A New Joint Employer Rule Could Lead to Greater Involvement by CAAs in Union-Related Activities, If It Survives

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A new federal rule on joint employment is causing confusion about an organization's responsibilities when employees of external partners seek to engage in union-related activities. Adding to the confusion, legal challenges to the rule have made it difficult to predict when it will go into effect, if at all.

If and when it does, the new **Standard for Determining Joint Employer Status** (the "new rule") will establish a broader standard for determining if two entities are "joint employers" of particular employees for purposes of compliance with the National Labor Relations Act (NLRA). NLRA provisions that protect an employee's right to complain about their working conditions and engage in unionizing activities apply to all employers. However, the new rule leaves it unclear whether a community action agency (CAA) and external partner are "joint employers," such that both are responsible and liable for union-related activities conducted by the other's employees.

Importantly, this new standard for determining joint employer status applies only to the NLRA and its requirements. It does not impact, for example, how the Department of Labor (DOL) determines who are "joint employers" subject to the wage and overtime requirements of the Fair Labor Standards Act. As such, an independent contractor under DOL rules could still violate the NLRA as a "joint employer" under the NLRB's new standard.

New Rule

The new rule makes it easier for the NLRB to find that an entity is a joint employer. Since 2020, the NLRB based joint employer status on an inquiry into whether an employer exercised "substantial direct and immediate control" over essential terms and conditions of employment. The new rule rescinds this test and establishes that an entity is a joint employer if it is a common law employer of another entity's employee and shares or codetermines any one of seven essential terms and conditions of employment of the other entity's employees.

The party attempting to prove that another entity is a joint employer must show that an employment relationship exists based on common-law agency principles. Courts recognize agency principles as foundational to establishing the employer-employee relationship. The principles are based on the issue of control, but inconsistent interpretations of when sufficient control exists to establish a joint employer relationship have made compliance challenging. The new rule, thus, requires an inquiry into an entity's ability to control one of the following terms and conditions:

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

The new rule implements several key changes to the way control is determined. Simply having the *authority to control* one essential term or condition, even if not acted upon by the entity or exercised through an intermediary, is sufficient for the NLRB to find a joint employment relationship. In other words, *actual control* is not required. The new rule also adds the authority to control working conditions related to safety and health of employees as an essential term upon which a determination of joint employer status may be found. Since so many employers implement rules and policies around safety in the workplace, this could significantly expand the scope of the standard.

Despite concerns over the broader scope of the new rule, the NLRB declined to provide specific examples of relationships or contractual language that would indicate a joint employer relationship. Rather, it will make determinations on a case-by-case basis. While the burden of proving a joint employer relationship falls on the party asserting its existence, it remains unclear how the NLRB will apply the new rule and weigh the various factors presented.

Understanding the scope of the new standard is important because joint employers have certain responsibilities toward their employees under the NLRA. Joint employers must engage in collective bargaining for unionized employees on those issues over which they have authority to control. A joint employer also may be held liable for the unfair labor practices of the other employer. These responsibilities require significant time and resources on the part of employers to ensure compliance. When based on more tenuous types of control, efforts related to fulfilling these responsibilities may be compounded and complicated because the relationship may be unexpected, limited (e.g., little to no actual communication, contact, supervision, etc.), and involve penalties for non-compliance.

Effective Date

Legal challenges continue to delay the effective date of the new rule. The NLRB pushed it back once, and most recently a U.S. District Court judge for the Eastern District of Texas presiding over a legal challenge to the new rule delayed its effective date further, to March 11, 2024. It is unclear if delays will continue beyond that date, or if the new rule will ultimately be struck down in court.

The U.S. House of Representatives has also attempted to revoke the new rule through the Congressional Review Act (CRA). Under that CRA, Congress has 60 legislative days after a new final federal rule is published to pass a resolution of disapproval that nullifies the rule. On January 12, 2024, the House passed a resolution of disapproval that is currently in the Senate, where passage is questionable. Even in the event it passes the Senate, the resolution would then go to President Biden to sign or veto.

What does this all mean for CAAs?

Since the NLRB will determine joint employer status on a case-by-case basis, it is difficult for employers to know exactly what compliance will look like. Without further guidance, CAAs will need to think strategically about their relationships with vendors and partners if the new rule survives and goes into effect.

To understand where they have authority to control essential terms and conditions of another entity's employees, CAAs will need to work with local counsel to review the terms of their third-party agreements. Each CAA will likely need to exclude terms that provide the CAA with the authority to control or direct any

of the seven essential terms and conditions contained in the new rule. Our understanding at this time of the practical implications of the new rule may be as follows – if a CAA, for example, is entering into an Early Head Start-Child Care partnership agreement with another organization, the terms of the contract would simply set forth the funding source rules but neither direct nor reserve the right to direct how the partner complies with those rules. The agreement may include terms that detail the minimum requirements for safety in a facility pursuant to the Head Start Performance Standards such as keeping the facilities "clean and free from pests" but not direct the partner's employees to spray for pests every two weeks. In so doing, the hope is that the contract language would be viewed as a CAA laying out a programmatic rule that all workers in the program must comply with, rather than reserving authority to control anyone in a way that invokes the CAA as a "joint employer." The reality, however, is that no one knows at this point exactly how the NLRB will apply this rule.

While much remains unknown, CAPLAW will continue to monitor ongoing developments related to it and update the Network accordingly.

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