



441 G St. N.W.
Washington, DC 20548

B-335701

December 15, 2023

The Honorable Bernard Sanders
Chairman
The Honorable Bill Cassidy
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Virginia Foxx
Chairwoman
The Honorable Bobby Scott
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *National Labor Relations Board: Standard for Determining Joint Employer Status*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the National Labor Relations Board (NLRB) titled “Standard for Determining Joint Employer Status” (RIN: 3142-AA21).¹ We received the rule on October 27, 2023. It was published in the *Federal Register* as a final rule on October 27, 2023. 88 Fed. Reg. 73946. The stated effective date is December 26, 2023.

According to NLRB, it has decided to issue this final rule for the purpose of carrying out the National Labor Relations Act (NLRA or Act) by rescinding and replacing the final rule titled “*Joint Employer Status Under the National Labor Relations Act*,” which was published on February 26, 2020, and took effect on April 27, 2020. NLRA, ch. 372, 49 Stat. 449 (July 5, 1935); 85 Fed. Reg. 11184 (Feb. 26, 2020). NLRB stated that the final rule establishes a new standard for determining whether two employers, as defined in the Act, are joint employers of particular employees within the meaning of the Act. NLRB also stated that it believes that this rule will more explicitly ground the joint-employer standard in established common-law agency principles and provide guidance to parties covered by the Act regarding their rights and responsibilities when more than one statutory employer possesses the authority to control or exercises the power to control particular employees’ essential terms and conditions of employment. NLRB stated further that under the final rule, an entity may be considered a joint employer of another employer’s employees if the two share or codetermine the employees’ essential terms and conditions of employment.

¹ This major rule report replaces the report, B-335701, *National Labor Relations Board: Standard for Determining Joint Employer Status*, issued on Monday, November 9, 2023. In this revised report we note that as an independent regulatory agency, NLRB is not subject to the Administrative Pay-As-You-Go-Act of 2023.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The final rule was published in the *Federal Register* on October 27, 2023. 88 Fed. Reg. 73946. The House of Representatives received the rule on October 27, 2023. 169 Cong. Rec. H5179 (daily ed. Oct. 30, 2023). The Senate received the rule on October 30, 2023. 169 Cong. Rec. H5314 (daily ed. Oct. 30, 2023). The rule has a stated effective date of December 26, 2023. Consequently, the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of NLRB's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
NATIONAL LABOR RELATIONS BOARD
TITLED
“STANDARD FOR DETERMINING JOINT EMPLOYER STATUS”
(RIN: 3142-AA21)

(i) Cost-benefit analysis

In its submission to us, the National Labor Relations Board (NLRB) indicated that it did not prepare an analysis of costs and benefits for this final rule.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

NLRB stated that this final rule will not have a significant economic impact on any small entity. NLRB prepared an RFA analysis for the final rule. The analysis included a: 1) statement of the need for, and objectives of, the final rule; 2) statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; 3) response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments; 4) description and estimate of the number of small entities to which the rule applies; 5) description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and 6) description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

As an independent regulatory agency, NLRB is not subject to the Act.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant

exemption); the OMB Director granted a waiver of the Act's requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act" in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

As an independent regulatory agency, NLRB is not subject to the Act.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On September 7, 2022, NLRB issued a notice of proposed rulemaking. 87 Fed. Reg. 54641. According to NLRB, it received almost 13,000 comments from interested organizations, labor unions, trade associations, business owners, United States Senators and Members of Congress, state Attorneys General academics, and other individuals. NLRB stated that it has carefully reviewed and considered these comments and discussed them in the preamble of the final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

NLRB stated that the rule would not impose any information collection requirements. Thus, according to NLRB, the rule is not subject to PRA.

Statutory authorization for the rule

NLRB promulgated this final rule pursuant to section 156 of title 29, United States Code

Executive Order No. 12866 (Regulatory Planning and Review)

As an independent regulatory agency, NLRB is not subject to the Act.

Executive Order No. 13132 (Federalism)

As an independent regulatory agency, NLRB is not subject to the Act.