

NLRB Issues Final Rule on Joint Employer Status

On February 26, 2020, the National Labor Relations Board issued its [final rule](#) regarding the standard for determining joint employer status. The final rule overturns the standard articulated in the Board's 2015 *Browning-Ferris* decision and returns to the pre-*Browning-Ferris* "direct control" standard. The final rule also provides greater clarity regarding the application of the standard. The purpose of the rule is to increase predictability and consistency with respect to the Board's determination of joint employer status under the National Labor Relations Act. The final rule will go into effect on April 27, 2020.

Under the current *Browning-Ferris* standard, two or more entities are considered joint employers if they are both employers within the meaning of the common law, and if they share or co-determine those matters governing the essential terms and conditions of employment. Notably, the Board considers whether an entity exercises control over terms and conditions of employment indirectly or whether it has reserved the authority to exercise such control, even if it never actually does. The controversial *Browning-Ferris* decision overruled 30 years of precedent with respect to the joint employer standard.

Under the final rule, an entity will be considered a joint employer under the Act only if it possesses and exercises "substantial direct and immediate control" over one or more essential terms and conditions of employment of another employer's employees "as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." Evidence of indirect control over essential terms and conditions of employment, contractually reserved control that is never actually exercised, or control over mandatory subjects of bargaining other than essential terms and conditions of employment is probative of joint employer status only to the extent that it supplements and reinforces evidence of direct and immediate control over an essential term and condition of employment.

The regulation defines "essential terms and conditions of employment" to mean wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. It also defines "substantial direct and immediate control" as "direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees." Control is not "substantial" if it is only exercised on a "sporadic, isolated, or de minimis basis."

The regulation also provides further clarity regarding what constitutes "direct and immediate control" with respect to each essential term and condition of employment, and conversely, examples of what does not. For example, if the entity "actually determines work schedules or the work hours, including overtime, of another employer's employees," the entity exercises direct and immediate control over hours of work. By contrast, establishing operating hours or when the entity needs the services to be provided by another employer does not constitute exercising direct and immediate control over another employer's employees.

A determination that an entity is a joint employer could result in the entity being subject to joint bargaining obligations and potential joint liability for unfair labor practices or breaches of collective bargaining agreements. The promulgation of this final rule is significant because it will be less likely that entities such as franchisors, staffing agencies, and contractors will be considered joint employers under the Act.

The Board has published a [Fact Sheet](#) on its web site summarizing the impact and providing an overview of the final rule.

If you have any questions about this Information Memo, please contact [Stephanie H. Fedorka](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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