CLIENT ALERTS & INSIGHTS

NLRB and DOL Publish Significant Rules Governing Joint Employment and Independent Contractor Classification

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Authors: W. Eric Baisden, Adam Primm, Hannah J. Kraus

Featured Practices: Labor & Employment

Key Takeaways

- The NLRB has formally reinstated the employer-friendly 2020 joint employer rule, requiring companies to have substantial direct and immediate control over another employer's workers to be considered joint employers. At the same time, the DOL proposed rescinding the current independent contractor standard and returning to a more business-friendly test focused on economic reality and two "core" factors.
- These changes reduce the risk of joint employer liability and make it easier for businesses to classify workers as independent contractors, but the legal landscape remains uncertain due to ongoing court challenges and the potential for future regulatory shifts.
- Employers should review their staffing, contracting, and worker classification practices to ensure compliance with the latest standards, monitor ongoing legal developments, and consider submitting comments on the DOL's proposed rule before the April 28, 2026 deadline.

On February 26, 2026, two federal agencies published highly anticipated rules that guarantee to impact employers nationwide and across all industries. The National Labor Relations Board ("NLRB") promulgated a final rule, formally restoring the 2020 rule governing joint employer status under the National Labor Relations Act ("NLRA") issued during the first Trump presidency (the "2020 Rule"). Simultaneously, the U.S. Department of Labor ("DOL") issued a proposed rule rescinding the current standard for determining whether a worker is an employee or independent contractor under the Fair Labor Standards Act ("FLSA").

NLRB Formally Restores Employer-Friendly Rule Governing Joint Employer Status

The 2020 Rule

On February 26, 2020, the NLRB published the 2020 Rule, titled "Joint Employer Status Under the National Labor Relations Act." The 2020 Rule largely mirrors the joint employer standard applied by the NLRB for decades prior to the NLRB's decision in *Browning-Ferris Industries*, 362 NLRB No. 18 (2015). Under the *Browning-Ferris*

standard, a company's mere potential control over the working conditions of another employer's employees was sufficient to find a joint employer relationship under the NLRA. The *Browning-Ferris* decision drastically changed the well-established standard for joint employment applied by the NLRB since the 1980s.

In response to *Browning-Ferris*, the NLRB promulgated the 2020 Rule, which stated a company must **"**possess and exercise substantial direct and immediate control over essential terms and conditions of employment" over another employer's employees to be deemed a joint employer. "Essential terms and conditions of employment" means wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction.

The 2023 Rule

On October 27, 2023, the Biden-era NLRB published a final rule, titled "Standard for Determining Joint Employer Status" (the "2023 Rule"), that rescinded the 2020 Rule and established a new standard for determining joint employment under the NLRA. The 2023 Rule's broad definition of joint employment made it easier for companies to be deemed joint employers, exposing them to additional collective bargaining obligations, union picketing, economic pressure in the event of labor disputes, and potential liability under the NLRA.

Pursuant to the 2023 Rule, companies may be deemed joint employers of another employer's employees if they "share or codetermine the employees' essential terms and conditions of employment." The 2023 Rule defined "essential terms and conditions of employment" as wages benefits, and other compensation; hours of work and scheduling; assignment of duties; supervision of the performance of duties; work rules and directions governing the manner, means, and methods of the performance of duties and grounds for discipline; tenure of employment, including hiring and discharge; and working conditions related to employee safety and health.

The 2023 Rule was set to become effective on December 26, 2023. However, the NLRB postponed the effective date due to several legal challenges, including a lawsuit filed in the U.S. District Court for the Eastern District of Texas. In *Chamber of Commerce v. NLRB*, various business advocacy groups led by the U.S. Chamber of Commerce alleged that the 2023 Rule is overbroad, establishes a standard for joint employment that contradicts the common law, and is arbitrary and capricious. The Texas federal court agreed with the plaintiffs and vacated the 2023 Rule, determining that it exceeded the scope of the common law, was arbitrary and capricious, and was overly broad.

