Texas Court Halts NLRB's Proposed New Joint-Employer Rule

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On Friday, March 8, 2024, the Eastern District of Texas halted a new National Labor Relations Board (NLRB) joint-employer rule that would have taken effect on March 11, 2024. The new Joint-Employer Rule would have implemented a more relaxed standard under which indirect—and even unexercised—control over another employer's employees could qualify an employer as a "joint employer" with respect to application of the National Labor Relations Act (NLRA). If the new Joint-Employer Rule had gone into effect, it would have brought significantly more employers within the reach of the NLRA and the oversight of the NLRB.

In *Chamber of Commerce of the United States et al. v. National Labor Relations Board et al.*, No. 6:23-cv-00553 (E.D. Tex. Mar. 8, 2024), the Chamber of Commerce and other entities sued the NLRB to enjoin the implementation of the new rule as unlawful on the grounds that it was contrary to common law and was arbitrary and capricious. The Court agreed and held that the rule could not take effect.

Employers may recall that the current joint employer test came into effect in 2020 and provided that an entity is "a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment," 29 C.F.R. § 103.40(a) (2020). The 2020 rule enumerated eight essential terms and conditions of employment: (1) wages, (2) benefits, (3) hours of work, (4) hiring, (5) discharge, (6) discipline, (7) supervision and (8) direction. *Id.* § 103.40(b) (2020).

The 2020 rule also clarified that a putative joint employer's "indirect control" or "contractually reserved but never exercised authority" over the essential terms and conditions of another employer's employees may be "probative" of joint-employer status, "but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment." *Id.* § 103.40(a) (2020). The new rule would have "eliminated the 2020 Rule's provision that control over workers 'exercised on a sporadic, isolated or de minimis basis' is not sufficient to establish joint-employer status." *Chamber of Commerce*, slip op. at 14 (quoting 29 C.F.R. § 103.40(d) (2020)).

According to the Court, there were at least two issues with the new rule. First, the new rule's two part test under subsection (b) was not, in reality, a true two part test because the second prong was either coextensive or a "superset" of the first prong. Second, the new rule's subsection (e) independently allowed certain evidence alone to establish joint-employer status, regardless of subsection (b)'s test.

Under the proposed 2023 rule, the *unexercised* power over and the *indirect* control of the essential terms and conditions of employment would have satisfied the joint-employer test, while the 2020 rule required the exercise of *direct and immediate control* over the essential terms and conditions of employment for an entity to be considered a joint-employer. The court ultimately concluded that the broad language of the new rule would "treat virtually every entity that contracts for labor as a joint-employer because virtually every contract for third party labor has terms that impact, at least indirectly, at least one of the specified 'essential terms and conditions of employment.'" The court held that the new rule's "reach exceeds the bounds of the common law," and was, therefore, unlawful.

Employers should determine whether they potentially qualify as joint-employers under the existing NLRB rule and if so, ensure that they are in compliance with all applicable labor laws. Employers should also understand that *Chamber of Commerce* may not be the last word on the joint employer issue, as the NLRB may appeal the decision.

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