

# On-Site

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## Joint employer final rule

# CONSTRUCTION COMPANIES SHOULD BEWARE OF LIABILITY

Last year, the National Labor Relations Board (NLRB) issued a new final rule that dramatically changes the definition of “joint employer” for purposes of the National Labor Relations Act (NLRA). The law generally requires joint employers to engage in collective bargaining, among other requirements.

Construction industry trade group Associated Builders and Contractors (ABC) has criticized the new rule as overly broad. ABC contends the rule may expose contractors to increased liability and risk, and that it will disrupt existing relationships between general contractors and subcontractors. Here's what you need to know.

### “Policy whiplash”

In its statement on the new rule, ABC referred to “policy whiplash” regarding the joint employer

rule. Indeed, the rule has gone through several iterations over the past decade or so.

For years, the NLRB would recognize a joint employer relationship only if the employer had “direct and immediate” control over employees that was substantial and not “limited and routine.” The board considered only the actual practice of the parties involved, ignoring their contract.

The NLRB upended that standard in 2015 in what's known as the *Browning-Ferris* case. In a 3-2 ruling, the board found that the first step was to determine whether a “common law” employment relationship exists. (Common law is law created by a court, rather than a legislature.) If so, the board would consider whether the employer possessed sufficient control over employees’ “essential terms and conditions of employment” to allow meaningful collective bargaining.

The board identified several matters relevant to the control question including control over hiring, firing, discipline, direction, wages and hours. Notably, the *Browning-Ferris* ruling eliminated the requirement that a joint employer both possess and exercise control over the terms and conditions of employment.

In a 2020 final rule, the Trump administration reinstated this requirement, making it easier for employers to avoid being defined as a joint employer. Specifically, it required that an employer possess and exercise “substantial



## HOW TO PROTECT YOUR CONSTRUCTION COMPANY

Multiple business groups have filed lawsuits challenging the National Labor Relations Board's joint employer final rule issued in 2023. (See main article.) While those legal actions play out, construction companies would be wise to scrutinize all their subcontracting, staffing and other labor-related contractual relationships.

In particular, evaluate those relationships in light of the seven essential terms and conditions of employment. It's possible that relationships that didn't previously constitute joint employer status could fall within the rule now because they provide you with reserved or indirect control over essential terms and conditions. In that case, you may want to make modifications to escape the grasp of the National Labor Relations Act (NLRA).

For example, you might train your supervisors to avoid even the appearance of control over sub-contractors' employees. You also may want to ensure that any potential co-employers abide by the NLRA when it comes to the essential terms and conditions. You could, for instance, require them to provide you with evidence of their compliance, such as employee handbooks and policy documents. Contact your attorney for more specific tips.

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In September 2022, the NLRB published proposed regulations reversing the Trump-era rule. It received more than 13,000 comments and subsequently issued the current final rule, which essentially rescinds the previous version, in October 2023.

### The latest "final" rule

The new final rule considers the alleged joint employers' authority to control essential terms and conditions of employment, regardless of whether the control is "reserved" (not exercised) or indirect. Seven essential terms and conditions are defined exclusively as:

1. Wages, benefits and other compensation,
2. Hours of work and scheduling,
3. The assignment of duties to be performed,
4. The supervision of the performance of duties,
5. Work rules and directions governing the manner, means and methods of the performance of duties and the grounds for discipline,

6. The tenure of employment, including hiring and discharge, and

7. Working conditions related to the safety and health of employees.

The joint employer rule applies only if a business employs the workers at issue and has authority to control at least one of these terms or conditions. Authority over other matters isn't sufficient to trigger the rule. Although the standard itself is uniform, the NLRB will continue to conduct a fact-specific analysis on a case-by-case basis to determine whether it's met.

If deemed a joint employer, a company is required under the NLRA to collectively bargain on both the essential terms and conditions over which the business has control and all other mandatory subjects of bargaining that the company possesses or exercises the power to control.

Moreover, joint employers can be held liable for a co-employer's unfair labor practice and could lose their status as "neutral employers." This could pull them into strikes, boycotts and picketing over the co-employer's labor dispute.

## Stay prepared

Being designated a joint employer can have a substantial financial impact on your construction business. For this reason, learn the ins and outs of the final rule, as well as the NLRA. Look for ways to guard against unexpected liability. (See “How to protect your construction company” on page 3.)

As of this writing, the original effective date of the new rule was pushed back two months, to Feb. 26, 2024. According to the NLRB, the delay was “to facilitate resolution of legal challenges.” It seems likely, though, that the legal challenges will continue, and the 2024 election could result in even more changes. In the meantime, construction companies remain at risk. ■

# BEING A LITTLE “EXTRA” WITH A SCHEDULE OF CONTRACTS IN PROGRESS

The three primary components of a set of financial statements are the income statement, the balance sheet and the statement of cash flows. But why stop there? For many construction businesses, it can be beneficial to add supplementary “schedules” to their financial reporting repertoire. One to strongly consider is a schedule of contracts in progress.

