Podcast

The 2023 National Labor Relations Board's Joint-Employer Rule in Flux

By Richard F. Vitarelli &

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The U.S. Chamber of Commerce challenged the NLRB's 2023 Rule, arguing the Rule is unlawfully overbroad and would negatively affect franchisors-franchisees, contractors-subcontractors, and staffing agencies-user employers.

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Transcript

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind. How will my business be impacted?

The NLRB's 2023 rule expanded the criteria for establishing a joint-employer relationship under federal labor law. Under the rule, an entity could be deemed a joint employer by merely possessing reserved or indirect authority to control one or more of the employee's essential terms and conditions of employment.

The U.S. Chamber of Commerce challenged this rule, arguing it is unlawfully overbroad and would negatively affect relationships of franchisor franchisees, contractors, subcontractors, and staffing agencies and user employers. The federal court has since blocked the rule.

On this episode of We get work™, we discuss the 2023 rules, real-world impact and implications for employers. Our hosts today are Rick Vitarelli, principal and co-leader of Jackson Lewis' Labor Relations and Transactional Services Groups, and Jordan Von Bokern, Senior Counsel at the U.S. Chamber Litigation Center, the litigation arm of the U.S. Chamber of Commerce. Rick represents employers in strategic labor relations and collective bargaining matters, including in the context of mergers and acquisitions, restructuring and bankruptcy. Jordan focuses on regulatory litigation in which the chamber sues to challenge federal and state law

and regulations. Rick and Jordan, the question on everyone's mind today is what are the key takeaways for employers from the NLRB's 2023 rule and how does this impact my business?

Thank you, Alitia, and welcome to our podcast today. Today we're going to be speaking about the joint-employer rule. My name is Rick Vitarelli. I am the co-chair of Jackson Lewis' National Labor Relations Practice, as well as our M&A practice. Today we have a special guest in our studio, Jordan Von Bokern from the U.S. Chamber. He is a senior counsel at the Chamber. So Jordan, give us a little background on yourself.

Sure. Thanks so much, Rick. Yeah, I'm a senior counsel at the Chamber Litigation Center, which is kind of the litigation arm of the U.S. Chamber of Commerce. I've been here about two years and I work on a lot of labor and employment issues and a lot of our party litigation where we file suits in the name of the Chamber on behalf of its members.

All right. So Jordan, the topic today is the joint-employer rule, particularly the NLRB's issuance of this joint-employer rule. What is this joint-employer rule? Can you describe what it does?

Absolutely. To set the background a little bit. The National Labor Relations Act governs labor relations between employers and employees. And an important question on that is, if you're an employer, who are your employees? Or if you're an employee, who is your employer? Because that determines whom you can organize against, who you have an obligation to collectively bargain with, who's precluded from committing unfair labor practices against you, et cetera. And what the courts have long held to and what the legislation Congress has long held to is kind of a common law understanding of the employer-employee relationship. But the joint-employer question asks is, is it possible for there to be more than one employer for a given employee? And the answer to that has long been understood to be yes. There are situations where two or more employers share or co-determine the essential terms and conditions of a particular employee. The question is, what test do you use to determine if you have multiple employers for a single employee? So the joint-employer rule sets that test.

The NLRB has used a few different formulations in the past, but what the 2023 rule did is jettison the common law understanding, which required two or more employers actively share or co-determine terms and conditions of employment and instead put in this amorphous standard that allows even an employer's reserved control or indirect unexercised control to be sufficient to say that they are your employer. So in a nutshell, the distinction between the rule that has been in effect for years and actually prior to the issuance of the NLRB's new rule. The test was more stringent.

So could you just tell me again, it requires direct and immediate control over terms and conditions as opposed to indirect? Is that accurate?

Yeah, what's long been understood to be the rule is you need direct, immediate, and substantial control over an employee's essential terms and conditions of employment to be an employer and, in that case, a joint employer of that employee.

What the NLRB has said in the 2023 rule now is you can rely on solely indirect and reserved control. So, you know, one real-world example would be if you contract with the company and pay them a set rate for them to perform services for you under standard contract relationship. Under the new rule, the Board might say, well, you pay a fixed amount and expect a certain amount of man hours from the employees of your contractor. You're effectively determining their wage because you're capping how much that entity can afford to pay its employees. So that's reserved or indirect control. And that's enough to make you a joint employer of those employees, which has never been understood to be the test before but seems to be what the NLRB is trying to do in its 2023 rule.

