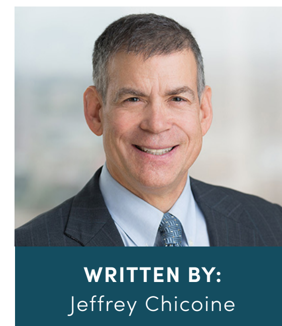
ALL ABOARD THE HR EXPRESS:

THE BIDEN NLRB KEEPS CHUGGING ALONG: PRIVATE SECTOR DEVELOPMENTS



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Joint Employment

Revised Rule Proposed

The ping pong game over who is a joint employer under the National Labor Relations Act (the "Act") continues. On September 6, 2022, the Biden-appointed majority controlling the National Labor Relations Board (the NLRB) proposed a new rule defining who is a joint employer, replacing the rule in 29 CFR 103.40, which was adopted in 2020 by an NLRB dominated by a Trump-appointed majority. The proposed rule is designed to greatly expand who will be considered a joint employer under the Act.

Both the current rule and proposed rule purport to rely on the common law right to control the essential terms and conditions of employment. But the proposed rule defines the essential terms more broadly to *include* but not be "limited to wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance."

More importantly, under the proposed rule, possessing the authority to control such essential terms is sufficient to establish status as a joint employer, regardless of whether control is actually ever exercised. Exercising the power to control essential terms indirectly would also suffice to establish status as a joint employer, regardless of whether the power is exercised directly. And, control exercised through an intermediary person or entity would likewise be sufficient to establish status as a joint employer.

By contrast, under the current rule, an entity is a joint employer only where it possesses and exercises "substantial direct and immediate control" over the essential terms and conditions of another entity's employee. These essential terms and conditions of employment are wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. It further provides that even where an employer exercises direct control over another employer's workers, it will not be a joint employer if such control is "limited and routine."

Additionally under the current rule, indirect control and control that is contractually reserved over terms and conditions of employment (but never actually exercised) is probative of joint-employer status. But such probity is limited to the extent that it reinforces evidence of direct and immediate control over an essential term. The current rule makes clear that joint-employer status cannot be based solely on indirect influence or the reservation of a right to control that is never exercised.

KEY TAKEAWAY

The key is to ensure that your contracts with franchisees or third-party contractors do not dictate essential terms of employment as defined in the proposed rule. The more that employment terms are detailed in your contracts, the greater risk you will run in being considered a joint employer of another entity's employees.

Independent Contractors

Part 1: New Standard Under Consideration

On December 27, 2021, the NLRB invited briefs on whether the agency should "reconsider its standard for determining the independent contractor status of workers" in *The Atlanta Opera, Inc.*, 371 NLRB No. 45 (2021) (a representation case). Independent contractors are excluded from the definition of "employees" under the Act and so are not covered by the law's protection to organize and engage in bargaining. Until 2014, the NLRB had applied a traditional common law agency test to determine whether a worker is an employee or independent contractor viewed as employer-friendly. In *FedEx Home Delivery*, 361 NLRB 610 (2014), the Obama-era NLRB modified its approach to make it more difficult to establish that a worker was an independent contractor, requiring that the worker had actual "entrepreneurial opportunity" and operated as an "independent" business. But in 2019, in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75, the Trump-era NLRB overruled *FedEx* and returned to the prior, traditional standard.

The independent contractor question has also been taken under review by the NLRB in *STG Cartage, LLC, d/b/a XPO Logistics*, 21-RC-289115 (July 13, 2022).

Part 2: Is Misclassification an Unfair Labor Practice?

The NLRB General Counsel serves as the agency's chief prosecutor. On March 17, 2022, the General Counsel issued a complaint against California-based trucking, warehouse, and delivery firms, contending that misclassifying drivers as independent contractors rather than employees violated the Act. *See Deco Logistics d/b/a Container Connection*, 21-CA-272323 (complaint issued March 17, 2022 and withdrawal approved Aug. 5, 2022). The complaint alleges that the misclassification of the drivers prevented them from engaging in concerted activity protected under the Act. In *Velox Express Inc.*, 368 NLRB No. 61 (2019), the Trump-era NLRB ruled that misclassifying employees by itself is not an unfair labor practice and does not violate the Act. The General Counsel is seeking an order forcing the companies to reclassify drivers as employees and to pay them consequential damages suffered because of their misclassification, among other remedies.

KEY TAKEAWAY

The Biden NLRB is expected to change the standard making it more difficult to establish a worker as an independent contractor and to require treating a broader range of so called gig workers as employees protected by the Act.

Micro-Units Revisited

On December 7, 2021, the NLRB invited briefs on whether it should reconsider the standard for determining petitioned-for bargaining units. *See American Steel Construction*, 371 NLRB No. 41 (Dec. 7, 2021). The NLRB asked whether it should return to its bargaining unit analysis set in *Specialty Healthcare and Rehabilitation Center*, 357 NLRB 934 (2011), adopted by the Obama-era NLRB. The Specialty Healthcare decision enabled unions to carve out groups of employees within an enterprise (commonly called "micro-units"), where the unions had the greatest likelihood of success in order to facilitate union organizing. Employers arguing for a bargaining unit larger than one proposed by the union had to establish that the additional employees shared an "overwhelming community of interest" with the group proposed by the union. In *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), as revised in *The Boeing Company*, 368 NLRB No. 67 (2019), the Trump-era NLRB reversed Specialty Healthcare and returned to the traditional community of interest standard.

