

JOINT COMMITTEE ON ADMINISTRATIVE RULES

ILLINOIS GENERAL ASSEMBLY

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REP. FRANCES ANN HURLEY
REP. STEVEN REICK
REP. CURTIS J. TARVER, II

MINUTES

January 18, 2022

MEETING CALLED TO ORDER

The Joint Committee on Administrative Rules met on Tuesday, January 18, 2021, at 10:30 a.m. in Room C600 of the Bilandic Building, Chicago. Co-Chair Cunningham called the meeting to order and announced that the policy of the Committee is to allow only representatives of State agencies to testify orally on any rule under consideration at Committee meetings. Other persons are encouraged to submit their comments to the JCAR office in writing.

ATTENDANCE ROLL CALL

X Senator Bill Cunningham	X Representative Tom Demmer
X Senator John F. Curran	X Representative Michael Halpin
X Senator Donald DeWitte	X Representative Frances Ann Hurley
Senator Kimberly A. Lightford	X Representative Steven Reick
X Senator Antonio Muñoz	Representative Curtis J. Tarver, II
Senator Sue Rezin	X Representative Keith Wheeler

APPROVAL OF THE MINUTES OF THE DECEMBER 15, 2021 MEETING

Sen. Muñoz moved, seconded by Rep. Reick, that the minutes of the December 15, 2021 meeting be approved. The motion passed unanimously (9-0-0).

EXPEDITED CORRECTIONS

Department of Public Health – Skilled Nursing and Intermediate Care Facilities Code (77 Ill. Adm. Code 300; 45 Ill. Reg. 16088)

Rep. Hurley moved, seconded by Rep. Halpin, that the Expedited Correction be certified effective October 25, 2021. The motion passed unanimously (9-0-0).

REVIEW OF AGENCY RULEMAKINGS

Department of Commerce and Economic Opportunity – Data Center Investment Program (14 Ill. Adm. Code 521; 45 Ill. Reg. 2530)

Sen. DeWitte moved, seconded by Sen. Curran, that JCAR, with the concurrence of the Department of Commerce and Economic Opportunity, extend this rulemaking for an additional 45 days. The motion passed unanimously (9-0-0).

CONSIDERATION OF OTHER RULEMAKINGS AND ISSUES

Department of Labor – Minimum Wage Law (56 Ill. Adm. Code 210; 45 Ill. Reg. 6894)

Anna Koeppel, Legislative Director, Jason Keller, Assistant Director, and Yolanda Carrillo, General Counsel, represented DOL.

Rep. Reick asked for an overall view of the situation with this rulemaking.

Ms. Koeppel: Since around 70 years ago there has been a development of case law establishing a multifactor economic realities test to determine whether a joint employment situation exists between an employer and an employee. A couple of years ago, the Trump administration promulgated a rule that adopted a stricter test than the one developed in case law that the State of Illinois had been following. At that time, DOL, given that the Minimum Wage Law says that if the federal standard is stricter than whatever the State has adopted, had not put this standard into rule. DOL wanted to adopt a State standard that was appropriate and more in line with what had been the case for seventy-some years. The Trump administration rule was challenged, withdrawn, and rescinded. The Biden administration has not promulgated any such rule and has not indicated that it is going to do so. Because of this back-and-forth on the federal level, DOL does not want to leave employers and employees in an ambiguous situation. So DOL is still seeking to adopt this rule, which codifies the economic realities test that has been in place for more than seventy years.

Rep. Reick: So what you're saying is that there are currently no federal standards in place with regard to joint employment, the previous rules having been rescinded.

Ms. Carrillo: There are no federal standards with respect to joint employment that would impact Minimum Wage Law. The best that we can tell is there is a rule from 1958. That rule, however, does not codify the economic realities test, which subsequent rules have incorporated and the case law at the State and federal levels has supported.

Rep. Reick: Let's then take a moment and talk about the evolution of economic realities since 1947 or 1958 and the Trump rules that were enacted during that administration. And the economic realities as they exist today. Can you walk me through what changes you think are important within that timeline that give rise to the need for this rule that you are trying to propose?

Ms. Carrillo: One of the biggest changes—and this is where the case law has developed around economic realities and what factors to look at in the employment relationship—has been a more fissured workplace. So the nature of what a job or employment is has changed. And so the economic realities test looks at the root of what that relationship is. Is it truly a contractual, separate relationship, or is it really that two businesses are working together as it relates to the individuals who are employed.

