are joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment."

But the 2020 rule says you cannot stick your head into the hallway, cannot even look into the hallway, cannot get out of bed and cannot turn on the light.

Under the 2020 rule, to meet the "share or codetermine" standard, an

> entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees.

That is, under the 2020 rule:

- The actual exercise of control is required;
- The control must be substantial;
- It must be direct; and
- It must be immediate.

Big difference.

Now let's look at subpart (d) of the proposed new rule, which defines "essential terms and conditions of employment." Under the proposed rule, essential terms and conditions

> will generally include, but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.

The comments accompanying the rule stress that this is a nonexhaustive list. We don't

know what other terms or conditions the board might consider essential.

This lengthy, nonexhaustive list is quite a contrast from the 2020 rule. Under the 2020 rule, essential terms and conditions of employment "means wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction." That's the complete list. There's no guessing, and there's nothing else.

Under the 2020 rule, the exercise of control over these terms must be substantial, direct and immediate before joint employment can be found. The 2020 rule then provides examples of what type of control over wages and the other essential terms would be substantial, direct and immediate enough to satisfy the test.

The Proposed Rule Would Vastly Expand Joint Employment

Taking these definitions together, the substantial breadth of the new rule quickly becomes apparent.

Under the proposed rule, joint employment could exist if a business has the authority to give directions to a third party's employee, even if that authority were never exercised and the business never gave such directions.

Joint employment could exist if a business indirectly exerted control over scheduling or assignments for a third party's employee.

And it could exist if a business reserved the right to impose disciplinary action if a third party's employee violated site safety rules, even if the discipline were imposed indirectly, such as through the third party's onsite manager.

Perhaps the most problematic expansion in the proposed rule is the inclusion of workplace health and safety as an essential term and condition of employment.

Remember, the proposed rule would create a joint employment relationship if a business has the right to exercise control over just one essential term or condition of employment. But every business has a duty to maintain a safe workplace.

Under the proposed rule, maintaining the authority to impose health and safety rules at a workplace might, by itself, create joint employment for anyone working onsite. That seems implausible and an unfair result.

Consider these scenarios:

1. A business implements a requirement that all individuals in the facility, including any third party's onsite employees, must wear safety glasses and steel-toed shoes to enter the plant floor.

By implementing that requirement, the business is exercising direct control over workplace health and safety. Under the proposed rule, that could be sufficient to create joint employment.

2. A business tells a third party's liaison to tell its employees that they must wear safety glasses and steel-toed shoes if they enter the plant floor. Communicating that safety rule through a liaison does not change the result.

Under the proposed joint employment rule, the business may be indirectly controlling workplace health and safety for a third party's employees, which could create joint employment.

3. A business tells a third party's liaison that at some point, "we might start a new manufacturing process in the building, and if we decide to do it, we would need your employees to wear steel-toed shoes and safety glasses. Right now, we have no plans to start that process, but if we do, we'll let you know, and you would have to tell your employees to wear steel-toed shoes and safety glasses."

Under the proposed new rule, that appears to be indirect, reserved control — and could also create joint employment.

Or consider these workplace safety directives issued to nonemployees:

- Stay away from that furnace. It's hot.
- Look both ways when crossing the aisle, and don't walk in front of a tow motor.
- If you have to walk through the part of the facility where there's silica dust, wear a respirator.
- If you go into Edna's office, wear a mask. She just had a kidney transplant and is immunosuppressed.

All appear to be the direct exercise of control over workplace safety. Under the proposed rule, the exercise of control over workplace safety, by itself, could make a business a joint employer.

In the comments accompanying the proposed rule, the board notes the significance of workplace health and safety as a newly recognized essential term and condition. Perhaps the board will rethink its position during the public comment period.

What's Next?

Now that the proposed rule has been published in the Federal Register, the public may submit comments through Nov. 7. The public may submit comments that reply to other comments through Nov. 21. Comments may be submitted online at www.regulations.gov or through mail.

After the comment period, the board can rescind the proposed rule, modify the proposed rule and adopt a new version, or adopt the proposed rule as is.

The rule will not be rescinded in its entirety so long as the board maintains a Democratic majority, so the most likely outcome is either the adoption of a modified rule or the adoption of the proposed rule as is. It will likely be many months, maybe more than a year, before a final rule is adopted by the board.

The rule will then be challenged in court as arbitrary and capricious, in violation of the Administrative Procedure Act. Under the APA, the board needs to show that it has good reason for rescinding and rewriting the earlier 2020 joint employment rule.

The rule will also be challenged as an unlawful interpretation of the NLRA. In July, the U.S. Court of Appeals for the District of Columbia Circuit ruled in Sanitary Truck Drivers v. NLRB[2] that any joint employment test under the NLRA must be consistent with common law principles.

While the board professes that the new standard is just a clarification of the common law standard, the two dissenting board members vehemently disagree with that conclusion.

A federal court could enjoin the rule, preventing it from taking effect.

Or the rule could go into effect in whatever form the board adopts. The board would then start applying the rule when assessing joint employment relationships under the NLRA.

What Is the Impact of Joint Employment?

Here are a few consequences of being a joint employer under the NLRA:

- A union may be able to organize a group of workers that includes a business's direct employees and employees of an onsite third party or staffing agency.

- If a third party's employees are unionized and another business is deemed their joint employer, the joint employer has a duty to bargain with them too. Joint employment can bring mandatory collective bargaining to an otherwise union-free facility.

- If a third party's employees are unionized and another business is deemed their joint employer, the joint employer's duty to bargain will cover terms and conditions of employment that the newly minted joint employer has historically controlled on its own. Joint employer status could mean having to involve the union before making changes that affect the workplace.

- A third party's employees may lawfully strike or picket a business that is their joint employer. In the absence of joint employment, secondary picketing can be illegal. Joint employers, however, may be subjected to the same protected activity as the primary employer, including strikes and picketing.

A finding of joint employment under the NLRA will not necessarily result in a finding of joint employment under the Fair Labor Standards Act or any other law. The proposed rule discussed here would apply only to the NLRA. The FLSA uses a different test for determining whether joint employment exists, and any FLSA rule would have to be adopted by the U.S. Department of Labor, not the board.

For now, businesses should continue to monitor the rulemaking process. Comments may be submitted to the board until Nov. 7, with reply comments due no later than Nov. 21. It will be many months, and possibly more than a year, before any new rule goes into effect.

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[1] https://www.federalregister.gov/documents/2022/09/07/2022-19181/standard-for-determining-joint-employer-status.

[2] https://www.bakerlaw.com/webfiles/Browning%20Ferris.pdf.