JOHNSTON ALLISONHORD

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JOINT-EMPLOYER STATUS CHANGES 2024

Many business models utilize the services of independent contractors to add certain specialized offerings to their overall business. This helps the business in various ways by expanding their brand and expanding their overall offerings, in turn, helping the independent contractors to build their book of business while remaining in the control seat as their own boss. While the trend of using independent contractors is nothing new, the standard of whether or not a business can be liable as a joint employer to sub-employees of its independent contractor is ever-changing, much to the chagrin of established businesses everywhere.

History of Joint-Employment

In 1935, the United States adopted the National Labor Relations Act ("**NLRA**") which aimed to set forth several rights and responsibilities that apply to employers, employees, and labor organizations representing employees. As a component of the NLRA, the National Labor Relations Board ("**NLRB**") was created. The NLRB is a federal agency that protects the rights of employees to band together and form unions, as well as acts to prevent and remedy unfair labor practices committed by employers and unions. In 2020, following the 2018 D.C. Circuit's decision in Browning-Ferris Industries of California, Inc. v. NLRB (911 F.3d 1195), the NLRB aimed to restore and articulately define the joint-employer standard.

This resulted in the NLRB publishing the "final rule" of what constitutes a joint employer status under the NLRA (the "**2020 Rule**"). To be considered a joint-employer under the 2020 Rule, a potential joint-employer must "possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of [an employee's] employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with [another employer's] employees." In other words, the 2020 Rule established that a joint-employer (i) co-determines an employee's essential terms and conditions of employment and (ii) exerts *actual* control over one of these essential terms of another employer's employee. Parties claiming an entity constituted as a joint-employer under the 2020 Rule would need to supplement and provide evidence of the joint-employers direct control; evidence of indirect control, or contractually reserved control, would not suffice for these purposes.

Under the 2020 Rule, it was clear how business owners could avoid categorization as a joint-employer – they would not exert direct control over the essential terms and conditions of their independent contractor's employees. This still allowed business owners the ability to provide guidelines to their independent contractors on these essential terms so long as they did not step in and take actual control over any essential term or condition.

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Recent Modifications to the Joint-Employer Standard

In October 2023, the NLRB published a new "final rule" addressing the standard for determining joint-employer status (the "**2023 Rule**"), and the 2023 Rule superseded and replaced the 2020 Rule. Under the 2023 Rule, the requirement of a joint-employer to co-determine employees essential terms and conditions of employment remains intact; the 2023 Rule further expands upon this idea to provide a comprehensive list of what is considered an "essential term and condition of employment," (the "**Essential Term(s)**") and the list includes the following:

- Wages, benefits, and other compensation;
- Hours of work and scheduling;
- The assignment of duties to be performed;
- The supervision of the performance of duties;
- Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
- The tenure of employment, including hiring and discharge; and
- Working conditions related to the safety and health of employees.

Unlike the 2020 Rule, however, under the 2023 Rule, *actual* control over these Essential Terms is not necessary to be considered a joint-employer, and simply giving another entity *the authority to control* one of the Essential Terms is enough. Additionally, under the 2023 Rule, it does not matter if the control, or authority to control, is direct or indirect. In other words, joint-employer status can now be established solely on contractually reserved control, even if that control is never actually exercised. When asked how this 2023 Rule would impact small businesses, franchises, temp agencies, etc., the NLRB stated:

"*The bottom line is that, while the final rule establishes a uniform joint-employer standard, the Board will still have to conduct a fact-specific analysis on a case-by-case basis to determine whether two or more employers meet the standard.*"

This overt expansion of the joint-employer status has many on edge simply because, as the NLRB stated, it is a fact-specific analysis that must be determined on a case-by-case basis. The 2023 Rule leaves an air of uncertainty in how business owners can run their businesses and utilize independent contractors as a whole.

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Current Status of the Joint-Employer Rule and What it Means for for Businesses

Although the 2023 Rule went into effect on February 26, 2024, there is still hope this broad expansion will not be the new norm. On March 8, 2024, the Eastern District of Texas vacated the 2023 Rule, holding that it would "treat virtually every entity that contracts for labor as a joint employer because every contract for third-party labor has terms that impact, at least indirectly, at least one of the specific 'essential terms and conditions of employment.'" *U.S. Chamber of Commerce et al. v. NLRB et al., No. 6:23-cv-00553*. The Court further held the 2023 Rule is an overexpansion of common law principles, and, thus, contrary to the law.

Although the NLRB has already filed an appeal dated May 7, 2024, as it stands currently, the 2020 Rule is the current standard in determining joint-employer status. This means an owner has to exercise substantial control over an essential term of an employee's duties. While the standard of actual control holds for now, the future of this standard is shaky; due to this, any business that utilizes independent contractors, which includes business models such as franchising, should continue to stay wary of these evolving standards and contact a business attorney who can help guide them through this ever-changing landscape.

JAH Can Help

Our experienced **corporate attorneys** are staying apprised of all joint-employer status updates. If you have any questions regarding how your business will be affected by the changes, complete our **general contact form**.