Now under the old rule, that wouldn't have been the case, right? So under the old rule, how would that same situation where you've got a contract that might factor in hours worked and maybe the cost of labor in coming up with a commercial agreement between the party that uses the secondary employer and the party that is securing the services. Under the old rule, how would that have been handled?

I mean, under the old rule, the question would have been, are both employers or both companies directly, immediately, and substantially controlling the essential terms of employment for those individuals? And the answer, I think, would pretty clearly be no, absent some contractual provisions we haven't discussed. If the company hiring the contractor starts dictating, here are the terms and conditions I want you to impose on your employees, that's a different matter. But if it's just, you know, the economic realities of the agreement you've entered into lead to certain results in how the contractor staffs the company and runs the company. You know, that's reserved or indirect, and that's not been enough to be a joint employer under the long held common law rule.

So the Chamber actually initiated litigation to enjoin the rule in Texas and was successful in doing that, at least for the time being. I assume that your members wanted the Chamber to pursue this litigation angle. Why was this important to your members?

We heard from our members that the joint-employer rule was very important for them because it imperils a lot of standard commercial arrangements, franchise models, contractors, subcontractors, even trademark licensing schemes. People were worried, brand standards, all sorts of commercial engagements. Our members told us this is a rule that really hurts us and that we really care about. The Chamber has fought a lot of lawsuits against overregulation and government action both at the federal and state level that burdens businesses. And we thought this was a great candidate because NLRB was acting in excess of its statutory authorization and did not adequately justify its change in position for this new rule. So it was a no-brainer for us that this has merited a challenge.

At some point, I think, Jordan, we're going to want to talk about some of the real world impacts on some of your employers. And I imagine this rule impacts employers across industries covered by the NLRA. I know retail companies have been concerned about it. I know that healthcare companies have been concerned. I do a lot of construction work and I know that our construction clients are very concerned about it because it muddles the contractor subcontractor distinctions.

How does this rule hit the core business model of all those industries?

I think you're exactly right that it really hits industries, you know, kind of across the economy, across a variety of business models. And that's reflected in the other groups who are plaintiffs in this lawsuit. You know, it was the U.S. Chamber was the first name in the caption, but we had the American Hotel and Lodging Association. A lot of hotels use a franchise model or use contractors. We had associated builders and contractors, no-brainer there with the contractor model, and associated general contractors of America as well. And we had International Franchise Association. The franchise model was squarely in the targets of the NLRB with this role. We had the National Association of Convenience Stores that often work on a franchise or brand licensing model. National Retail Federation that uses contractors and franchising as well, Restaurant Law Center and the Texas Restaurant Association. So you can see numerous different industries that are represented by the trade group plaintiffs here that show it really hits home across a variety of business models. And with the law sort of in a state of flux at this point, it's kind of held up.

So we're still operating under the old rule that predated the 2023 rule. What are you expecting to occur next in the litigation?

Sure. So we prevailed in front of the district court and the court held that the 2023 rule was contrary to law, it went beyond the bounds of the common law that has to govern the joint-employer relationship. And it vacated the rule and reinstated the 2020 rule that it hewed more closely to the traditional common law model. So that rule is in effect. The NLRB has filed its notice of appeal as of May 7th, so this will be going up to the Fifth Circuit for further litigation. But we intend to continue pressing this challenge at every stage necessary to continue to secure that victory and ensure that this rule does not take effect.

Now I understand there was a second lawsuit brought affirmatively by a labor union, the SEIU, Service Employees International Union, in the District of Columbia Circuit. Is that litigation still pending?

That litigation's on hold right now. There's still some motions practice going on. But that was a challenge by the SEIU saying that they wanted the rule to have gone further in the direction that it did.

And there's some, you know, jurisdictional fight over what court is the right one to hear it. Do these challenges have to be brought in district court or circuit court?

You know, the court in our district court challenge was a sure, confident, correctly so, that it had jurisdiction over the claims. But I don't want to bore everybody with the finer points of those jurisdictional disputes.

Right. We could nerd out on this issue all day long, Jordan. So it's, yeah, that's, that's great, helpful background. So there's more to come on this. We can expect more from the courts as this winds up through the appellate process probably bears mentioning at this point that there are some real world impacts to this rule.

