Published on *The National Law Review* https://www.natlawreview.com

U.S. Chamber Strikes Back At NLRB Joint-Employer Rule

Article By:

Joshua S. Fox

Raymond Arroyo Jr.

On November 9, 2023, the United States Chamber of Commerce ("Chamber") and a coalition of business groups filed suit in the Eastern District Court of Texas against the National Labor Relations Board ("NLRB"), alleging the Board's newly-issued joint-employer rule is unlawful, and should be struck by the courts because it is arbitrary and capricious. Chamber shortly thereafter filed for summary judgment on November 13, 2023.

As we previously reported, the NLRB recently established a new standard for determining whether two employers are joint employers of particular employees within the meaning of the National Labor Relations Act ("Act"). The most significant aspect of the new rule is that an entity may be found to be a joint employer controlling the essential terms and conditions of employment ***whether or not such control is ever exercised*** ("reserve control") and without regard to ***whether any such exercise of control is direct or indirect*** ("indirect control"). The new rule is set to go into effect on December 26, 2023 and will be applied

prospectively to cases filed after that effective date.

The complaint seeks relief under the Administrative Procedure Act by requesting that the Court find the rule unlawful and set it aside.

The Chamber's Main Arguments Against the Joint-Employer Rule

In support of its position, the Chamber makes the following arguments:

- The rule's requirement that an employer be classified as a joint employer whenever it has the authority to control a single "essential" term of employment, regardless of whether the entity exercises such authority, is not permissible under existing common-law precedent from which the NLRB claims the rule is derived.
- The rule obscures the distinction between employees and independent contractors, noting that by enforcing employer status when indirect control exists, the rule requires the NLRB to take into consideration terms and conditions that would traditionally be indicia of an independent contractor relationship—not joint-employer status.
- The rule ignores the structure and purpose of the Act by finding an entity is a joint employer when it exercises control—direct or indirect—over a *single* term of employment. By sharp contrast, Chamber argues, the NLRA requires an employer to possess control over *several* essential terms and conditions in order for meaningful bargaining to be possible between an employer and a prospective union.

The Chamber Cites A Number Of Negative Implications Of The Rule

The Chamber also provided a list of negative effects it anticipates the rule will have on myriad industries, such as restaurants, construction, retail, hospitality, healthcare, among others. The Chamber specifically noted the negative impact the rule will have on the franchise business model, noting that under the new rule, many franchisors may be considered joint-employers despite the fact a franchisor may not exercise day-to-day management over the business operations of their franchisees. Finally, the Chamber asserts that the new rule will create obstacles to meaningful bargaining, as companies unfamiliar with the bargaining parties will be forced to bargain. The Chamber argues the anticipated disruptive impact of the rule further demonstrates the arbitrary and capricious nature of the rule.

This is not the Chamber's first legal challenge to overreaching administrative rules. The Chamber has successfully mounted legal challenges to the exercise of authority by a number of administrative agencies, including the Securities and Exchange Commission and the Federal Trade Commission. If the District Court rules in favor of the Chamber, it is anticipated that the Board will likely appeal the ruling to the Fifth Circuit.

Further complicating this filing is a November 6, 2023, petition, filed by the Service Employees International Union, requesting the District of Columbia Court of Appeals to review the Board's joint-employer rule. The two actions may be consolidated into a single proceeding within one of the two Circuits, chosen randomly by the United States Judicial Panel on Multidistrict Litigation.

National Law Review, Volumess XIII, Number 319