Interestingly, in *WideOpen-West Illinois, LLC*, 371 NLRB No. 107 (June 10, 2022), the NLRB rejected the larger unit sought by the employer and applied *The Boeing Company* criteria, without considering whether to reverse it. The NLRB concluded that the additional employees that the employer sought to include in the unit had "meaningfully distinct interests" from those employees in the unit that the union had proposed.

A Return to Card Checks

In *Cemex Construction Materials Pacific, LLC*, No. 28-CA-230115, the General Counsel filed a brief seeking to expand unions' right to obtain recognition from employers based *solely* on signed authorization cards alone, without the need for a board election. The brief seeks to reinstate *Joy Silk Mills*, 85 NLRB 1263 (1949), under which an employer faced with signed authorization cards indicating a union's majority status has no right to insist on a secret ballot election unless it can establish a good faith doubt of the union's majority status. If *Joy Silk* were to be reinstated, it is not clear what would constitute such a "good faith doubt" about majority status. The NLRB had abandoned the *Joy Silk* standard by 1969, adopting its current standard, under which an employer presented with signed union authorization cards need not accept the union's claim of majority status. Instead, the employer can lawfully insist on a secret ballot election. Unions have long advocated a card majority rule. If the NLRB reinstates *Joy Silk*, employers—and employees—might not have the option of a secret ballot election.

Captive Audience Speeches

On April 7, 2022, the General Counsel announced it will assert that "captive audience" meetings and similar employer campaign conduct violates the Act (Memorandum GC 22-04). Captive audience meetings have been central to many employer responses to union organizing campaigns and appear to be supported by the so-called free speech provision of Act section 8(c), added in 1948. But the General Counsel argues that the NLRB has "long-recognized that the Act protects employees' right to listen to—or refrain from listening to—employer speech concerning their rights to act collectively to improve their workplace," citing a 1946 NLRB case, decided before the free speech amendment. See *Clark Bros. Co.*, 70 NLRB 802, 805 (1946), enforced, 163 F.2d 373 (2d Cir. 1947).

KEY TAKEAWAY

The Biden NLRB will pursue multiple avenues (including new rules allowing micro-units, card checks, and attacking captive audience speeches) in order to make it easier for unions to organize employees in the coming years.

Redefining Protected Activity

Part 1: Concerted Activity

In *American Federation for Children*, 28-CA-246878 (brief filed Jan. 13, 2022), the General Counsel filed objections to an administrative law judge's (ALJ) decision that an employer did not unlawfully discharge a worker who expressed concern that a supervisor sabotaged the work authorization and declined to rehire a former coworker out of anti-immigrant bias. In particular, the General Counsel targeted a 2019 Trump-era NLRB decision, *Alstate Maint., LLC*, 367 NLRB No. 68 (2019), that the ALJ relied upon in concluding that the concerns expressed by the fired employee were not concerted because other employees did not join in the activities and some employees were offended by them. In the 2019 decision, the NLRB found protected activity requires more than the mere presence of other coworkers when an individual raises workplace concerns.

Part 2: Union T-Shirts

In *Tesla, Inc.*, 370 NLRB No. 131 (Aug. 29, 2022), the NLRB overturned a Trump-era decision *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019), in concluding it was unlawful to require employees to wear only a plain black T-shirt or one bearing the company logo. The NLRB returned to the standard from *Republic Aviation*, 324 U.S. 793 (1945), that interfering with a display of a union insignia is presumptively unlawful unless the employer can show "special circumstances" justifying the rule, such as necessary to maintain production or discipline.

Part 3: Email Usage

Email restrictions upheld—for now. In a case on remand for a court of appeals, a Republican majority panel upheld the right of business to restrict email usage to work-related communications (*T-Mobile USA, Inc. and Communications Workers of America*, NLRB 14-CA-155249, September 30, 2022). In doing so, the panel ruled that T-Mobile had discriminatorily sanctioned an employee for use of the employer email system to engage in union business. While the employer had a rule restricting email usage to work-related communications it did not enforce it, permitting email blasts about hockey tickets, bowling parties and "Nacho Day" in the cafeteria without being punished.

Part 4: Standards for Review of Work Rules

In *Stericyle, Inc.*, 371 NLRB No. 48 (Jan. 6, 2022), the NLRB invited briefs on whether to revise the standard by which it reviews work rules, set by the Trump-era NLRB in *Boeing Co.*, 365 NLRB No. 154 (2017), and revised in *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019). In addition, the NLRB asked if certain categories of rules are always lawful to maintain, such as investigation confidentiality rules, non-disparagement rules and outside employment bans.

