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# Labor Relations Bulletin

FROM THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

## Expansive Joint Employer Rule Adopted and Set for February 26, 2024

The joint employer rule (Rule)—which is largely dictated by interpretations of the National Labor Relations Act (NLRA) made by the National Labor Relations Board (NLRB)—is significant for NECA contractors. The Rule is significant because joint employers are often jointly and severally liable for labor law violations, wages and benefits, and they can both be required to engage in good faith bargaining with the union.

The NLRB has flip-flopped back and forth on the Rule and what constitutes a joint employer relationship over the last decade, and it is headed back in the wrong direction for employers. NECA contractors that utilize staffing agencies to supplement the labor force, those that function as subcontractors or use subcontractors, as well as those in parent/subsidiary relationships, will be particularly impacted by being determined a joint employer with another entity.

Just last year, we provided a guest column on the Notice of Proposed Rulemaking on the movement of the joint employer rule from the employer-friendly standard of “direct and immediate control” to one that is far broader in scope. Then, on Oct. 26, 2023, the NLRB issued a final [Rule](#) that settled on this far broader standard.

Under the new Rule, which rescinds the prior 2020 rule implemented by the NLRB under the Trump Administration, an entity may be considered a joint employer of another entity’s employees if the employers “share or codetermine” the employees’ essential terms and conditions of employment. The new Rule defines “share or codetermine” to mean for an employer, directly or indirectly, to possess the authority to control or to exercise the power to control, directly or indirectly, one or more of the essential terms and conditions of employment. The new Rule provides a laundry list of what qualifies as essential terms and conditions of employment for purposes of a joint employer determination: “(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.”

The new Rule goes far beyond even the pre-2020 Obama era standard and makes merely *indirect and unexercised* control over essential terms and conditions of employment indicative of joint employer status, as opposed to just probative of such status. It also affirmatively states that such low-level contact indicates that such an employer should maintain a presence at the bargaining table “to permit meaningful bargaining.” Under the new Rule, even in a scenario in which only one of the joint employers indisputably has exercised sole and complete control over every aspect of its employees’ essential terms and conditions, the other joint employer, with only reserved and indirect control, becomes a required participant in labor negotiations.

NECA contractors should stay up to date on the case law that will follow the implementation date of the new Rule, examine their collective bargaining agreements, corporate documentation and staffing agreements for relevant and/or inconsistent language, and engage in discussions with local Chapter executives and counsel to examine how the new Rule may adversely impact business operations.

The NECA Labor Relations Department will monitor related developments in the law and legislation.

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