So as you know, I'm involved in the active practice representing clients across the country in labor relations matters, in all the industries that you touched on that are impacted by the rule. We're seeing an awful lot of concern about the rule just

because the foundation of these relationships are in commercial contracts between business parties. And the rule in a nutshell, from their perspective, in the commercial parties perspective, changes the rules on which they contract it. So the very premises of the relationships that they've entered into to run certain functions. And oftentimes in all the industries that you mentioned, you know, contracting within a business, sometimes a business wants to have flexibility to run a certain part of the operation. A healthcare employer wants to outsource dietary or laundry. You know, some other companies may want to have temporary employees come in there to deal with seasonal upticks or cyclical upticks in need for labor.

The concern about this rule from their vantage point is that it creates this potential that both of these contracting parties, both the user and the supplier, could both be brought in as the same employer of all these employees, which makes it difficult to sort of navigate these rules. So, you know, obviously when you're in a contract relationship, if you don't think the contract is working out from a commercial standpoint, you have a right to terminate the contract.

I think the rule has the tendency of making these relationships sticky from a labor law standpoint. So it makes it much more difficult to extricate from those relationships without undue burdens, where if you wanted to get another supplier to come in there to provide you a better type of service or more efficient service or to otherwise take a shot at running a particular segment of the business, this now makes it much more difficult, especially if a union comes in and actually represents employees of the supplying employer. At that point, the user employer and the supplier employer are both brought in together, makes it more difficult.

Has that been a concern for your members? Has that been voiced as well to the Chamber?

Yeah, I think that's absolutely right. A lot of companies are interested in this rule in part because they build their businesses around a lot of different regulatory regimes. But an important one is, you know, the regime that governs employer-employee relationships. You know, for a lot of businesses, employees are their greatest asset and really are the heart of the business and heart of the organization. And then how you interact with those employees and your obligations and whom you owe those obligations to are very important for those business models may fundamentally alter what businesses choose to do if they've availed themselves of particular business arrangements that are losing some of their advantages or make them responsible for things they frankly don't want to be responsible for.

Like you said, a lot of businesses use contractors because they want to put another business that's expert at a particular function or practice in charge of that function or practice within certain set parameters. If you lose the advantages of that, it raises the issue, do you buy those services on the market or do you produce them yourselves? How are you going to reorganize? And Rick, I'd be very interested to hear from you, from your practice and your experience. What are employers worried about from what you've seen with this change in the joint-employer rule?

Vacated now, but when it was pending and the business arrangements that they were worried about and the consequences they were worried they would face or the practices they'd have to undertake to ameliorate the legal risk here. The concern

they have is really with the finding of joint employment. So what the NLRB did was instead of requiring direct and immediate control that's really exercised by the user employer over the supplier's employers, at this point, if the user employer wants to impose any kind of quality requirement or even like premises requirements that you would apply to any vendor that would utilize your property or enter your property, from basic risk type issues or safety policies, rules of conduct for behavior while being on the property. Things as basic as that, in and of themselves as one factor, could turn the relationship from an arm's length separate employer relationship to this joint-employer relationship. And that's the concern.

So with construction, for example, we see general contractor or developer or an owner have rules that apply to the projects. So there'll be certain safety rules, basic safety rules that will apply across the board, regardless of whether it's somebody who's working outside or a material person making deliveries. Everybody that would go on that property or a vendor or a salesperson, whoever it would be, would have to abide by those. If you read the joint-employer rule and the guidance that was also issued with it, you see that even something as simple as that could change the nature of the relationship fundamentally. And that has far sweeping ramifications on these relationships.

Other things, obviously, if two parties are going to co-determine wages, benefits, and compensation for the suppliers, employees, obviously that would have been an issue before. But hours of work and scheduling. If, for example, because of circumstances like working on a title work where you have to work between the high and low tides at the right time, those kinds of things where you're requiring people to be on-site and off premises or off a project site within a particular time, that could be enough, which is just a little bit beyond what anybody had ever contemplated. Assignment of duties, obviously supervision and those kinds of things.

But really the place I see where a lot of employers are concerned is just basic safety and health and premises liability rules that would protect them just because of the property and the fact that they have dominion over the property. Those are the places where I see people saying, I mean, how do you prevent being found a joint employer under these rules? It's a hair trigger. So it's the unpredictability of this that kind of impacts folks and it takes away the ability to require at least some level of even just risk avoidance. It makes you have to kind of turn your head on that in the commercial contracts and how you actually enforce those standards, in fact, on the property, which is for many employers an unworkable construct. So that's what we're seeing.

