

# What Court Striking Down Labor Board's New Joint-Employer Rule Means for Construction Employers

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The U.S. District Court for the Eastern District of Texas struck down the National Labor Relations Board's (NLRB's) 2023 joint-employer rule, which only required an entity to possess or reserve the right to control an employee's essential terms and conditions of employment, regardless of whether such control was exercised. *U.S. Chamber of Commerce et al. v. NLRB et al.*, No. 6:23-cv-00553 (Mar. 8, 2024).

Determination of the joint-employer issue will have a profound impact on the construction industry. As industry projects rely heavily on contractors and subcontractors, the NLRB's October 2023 joint-employer rule raised several concerns as the rule's expansion made it possible for *virtually all* contractor-subcontractor relationships to fall under the joint-employer umbrella without any exceptions for the construction industry. This concern has been temporarily alleviated.

### Court Vacates 2023 NLRB Rule

Two business entities are considered "joint employers" when they determine together the essential terms of a worker's employment. If found to be joint employers, entities can face unexpected obligations and liability for workers they do not directly employ. The appropriate standard has flipped back and forth by new political administrations. The current one is advocating for a broad, less-defined standard like the 2023 rule.

The 2023 joint-employer rule expanded the long-standing rule that employers had to actually exercise control over an employee's essential terms and conditions of employment to be considered an employer. Under the NLRB's October 2023 rule, which was set to take effect on March 11, 2024, an entity could be deemed a joint employer by merely possessing or reserving the authority to control one or more of the employees' essential terms and conditions of employment, regardless of whether the control was actually exercised.

The court deemed the rule unlawfully broad, exceeding the bounds of the common law, and thus contrary to law. It also deemed the Board's rescission of the prior 2020 joint-employer rule to be arbitrary and capricious.

### 2020 and 2023 NLRB Joint-Employer Rules

The court's ruling returns the law to the NLRB's 2020 rule under which entities can only be considered joint employers if they possess and actually exercise "substantial direct and immediate control" over one or more of the employees' essential terms and conditions of employment, including hiring, firing, discipline, supervision, and direction. Indirect control and the reservation of control are factors that could be considered for joint-employer status, but neither was sufficient standing alone. The NLRB now faces a more stringent test to establish joint-employer status.

Under the vacated 2023 joint-employer rule, two or more entities would be deemed joint employers if they shared or codetermined the employees' essential terms and conditions of employment. Subsection (d) of the 2023 rule listed the following "broad categories as essential terms and conditions of employment":

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; and
7. Working conditions related to the safety and health of employees.

### Next

NLRB Chairman Lauren McFerran referred to the court ruling as a "disappointing setback," but she stated that "it is not the last word on [the NLRB's] efforts to return our joint-employer standard to the common law principles that have been endorsed by other courts." Reportedly, the NLRB is weighing its options to appeal the district court's ruling to the U.S. Court of Appeals for the Fifth Circuit. Other courts are expected to weigh in on the issue as well.

In any event, it remains crucial for construction industry employers to review with their counsel any existing and future contracts containing terms or rights over other employers' employees that could provide a basis for the NLRB to claim the entity is a joint employer and that company boundaries are sufficiently defined by contract and in practice.

Jackson Lewis attorneys will continue to monitor related legal developments and provide advice and counsel.

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