Insight

NLRB Joint Employer Proposal Signals Return to Obama-era Labor Regulations

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Executive Summary

- The Biden Administration took significant and long-expected action on labor regulations recently, as the National Labor Relations Board published a Notice of Proposed Rulemaking intended to rescind and replace the current Joint Employer Standard Under the National Labor Relations Act.
- Replacement of the Trump-era joint employer standard would allow employers to be more easily classified as joint employers, increasing their susceptibility to collective bargaining negotiations and unfair labor practice claims.
- Policy experts expect the Biden Administration to accelerate its efforts to return to Obama-era standards for labor-related issues including apprenticeship programs and worker classification; such changes would have significant impacts on the labor market – both for employers and workers.

Introduction

The National Labor Relations Board (NLRB) recently published a Notice of Proposed Rulemaking (NPRM), signaling the Biden Administration's return to Obama-era labor regulations. The Trump Administration rolled back various Obama-era labor-based regulations regarding apprenticeship program standards, worker classification, and joint employer status. When President Biden took office in 2021, many policy experts expected a swift return to the Obama-era labor rules, which would have significant consequences on the labor market—especially for employers and non-traditional workers. Under Obama-era labor rules, employers would be more easily classified as joint employers, increasing their susceptibility to collective bargaining negotiations and unfair labor practice claims; Industry Recognized Apprenticeship Programs (IRAPs) would be eliminated, limiting future apprentices to Registered Apprenticeship Programs; and more workers would qualify as employees under the Fair Labor Standards Act (FLSA), limiting individual's ability to do "gig" work. The Biden Administration has now taken significant action on the Joint Employer Standard Under the National Labor Relations Act, leading many experts to expect the administration to reintroduce other Obama-era standards following the midterm elections.

Joint Employer Status

Joint employer status affects employers through collective bargaining and gig economy implications, both of which are prominent topics in the current labor market. “Joint employment” describes a situation in which two or more distinct entities share responsibility in the terms and conditions of employment including hiring, disciplinary action, and supervision of employees. When labeled as a joint employer, an entity may be responsible for participating in union negotiations and responding to unfair labor practice claims on behalf of the other employers. It may also be subject to accretion, the addition of employees to existing bargaining unions without an election, and a greater likelihood that employee complaints be lawfully upheld.

Key to the debate regarding joint employer status is the extent to which the joint employer exercises its power over the employees. In 2015, under the Obama Administration, the joint employer definition was interpreted expansively, as decided in the Browning-Ferris decision. The NLRB decided that simply possessing the ability to impose authority over employees—even without exercising that ability—was enough to warrant joint employer status. For employers, this meant a greater risk of being implicated in bargaining conversations and labor practice liability cases. Under the Trump Administration, the board proposed to return to the pre-Browning-Ferris standard and published a new rule requiring that joint employers must “possess and exercise substantial direct and immediate control” over at least one essential aspect of employment of another entity’s employees, thus having a meaningful impact on the workers. This provided more protection for employers from alleged labor law violations.

Recently, the NLRB issued a NPRM intended to rescind and replace the current joint employer standard under the National Labor Relations Act. The proposed changes would provide guidance to parties involved when more than one entity “possesses the authority to control or exercises the power to control particular employees’ essential terms and conditions of employment.” The notice – which indicates a gradual return to the broad Obama-era definition of a joint employer – is now open to public comments, all of which must be submitted before November 21, 2022.

Pending Regulations

As the Biden Administration has made its first key regulatory play in rolling back Trump-era labor rules, many policy experts expect action on other regulations including apprenticeship programs and independent contractor classification.

Apprenticeship Programs, Labor Standards for Registration (Final Rule)

Under the Obama Administration, funding for and access to Registered Apprenticeship Programs (RAPs), which provide an alternative to traditional higher education, expanded. Apprenticeship programs attract individuals to participate via guaranteed wages, technical assistance, tax credits, and other federal resources, as well as flexible training options. These programs have proven to produce high-quality workers by equipping them with hands-on instruction and experience in a specific trade.

Since the implementation of the National Apprenticeship Act in 1937, Registered Apprenticeship Programs were recognized by the Department of Labor (DOL) and certain State Apprenticeship Agencies. In 2020, the Trump Administration DOL published a final rule establishing IRAPs. These programs were recognized by qualified third-party entities, known as Standards Recognition Entities (SREs), rather than the DOL. The rule sought to increase accessibility to apprenticeships and diversify the types of industries that could use such programs by creating IRAPs as a complement to RAPs. Although there is no available data on IRAP performance due to the short duration of the program, according to the final rule, IRAPs were expected to add

upward of 2 million new apprenticeships.

In 2021, the DOL proposed to eliminate IRAPs, specifically the regulatory framework around SREs and their role in organizing IRAPs. The Biden Administration's preference is to direct more resources toward expanding registered apprenticeships, signaling a return to Obama-era priorities. A final rule on this issue now awaits regulatory review and is expected to be published in November of this year.

Employee or Independent Contractor Classification

As the gig economy continues to grow, worker classification remains a prominent labor issue. Employee or independent contractor classification defines the criteria under which a worker is labeled. Under the Fair Labor Standards Act (FLSA), workers classified as employees are entitled to minimum wage, overtime pay, and other benefits. Independent contractors are not entitled to the same protections but enjoy the flexibility of being able to set their own hours and work for multiple companies and organizations.

In 2014, under the Obama Administration, the NLRB broadened the determination of worker classification. To determine whether a worker should be classified as an employee or an independent contractor under the FLSA, an economic reality test is used to consider six factors. Two factors, a worker's entrepreneurial opportunity for profit or loss and the hiring entity's control over the worker, are the key determinants. The Obama Administration opted to shift away from testing a worker's "entrepreneurial opportunity" and toward "economic dependency." This change expanded the coverage of the FLSA and made it more difficult for workers to be labeled as independent contractors because they were more likely to be deemed economically dependent on their hiring entity. Under the Trump Administration, in 2019 the NLRB returned to the pre-2014 standard for worker classification, citing that "entrepreneurial opportunity" should be a prominent consideration and that the 2014 ruling failed to weigh workers' ability to grow their own businesses. The DOL supported the 2019 decision by publishing a final rule in January 2021 to further clarify worker classification under the FSLA. The rule introduced the "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" and contained the DOL's revised interpretations of the FSLA text to "promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy." Upon the Biden Administration entering office, the DOL delayed the rule until March and withdrew it in May 2021. In March 2022, a district court in Texas vacated the delay and withdrawal, reinstating the final rule and backdating it to March 2021.

Most recently, in June 2022, the DOL issued a proposed rule on determining worker status. Since the announcement, the DOL has held two public forums for workers and employers to share their views and an additional eight meetings with interested parties. Though the proposed text has not been released, Secretary of Labor Marty Walsh has suggested that many workers currently labeled as gig-economy workers should be reclassified as employees. Between the Biden Administration's plan to revert to Obama-era policies and the secretary's statement, it is likely that the proposed rule will broaden the definition of an employee under the FSLA and make it more difficult for individuals to work as independent contractors.

Conclusion

As many Obama-era labor-related rules were rolled back under the Trump Administration, many experts expected the Biden Administration to quickly reinstate rules such as apprenticeship program standards, independent contractor classification, and the joint-employer standard. The Biden Administration has now taken significant action on the joint employer standard, leading many policy experts to expect action on other Trump-era regulations after the midterm elections.