Yeah. What do you think an employer does in that situation? Like what are, what incentives are set up or would be set up under this new rule, you know, for say a job site, like you're discussing where the employer who owns and runs the job site is taking responsibility for setting certain minimum safety standards that everyone who comes onto the site has to follow. If they're told that's exercising control over employees through the contractor, what can an employer do in response to that? Do you think, would they reconsider that arrangement entirely? Is there a risk that they'd stop trying to enforce standards?

In compliance with the rule, in a lot of ways, is impractical. It really just doesn't make sense. And that's why I think there's an outcry by the business community against it, because it really, in a lot of ways, doesn't make sense. It seems like it's an instrument to accomplish something beyond what the commercial parties would have ever contemplated. Some employers are looking back on the commercial agreements themselves to try to mitigate areas where it looks like they would have any control over these situations or require the supplying employer to administer rules that would be in keeping with what that user employer would require for its employees or its direct vendors. So they try to work on this through modification of the commercial agreements. But again, how do you ensure the quality, the safety of folks using the premises in that sort of thing if you can't sort of impose it as a contractual obligation on the supplier who's going to be having access to the property, it's going to be putting people on that property.

And it also creates a sort of a change in how you have to allocate risks because it's not just the NLRA risk, it's other risks that are also of concern because it's not just the NLRA, impacts that are significant. It's also what other agencies in the federal government are going to borrow this type of a construct to sort of expand the reach of the laws to in a joint employment sense to these two separate groups of employers. And that's what we're seeing is it really is a focus on the commercial agreements, how the agreements are administered day to day and how, you know, folks indemnify one another for potential liabilities, added costs and risks that might arise during the relationship. So that's how we see people trying to grapple with it.

Yeah, one consequence I want to pick your brain on is, you know, we haven't really talked about what does the joint-employer rule look like in its application? Like once you're found to be a joint employer, you know, then if the employers are unionized, they, you have to bargain with them. You have to collectively bargain with, you know, your contractors, employees about terms and conditions of their employment. When the only control you exercise over those employees may be you set a price that the contractor receives and the contractor sets wages and hours based on those prices. What does this collective bargaining look like if you've got multiple employers whose relationship to the employees might be fairly attenuated and interact?

Well, so the issue of wages might be a good one. So if you've got a contract where the user employer has a supplier employer coming in to perform a service and those employees are unionized and they want to negotiate over wages. If the cost of the contract impacts the wages of those employees after other indicia are present that would support a joint-employment finding, then the user employer needs to come to the table when they negotiate over wages because the argument is that the supplier employer doesn't have the ability to increase those wages or other benefits that might be economic in nature by itself. It would only be able to maybe make increases or other changes to wages if they could bring to the table the user employer and get them to agree to presumably cough up more money to help fund those wages or benefits. That's a practical example.

So this could result in unionization and collective bargaining being used as kind of a wedge to control the commercial relationship between these two companies.

Exactly. Or to impact or modify that commercial relationship. Because again, a key term on a contract for the user employer is the cost of getting the services provided. And many of these user employers want a turnkey service. They just rely upon the fact that somebody is going to do building maintenance, somebody is going to handle the scope of work on a construction project. And so when they go out to bid on these projects, they're assuming that they have a certain price that they're going to be living with throughout the duration of that contract relationship. And now they've got to go back and the union can come in and influence what the costs are between the two companies, which is, you know, again, different than what it's like under the current rule that's now in effect.

Thankfully, because of the Chamber's litigation, but would certainly change if that rule did go into effect. Now it would change that relationship and bring everybody to the table and potentially modify those commercial terms.

So Jordan, this is one rule among many that are coming out from the federal government. Obviously, we won't even talk about the state governments right now because we're seeing a lot of this, especially in the blue states across the country. What else is going on at the federal level that's similar to this joint-employer rule that's gotten on the radar screen of the Chamber?

That's a good question. At times, President Biden has said that he intends to be the most pro-union president in history. And I think we're seeing that across a wide range of agencies and a wide range of rulemakings. The NLRB, it's no surprise there that the current NLRB is promoting more union power, more unionization obligations. But you're really seeing it across other agencies as well that have proposed or enacted rules that seek to shift the balance of power in favor of organized labor and against employers.

So the Chamber is involved in a lawsuit right now against the Department of Labor's independent contractor rule, which seeks to really narrow the circumstances in which somebody can be considered independent contractor rather than employee, even though people who are independent contractors like being independent contractors and are really not well served by a rule that deprives them of the opportunities to control their schedule, control their opportunity for profit. And kind of force more of them into the bucket of being considered employees.