## A systematic approach

Simply defined, a schedule of contracts in progress is a detailed accounting of the revenues, costs and billings on each of your construction company’s current “performance obligations” (contracts) as of the end date of the financial statement period.

The precise data points you should track will depend on the nature of your work. But a solid schedule of contracts in progress should typically include items such as:

- Total revenue per contract (including change orders),
- Total estimated costs to complete each contract, and
- A calculation of estimated gross profit or loss.

The schedule can also track per-contract costs within specified time frames or as of the last day of the year.

To accurately generate such accounting data, you need to have a comprehensive system in place. Your CPA can help you set up a schedule of contracts in progress or review the version you’re currently using and suggest improvements. The right financial management software should help as well.

## Estimates are everything

So, why go through all this? For users of your financial statements, such as lenders and investors, a schedule of contracts in progress will provide additional and detailed insights into your operations. Ideally, it’ll provide reassurance that your construction company is plenty busy, generating substantial revenue and on track to turn a profit.





However, the schedule can provide valuable insights to you and your leadership team as well. Let's start with your estimates. A schedule of contracts in progress should enable you to better ensure that: 1) your estimate for each job reflects accurate, realistic costs to complete, and 2) your current numbers show that you're on track for true profitability.

Of particular importance are estimated losses. It's one thing to lose a percentage point or two off your profit margin; it's another to lose money on a project. If your costs to complete are notably at odds with your estimate, the first order of business is to determine why and whether you can salvage the job.

If losses can't be helped, you've got to apply the proper accounting approach to the situation so you know precisely how the struggling project (or projects) will affect your bottom line. Under the percentage of completion accounting method, for example, you must recognize the full estimated loss of the project in the period in which you identify the estimated loss.

### **Indirect costs are important, too**

A schedule of contracts in progress can also illuminate another element of doing business in the construction industry: indirect costs. Don't confuse these with overhead. Generally, overhead refers

to the costs of running any business. Examples include rent, office equipment and supplies, salaries, insurance, taxes, advertising and marketing expenses, and accounting and legal fees.

Indirect costs, on the other hand, are expenses related to a contract that aren't necessarily specific to one job. For instance, if you pay for activities such as project management consulting, purchasing, contract administration and safety oversight, these likely fall into this category. The costs of repairs and maintenance to equipment not specific to one project are also usually considered indirect costs.

A spike in indirect costs can negatively affect profitability. Maybe you're working on several complex jobs that call for more outside consulting. Or perhaps bad weather has put undue stress on vehicles and equipment, necessitating more repairs. Your schedule of contracts in progress should tip you off to such issues.

### **Continuous improvement**

As your construction business grows, continuously improving the sophistication of its financial reporting is a good idea. Plus, as mentioned, a schedule of contracts in progress is just plain helpful. Contact your CPA for help setting one up or improving the one you have. ■

## **5 WAYS TO MAINTAIN MORE SECURE JOBSITES**

Construction businesses have always operated under high risk for job-site theft. The National Equipment Register, a database of detailed information about equipment ownership and theft, has estimated that the construction industry loses about \$1 billion annually to on-site thievery.

Failure to adequately address and continuously improve jobsite security could lead to not only substantial financial losses, but also project delays as you replace lost materials, tools and equipment. You could get hit with increased insurance premiums, too. Here are five ways to maintain more secure jobsites:

**1. Create a theft prevention plan.** In a formally written and reviewed plan, clearly outline your

construction company's policies and procedures regarding theft prevention. It can address topics such as borrowing tools for use on other jobs, entering jobsites after hours, and removing scrap material for personal use or sale.

Distribute the plan to employees, subcontractors and anyone else who'll be physically present on a jobsite. Be sure to emphasize that you'll prosecute anyone caught stealing.

**2. Ensure every jobsite complies with your plan.** Use your theft prevention plan as a compliance tool. Whether it's the project manager, foreman or another trusted employee, someone should be responsible for regularly verifying that the rules are being followed.

For example, is the property well-lit and fenced off? Are "No Trespassing" signs prominently displayed? Are tools stored in locked boxes and materials tied down or otherwise secured? Is the construction trailer safely locked when work ends for the day?

Internet-connected cameras can help you identify and prosecute thieves.

For some projects, you may want to ask the local police whether they can send a patrol car by the jobsite regularly. You might even consider engaging a private security service if budget allows.

**3. Register and secure equipment.** For a fee, the aforementioned National Equipment Register allows contractors and others to register heavy equipment. They may provide free access to law enforcement to aid in recovering stolen equipment.

Beyond that, make sure your theft prevention plan addresses optimal ways to secure heavy



equipment. Doing so can be as simple as removing batteries or wheels, lowering blades and buckets, and using locks designed to immobilize controls or wheels. High-tech options include motion-sensing alarms and ignition cut-off switches.

**4. Install camera systems.** Internet-connected cameras are in people's homes, garages and businesses these days; they should be on your jobsites as well. These cameras will enable you to maintain anytime/anywhere vigilance. Plus, the footage can help you identify and prosecute thieves. Whenever possible, set up cameras to cover the entire site. At the very least, target entrances and exits, heavy equipment, and areas containing high-value assets.