The 2023 Rule never actually took effect, so the 2020 Rule has remained operative for determining joint employer status under the NLRA. However, the NLRB's rules and regulations were not formally revised to reflect this until February 26, 2026.

Restoration of the 2020 Rule

In accordance with the Court's ruling in *Chamber of Commerce v. NLRB*, the NLRB's final rule replaces the text of the 2023 Rule with the 2020 Rule, restoring the "substantial direct and immediate control" standard adopted in 2020.

The joint employer standard under the NLRA has a significant impact on businesses. If companies are deemed joint employers, both have a duty to bargain with the union that represents the jointly employed employees, both are potentially liable for unfair labor practices committed by the other

company, and both are subject to union picketing or other economic pressure if there is a labor dispute. With the 2020 Rule formally reinstated, the standard for joint employment is much higher, thereby decreasing potential exposure for companies under the NLRA.

Despite the NLRB's final rule, the future of the 2020 Rule remains uncertain. A challenge to the 2020 Rule by the Service Employees International Union is currently pending in the U.S. Court of Appeals for the District of Columbia Circuit. If the Union prevails, the standard for joint employment under the NLRA could once again be upended.

DOL Announces New Independent Contractor Test

The DOL is proposing to rescind the independent contractor test issued under the Biden Administration in 2024 (the "2024 Rule") and restore the final rule published on January 7, 2021 (the "2021 Rule"), with some notable modifications.

Overview of the 2021 Rule and the 2024 Rule

The 2021 Rule, which took effect on March 8, 2021, adopted the employer-friendly economic reality test as the standard for determining whether a worker is "in business for himself or herself (independent contractor) or is instead economically dependent on an employer for work." The economic reality test is a multifactor analysis utilized by courts for decades. The DOL identified two "core" factors that are most important in this analysis: the nature and degree of control over the work and the worker's opportunity for profit or loss. The DOL also identified three other factors that are less probative: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the company, and whether the work is part of an integrated unit of production. If both of the "core" factors point towards independent contractor status, then there is a "substantial likelihood" that the worker should be classified as an independent contractor.

On January 10, 2024, the DOL repealed the 2021 Rule and replaced it with the 2024 Rule, which applies a totality-of-the-circumstances analysis and made it more difficult for companies to treat workers as independent contractors. The totality-of-the-circumstances analysis "does not depend on isolated factors but rather upon the circumstances of the whole activity to answer the question of whether the worker is economically dependent on the potential employer for work or is in business for themselves." However, the 2024 Rule identifies six non-exhaustive factors to consider: opportunity for profit or loss depending on managerial skill; investments by the worker and the company; degree of permanence of the work relationship; nature and degree of control; extent to which the work performed is integral to the company's business; and skill and initiative.

The DOL's Current Proposal

In the proposed rule, the DOL states that "[t]he principal flaw of the 2024 Rule is its failure to provide effective guidance on how different factors in its multi-factor balancing test should be weighed or applied together." The DOL is also concerned that "the 2024 Rule could be viewed as more restrictive of independent contracting than the [FLSA] requires." Accordingly, the DOL wants to rescind the 2024 Rule and readopt the 2021 Rule with a few modifications.

The DOL's proposed rule emphasizes that the "ultimate inquiry of economic dependence turns on whether an individual is in business for him- or herself (independent contractor) or is economically

dependent on an employer for work (employee)" and, once again, focuses on the two "core" or "primary" factors-nature and degree of the worker's control and the worker's opportunity for profit or loss. Moreover, the proposed rule would also govern the independent contractor analysis under the Family and Medical Leave Act and the Migrant and Seasonal Agricultural Worker Protection Act, not just the FLSA.

The proposed rule is scheduled for publication in the Federal Register tomorrow, and the public comment period will be open through April 28, 2026. We will continue to monitor and report on further developments. Please contact a member of Benesch's Labor & Employment Practice Group for more information.