The FTC, which no one has ever thought is a labor regulator before now, has passed a rule that's currently going to be going into effect in September, banning non-compete agreements in almost all circumstances across the American economy. The Chamber has filed a lawsuit against that where briefing is ongoing. So I won't say too much or else our lawyers will shake their fist at me. But that's another rule where we think the agency has really overstepped its bounds and is regulating area outside of its core competency.

You're seeing the NLRB itself being very aggressive. The current general counsel has proposed kind of a laundry list of changes that she would like to see. And the Board has overturned longstanding precedent in a number of important areas relating to things like work rules, union elections, remedies for unfair labor practices. I don't think that anybody sees any of this slowing down soon.

I would agree with that. It is a significant concern for our clients. They definitely have stood up and took notice. I think the NLRA was kind of a sleepy law for many years. There wasn't a lot of change in that law, but the change is happening faster than many folks can process it.

So Rick, at the end of this joint-employment process, the goal is ultimately to have two employers collectively bargaining with one set of employees in the same room.

It seems like an unwieldy process and pretty different from the normal collective bargaining dynamic of employer, single, and employees, what's motivating this? What's gained by having multiple employers in the room with one set of employees?

The purpose of the rule, as far as I can tell, is to give the union the ability to bring in multiple employers to demonstrate that the unions are not impotent in the face of these commercial arrangements. I think that is if you were to break it down in a way that's sort of simple and succinct, that would be the purpose of it. By bringing multiple employers in, the user employer, who would be the direct employer of these employees, can't credibly sit there and say, this is between you and us. We are doing this job under a commercial agreement that has certain terms built into it. We're going to negotiate with you over what we can control. We can't control what the user employer is able to do with us in a commercial sense. So what it does is it embroils that user employer into those discussions to give the union the power to compel them to be in the room under penalty of unfair labor practice charges if they fail to do so. And the ability to try to get them through pressure, which if it's a joint-employment situation, the pressure can be direct against the joint employer. And that's really significant because under labor law, there's a primary and secondary employer distinction.

So under labor law, a union can really target for things like picketing and strikes, the direct employer. If you muddle who the direct employer is by creating this concept of joint employment and expanding its scope, what you do is you bring that user employer into the same ambit so that picketing strikes negative publicity that would be of the type that labor unions would use against the direct employer lawfully would then be able to be brought without any legal impediment against that user employer. So this is a way to give them not only access to that user employer, a reason to put them in the room that's enforceable by law, but also it makes them a target for union pressure tactics to try to push whatever agenda they have at the bargaining table with the direct employer.

So that's in a nutshell what this does. If an employer is concerned about a rule that's going into effect, like the joint-employer rule or other legislative initiatives that are of concern to them and their businesses, how could they reach out to the Chamber for assistance?

Absolutely. I mean, the Chamber represents over 300,000 members across the country. And you know, indirectly represents millions of employers across the country through our relationships with other trade organizations, including state and local chambers of commerce. So I think those are all great avenues. I mean, the Texas Association of Business and the Longview Chamber of Commerce were both co-plaintiffs on the joint-employer challenge and have been invaluable partners in a number of litigations. So local chambers and state chambers are a great place to

start making your voices heard because they have great advocacy efforts of their own and they coordinate with the U.S. Chamber and with other trade groups as well.

Of course, industry-specific trade groups are also very involved, very receptive to hearing from their members. We've partnered with a number of them in this lawsuit and in other lawsuits. And this is all a system for helping to filter business feedback up to different trade associations and help give us the information we need to advocate on behalf of our members.

So I'd say, stay engaged early and often with your state and local chambers, the U.S. Chamber, with your other trade groups, and just keep raising the alarm. Because the most important thing to us and the most valuable resource that we have in our members and the information that they give us.

That's really helpful, Jordan. I think many of our employer clients will be interested to hear the perspectives of the Chamber for sure and understand how they could take action themselves if they wanted to get more involved in some of these initiatives, these important initiatives from the Chamber. I want to thank you for spending time with us today. This has been really helpful. I think our clients are going to be very open to hearing the perspective of the Chamber and will value the comments that you made today as they kind of consider their business relationships going forward, especially those that implicate the joint-employer rule. But definitely thanks for joining us. Hope to see you again soon.

Thanks so much for having me, Rick. Always glad to talk about the Chamber, litigation, joint-employer rule, anything.

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