**5. Keep detailed records.** Review your construction company's approach to inventory as well as how you receive and store materials. Radio frequency identification tags, geofencing technology and GPS tracking devices are also great for tracking assets and recovering lost or stolen tools and equipment. Be sure you've recorded the make, model, serial number and/or vehicle/product identification number of every piece of equipment. Take photographs as well.

The more carefully and regularly everything is documented, the easier it'll be to notice when items go missing — and the harder it'll be for thieves to get away with their crimes. ■

# IS YOUR CONSTRUCTION BUSINESS CYBERSECURE?

Every business with digital resources needs to dedicate time and effort to cybersecurity. That certainly holds true for construction companies. In fact, construction was the top industry hit by ransomware attacks in 2021 and 2022, according to file encryption app developer NordLocker.

Contractors are targeted because they often play critical roles in supply chains and tend to handle a substantial amount of customer and employee data. They're often considered an entry point through which cybercriminals can attack more lucrative targets such as real estate developers and other businesses with deep pockets.

Perhaps worst of all, most of the construction industry isn't prepared for a serious cyberattack. This alarming assessment was made in a 2023 report from Dodge Construction Network and content security and management company Egnite. The report, entitled *Data Resilience in Design and Construction: How Digital Discipline Builds Stronger Firms*, also provided a ray of hope — those who invest in preventive measures often have good results.

## The big picture

A proactive approach to cybersecurity can help prevent cyberattacks and other security breaches before they occur. Where to begin? First think about some “big picture” steps. Conduct annual cybersecurity risk assessments to understand:

- What types of data your company captures and processes,
- Where data is stored and how it's used, and
- Which security tools are needed.

Ask your attorney for help adding cybersecurity requirements to contracts with project owners, sub-contractors and vendors. Create a cyberattack response and recovery plan and establish a team to implement the plan in the event of a data breach. Assess the cost and value of cyberinsurance, which can help mitigate losses from data breaches, business interruptions and network damage.

## Employees and assets

Educate your employees on how to recognize and report potential cyberthreats, such as phishing and malware messages. Ensure every staff member uses complex passwords and changes them regularly. Better yet, implement multifactor authentication — that is, a password plus a unique code — on all devices, software and mobile apps used on the job to add an extra layer of security to the login process.

Beyond that, keep software, mobile apps and firewalls up to date. Install patches and updates as soon as they become available. Erase all hard drives before disposal. Also, regularly perform encrypted backups of sensitive data to lessen the impact of a breach and avoid work stoppage if data, applications or systems are held hostage by cybercriminals demanding ransom.

## Sensible budget

By implementing the above measures, and likely others customized to your needs, you can protect your construction company's sensitive data and reduce the risk of a cyberattack. Work with your CPA to set a reasonable cybersecurity budget. ■





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## Improving Back-Office Efficiencies for Construction Project Success

Improving back-office efficiencies is crucial for the success of construction projects, not just during the construction phase but before and after it as well. Here are key strategies for enhancing project outcomes through back-office improvements:

**Embrace Technology:** Leveraging technology is a straightforward yet effective way to boost project efficiency. Technologies such as data analytics, robotic process automation (RPA), and artificial intelligence (AI) can streamline repetitive tasks, improve accuracy, and save time, ultimately leading to cost savings. These technologies can help in predicting future needs, automating communication with job candidates or late payers, and generating reports or updates efficiently. Many of these tools are integrated into existing enterprise resource planning (ERP) or accounting software, and optimizing their use can significantly benefit construction projects.

**Implement Digital Security Measures:** Protecting digital assets from unauthorized access is essential. This can be achieved through measures such as requiring unique logins, using virtual private networks (VPNs), regularly updating software, encrypting sensitive information, backing up data, conducting cybersecurity training, monitoring digital safeguards, and performing cybersecurity audits. These steps help safeguard sensitive information and ensure the integrity of digital operations.

**Managing Cash Flow:** Improving payment processes and minimizing losses are key to managing cash flow effectively.

Strategies include identifying potential late payers early, sending automatic reminder emails, offering discounts for early payments, depositing checks promptly, shortening payment terms, invoicing more frequently and timely, and using RPA or AI for efficient invoice processing and payment preparations. Additionally, negotiating better loan terms with banks can also help in minimizing financial losses.

**Improve Your Company Culture:** The underlying company culture significantly impacts job outcomes. Identifying the current culture and defining the desired culture are the first steps toward cultural improvement. Desired behaviors should be modeled and reinforced through recognition programs, efficient meetings, accepting feedback, encouraging community groups, redefining the company's mission, and adjusting communication styles and work environments. These actions can foster a culture that supports innovation, collaboration, and efficiency.

In summary, construction project success can be significantly enhanced by adopting new technologies, implementing robust digital security measures, managing cash flow effectively, and cultivating a positive company culture. These strategies not only improve the efficiency of back-office operations but also contribute to the overall success and profitability of construction projects. For more detailed guidance on implementing these controls, contact a member of LaPorte's Construction Industry Group.