Rep. Reick: Can you give me an example or two of what you're talking about?

Ms. Carrillo: One of the more basic examples is a company or business that incorporates different restaurants separately.

Rep. Reick: Like franchises?

Ms. Carrillo: Not like franchises. It's the same owner, but they open multiple restaurants and incorporate each restaurant separately. But they share human resources between them, and when they schedule employees they schedule them to work at various locations. The issue here is that they are incorporated separately but really they are working as one employer. So the question is if Restaurant A is liable for any wages that go unpaid or are Restaurants B and C also jointly liable for the underpayment of those wages. So that's one example of where this joint employer analysis will come into play. Because of how these businesses are incorporated vs. how they actually are operated.

Mr. Keller: Representative, we did provide examples as well within our rule.

Rep. Reick: I see that some of them, according to the comments in the Blue Book, have been taken off due to various objections to them and that's fine. Have you done any analysis or study as to the true honest-to-goodness effect as to how much of a problem this is?

Mr. Keller: This is the second time that this rule has been before JCAR. We promulgated it last year. We held a public hearing for that rule, which is required under the Minimum Wage Law, and we held a hearing here as well. Unfortunately we didn't file that rule in a timely manner so we promulgated another rule. We held a second public hearing as required by the Minimum Wage Law and are back here as well. We've taken numerous comments from small businesses and big businesses and have attempted to reply to those comments. We also had requested DCEO do a small business impact notice twice, and both times it came back as minimal impact.

Rep. Reick: You've given me one example of somebody having five restaurants downtown. So where, if it's of minimal impact as you've stated, the U.S. Department of Labor is currently without rules on this particular issue. And we don't know what the status of the U.S. Department of Labor's intent is with regard to promulgating new rules. The commentary that I've read from people who are questioning this rule is saying why do we need to rush in when—and I've got to assume that sometime down the line the U.S. Department of Labor is going to weigh in on this issue because it's probably not just a rule that affects businesses in Illinois but it affects businesses elsewhere in the country and there's probably a lot of people seeking guidance on where they would go with this. And I'm wondering if we aren't jumping the gun here with respect to the situation as it was in the past, but wouldn't it be better maybe to wait to see if the U.S. Department of Labor comes out with guidance that maybe provides a more streamlined method of analyzing whether we've got joint employer issues and that sort of thing rather than jumping in ourselves and sometime in the future you folks having to come back here with revised rules that conform more to the U.S. DOL's standards?

Ms. Carrillo: There are two different answers to that. In the immediate need, the rulemaking process under the Trump administration started in the spring of 2019. We are now in the winter of 2022, and the matter has not settled. We've gone through the passage and implementation phase of a new rule under the Trump administration. It was rescinded at the start of the Biden administration, and we are in limbo as to whether one is going to be introduced or not. If it does it's going to have to go through a lengthy comment period, so I do think it's important to give some businesses some security about what the standard is. As I mentioned to this body, there's a

question about what rule is in place now, and just talking to different folks that do this there is a question about whether that 1958 rule still applies. We think that it does, but –

Rep. Reick: We think that it does what?

Ms. Carrillo: That the 1958 rule applies, but there isn't certainty about whether it does and the question of what standards apply is in limbo. So giving businesses certainty in terms of what elements are going to be looked at in Illinois will give businesses that sense of security in terms of "this is how we develop our business plan to make sure that we are complying with this rule". The second point I would make is if we look further back prior to the Trump-era rule is that there was a different rule before the Obama administration came in. The Obama administration issued some guidance on joint employers, and the reaction to that was the Trump administration's rule. So what we've seen is a change of guidance at the federal level, and that creates uncertainty for businesses because of the changes that are happening every few years.

Rep. Reick: Have you examined the rulemaking or the rules that are in effect with regard to minimum wage laws in states surrounding us—in Indiana, Wisconsin, Missouri, Iowa, Kentucky?

Ms. Carrillo: I do not believe that they have joint employer rules, but I'm not 100% sure.