Dues Deductions Continue Past Contract Expiration

On September 30, 2022, the NLRB ruled that employers must continue to deduct union dues from paychecks after a labor agreement expires consistent with the terms of the expired labor agreement (*Valley Hospital Medical Center*, NLRB Case 28-CA-213783). The NLRB ruled 3-2 with the Board's two Republican members dissented.

The NLRB reverted to an Obama-era ruling, which was overturned in 2019 when the board was under GOP control. The decision reinstates an Obama-era ruling. The decision gives unions a boost when negotiating successor contracts because the unions will not face the prospect of employers' interrupting their dues revenue stream.

Injunctive Relief

Part 1: General Counsel Directs Regions to be Aggressive

The General Counsel directed NLRB regions to seek preemptive injunctions under the Act section 10(j) for alleged unlawful threats or other coercion during union campaigns. (NLRB GC Memo 22-02, issued Feb. 1, 2022). In GC Memo 22-02, the General Counsel provide direction for regional offices for when to seek injunctions during organizing campaigns, including where no actual coercion has been carried out. It directs the regional offices to consider "all contextual circumstances," including the effect on union support among employees, the rank of the persons taking the adverse actions, local labor market conditions, and whether the employer is a repeat offender.

Part 2: Starbucks Injunction Cases

The NLRB sought injunctions against Starbucks in Buffalo, Memphis, and Phoenix seeking reinstatement of fired workers, allegedly for engaging in union organizing activities. The court granted the injunction in Buffalo and denied the injunction in Phoenix. The injunction action in Memphis is pending.

KEY TAKEAWAY

The Biden NLRB is taking an aggressive approach to protecting employees from threats and other acts of coercion during union organizing drives. Employers can minimize such risks by remembering TIPS: Avoid **T**hreats, **I**nterrogating, **P**romises, and **S**pying during organizing drives.

ULP Remedies

Part 1: General Counsel Directions to Expand Scope

The General Counsel has directed regions to act aggressively in the types of remedies pursued in complaints and settlement agreements in three recent guidance memoranda, Memorandum GC 21-06 ("Seeking Full Remedies"); Memorandum GC 21-07 ("Full Remedies in Settlement Agreements"), and Memorandum GC 22-06 ("Update on Efforts to Secure Full Remedies in Settlements).

The directives in Memoranda GC 21-07 and GC 22-06 to seek full remedies in settlement agreements is particularly problematic because settlements, by nature, represent a compromise between the parties. The concept that a party should get full relief in a settlement—everything they would receive if they prevailed at hearing—disincentivizes a responding employer from settling except in the most straightforward or hopeless cases.

In addition, the General Counsel's evaluation of "full relief" is staggeringly broad. In fact, the below list goes beyond what is available to the charging party upon a wholly successful hearing. This includes:

- Full back pay
- Reinstatement or front pay when reinstatement is not possible
- Job placement at the employer's expense
- Full consequential damages including
  - » Interest and late fees on credit cards
  - » Early withdrawal penalties for retirement accounts
  - » Loss of vehicle costs
  - » Loss of housing costs (including potential moving expenses)
  - » Value of harm to credit score
  - » Cost of job retraining
  - » Cost of training to recover professional license or clearance
  - » Cost of obtaining health care coverage
  - » Personal injury expenses for physical injury, which likely would include mental health injury
- Letter(s) of apology
- Confessions of judgment or promissory notes
- Expanded notice posting requirements

Finally, the GC condemned the use of "no admission clauses," in which an employer expressly denies unlawful conduct in settlement agreements, despite the fact that such clauses are ubiquitous in settlements in other areas of the law and have previously been used in ULP settlements.

Last November, in *Thryv, Inc.*, 371 NLRB No. 37 (2021), the NLRB invited briefs on whether it should expand remedies beyond traditional make-whole relief to include consequential damages and, if so, whether it should be where damages are a direct and foreseeable result of the unlawful action, but only for egregious violations.

Part 2:

In *NLRB v. Ampersand Publishing*, No. 21-71060, (9th Cir. Aug. 11, 2022), the U.S. Court of Appeals for the Ninth Circuit enforced an NLRB order requiring the Santa Barbara News-Press to reimburse a Teamster Local's $42,000 in legal fees for work during collective bargaining negotiations. The NLRB found that the employer engaged in bad faith bargaining and other unfair labor practices, including unlawful, unilateral changes to working conditions and transfer of bargaining unit work. The Ninth Circuit enforced the NLRB's order, finding the newspaper's conduct constituted as aggravated misconduct, including the extraordinary remedy of reimbursement of the fees. Generally, the NLRB has no authority to order employers to pay legal fees incurred during litigation. But the Court agreed with the NLRB that reimbursement of expenses incurred during bargaining "falls squarely within the heartland of the [NLRB]'s delegated powers" and was "independent from the [NLRB] adjudications."

KEY TAKEAWAY

The NLRB is becoming more aggressive in ordering the reimbursement by employers of a wider range of consequential damages, including the interest paid on loans or credit cards, additional travel costs to alternative employment, or other costs incurred because of an employer's unlawful conduct.