



## LEGAL UPDATES

# Federal Court Vacates 2023 NLRB Joint Employment Rule And Reinstates 2020 Rule

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On March 8, 2024, a Texas federal court struck down the National Labor Relations Board's new 2023 joint employer rule, which was set to go into effect on March 11, 2024. *Chamber of Commerce of the United States of America, et al. v. Nat'l Labor Relations Board*, No. 6:23-cv-00553 (E.D. Tex., March 8, 2024). The Court's order vacated the 2023 Rule and restored the previous 2020 Rule, holding that the NLRB's decision to rescind the 2020 Rule was "arbitrary and capricious." This is only the latest development in a years-long policy and legal battle over the test for joint employer status under the NLRB, with far-reaching implications for the franchise industry.

The heart of the case pits two competing views of the proper joint employer test as reflected in the 2020 and 2023 Rules. Each hinges on questions regarding the level of an employer's direct or indirect control; involvement in work rules related to the manner, means, and methods of a worker's performance; and a separate entity's involvement in setting working conditions related to safety and health. Under the 2020 Rule, an entity was "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). As the Court explained, under that test the second entity "must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." Further, the 2020 Rule provided that "indirect control" or "reserved control" can be considered but is not dispositive to show joint employer status.

Under the 2023 Rule, by contrast, a showing of "reserve control" or "indirect control" can be sufficient to establish joint employer status under the new §§ 103.40(e)(1) & (2). In addition, the 2023 Rule added to the 2020 Rule's list of essential terms and conditions of employment (1) "[w]ork rules and directions governing the manner, means, and methods of the performance," and (2) "[w]orking conditions related to the safety and health of employees." New Rule § 103.40(d). Further, the 2023 Rule 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 under § 103.40(d).

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As a practical matter, a separate entity such as a franchisor was at greater risk of a finding that it was a joint employer under the broader 2023 Rule than under the narrower 2020 Rule.

Against this backdrop, the United States Chamber of Commerce (and International Franchise Association) filed suit against the NLRB and the parties moved for cross motions for summary judgment on three questions: whether the 2023 Rule is inconsistent with the common law; whether the 2023 Rule is arbitrary and capricious as promulgated; and whether the NLRB's decision to rescind the 2020 Rule was arbitrary and capricious. The Court focused primarily on the legal validity of the 2023 Rule, § 103.40(a)-(d), which turned on whether it had a "meaningful 'two step'" filter for qualifying as a joint employer. The Court rejected the NLRB's argument that it did, siding with Plaintiff that the under the new rule, the second step was illusory because if the first step was satisfied, the second step always would be too, and that there was only one step for "all practical purposes." The Court faulted the Board for failing to identify an example of an entity that satisfied step one but not step two. In a similar vein, the Court also found that the 2023 Rule in § 103.40(e) regarding the exercise of indirect control over an employer made insufficient allowance for further tests under established common law of agency. The Court, in short, concluded that the 2023 Rule extended beyond permissible common law limits that bind the NLRB's rulemaking, and therefore declined to reach the question of whether the new rule is also arbitrary and capricious.

Finally, the Court found that the NLRB's decision to rescind the 2020 Rule *was* arbitrary and capricious. In reaching that conclusion, the Court rejected the NLRB's view that the 2020 Rule was contrary to common-law agency principles simply because it was more narrowly drawn than permitted by such principles. It also rejected the NLRB's policy rationale that the 2020 Rule was not in conformance with the policies of the governing Act.

As it stands, the 2020 Rule controls the joint employee test. However, an appeal is expected to follow, so this issue is likely to remain unsettled in near future.

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