Rep. Reick: So what you're saying is that we're jumping in where others may have feared to tread and by doing that we have to move into the economic realities of where we are right now, which are the fact that businesses looking to open branches or relocate into states are going to look at this and say that there's uncertainty on both sides. There's uncertainty for those that don't have joint employer rules but we don't know that, or we have joint employer rules here in Illinois which, according to the business community and many commenters on this issue, are somewhat onerous and will do nothing but discourage businesses from coming to Illinois when they might go someplace else where they don't have the issue of joint employers that they need to worry about. So again I would go back and say that maybe it's best that we wait and see what comes out of the U.S. Department of Labor or we be a lot more circumspect in our definition of what constitutes economic realities in today's business climate in order to determine whether we are opening the door to additional litigation or things that might keep businesses from coming to Illinois in the first place.

Ms. Carrillo: This rule does track very closely with a 7th Circuit case. I make note of that because 7th Circuit case law would necessarily impact states like Indiana, Wisconsin, and Michigan. And so the factors that the 7th Circuit looks at are the factors incorporated in the test that we have put forth. So businesses are already going to be looking at those different factors when developing their business plan and putting their business model forward. And that has been around since 2007, so there are a good number of rules that this has been in place and businesses have been able to look at that test for purposes of creating their businesses.

Rep. Reick: Well, the 7th Circuit is certainly not an insignificant influence in this matter. It's got a reputation, and a good one. I still think, however, that jumping in with this rule at this time while we're waiting for the dust to settle on what may come out of the U.S. Department of Labor makes this rule somewhat premature.

Co-Chair Wheeler: Could you remind me of the process we went through? This rule came before us a year ago. Had the U.S. Department of Labor rule already been withdrawn at that point or was it still pending?

Ms. Carrillo: At the time we went through this rulemaking process the first time, the rescission process had not started yet, but the rule was challenged in court. There were a number of states that sued and at the time that we had the hearing the courts had not ruled. That fall the courts ruled. They struck down the rule that had been proposed by the Trump administration and subsequent to that the rescission process started.

Co-Chair Wheeler: So, just to put it in context, a year ago we were adopting a rule in preparation for what could be rescinded. Now we're doing a rule based on a whole different reasoning, but we're doing it again. There is a vacuum; there is uncertainty about rules. To Rep. Reick's point about future federal rulemaking: the questions that I have are about our economy and how people work right now and how businesses are meant to comply with what is put in front of them. Things changed a little in 2007 with the 7th Circuit's opinion, and then the previous administration wanted to change things. This created a vacuum, and now Illinois is trying to step in to provide some certainty. So there is some compliance knowledge that a business can hang its hat on even if we don't like it from the business community's side. My question going forward is if there will be further consideration about how our economy is evolving? Since COVID-19 began we've gone to a much more virtual economy in a lot of respects that are going to give employers and employees a different perspective going forward. Is this something that DOL will take into account when we get to that point?

Mr. Keller: Yes, I think we can answer that in the affirmative. We would certainly look. The economy is rapidly changing all the time so for DOL to say "now we're going to stick to a strict standard" doesn't make sense. So we would come before JCAR again if the rule needed to be changed.

Co-Chair Wheeler: I think it's important because we're seeing the economy change all the time. We're trying to change with it; I understand it from the employee and the employer's side. This will be dynamic for a while, and I think it's important we let people know that we will pay attention to that evolution and deal with it appropriately.

Mr. Keller: Thank you. And we're simply trying to be fair to the employer and employee: to put forth a standard that they know exists in the State of Illinois.

Co-Chair Wheeler: Right. Because the employer-employee relationship has changed dramatically in the 15 years since 2007 and it's going to change some more.

CERTIFICATION OF NO OBJECTION

Sen. DeWitte moved, seconded by Rep. Hurley, that the Committee inform the agencies to whose rulemakings the Committee has not voted an Objection or Extension, or did not remove from the No Objection List, that the Committee considered their respective rulemakings at the monthly meeting and, based upon the Agreements for modification of the rulemaking made by the agency, no Objections will be issued. The motion passed unanimously (9-0-0).

ANNOUNCEMENT OF FEBRUARY MEETING

Co-Chair Cunningham announced that the next JCAR meeting will be Tuesday, February 15, 2022, at 10:30 in Room C-1 of the Stratton Office Building, Springfield, Illinois.

ADJOURNMENT

Rep. Reick moved, seconded by Co-Chair Wheeler, that the meeting stand adjourned. The motion passed unanimously (9-0-0).

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