



# Labor Board Proposes Complete Overhaul To Joint Employment Rule

Insights

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In a move that has been anticipated for several months, the National Labor Relations Board today published a proposed rule that would fundamentally alter the definition of joint employment, making it more difficult for businesses to be held legally responsible for alleged labor and employment law violations by staffing companies, franchisees, and other related organizations. The rule, if eventually adopted, would also limit the ability of employees from affiliated companies to join together to form unions.

Under the proposed rule, an employer may be considered a joint employer of a separate employer's employees only if the two employers share or co-determine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. As the Board states, a putative joint employer must possess *and actually exercise* substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

While this is just the first step in what may be a long process, it is a welcome development for the employer community. What do you need to know about this proposed rule and the impact it could have on your workplace?

## **Brief History: Standard Has Flip-Flopped In Last Several Years**

The joint employment dilemma has taken many twists and turns in the recent past. For over 30 years, the National Labor Relations Board (NLRB) had held that two companies would only be considered "joint employers"—equally responsible for certain labor and employment matters—if they shared or codetermined those matters governing the essential terms and conditions of employment, and *actually exercised* the right to control.

However, in 2015, the Board renounced this joint-employer test in the controversial *Browning-Ferris* decision, eliminating the requirement that the employer actually exercise control. Instead, the NLRB decided that businesses need only retain the contractual right to control to be considered a joint employer—even if it has never exercised it. Further, the Board held that indirect control (e.g., control through an intermediary) would be sufficient to find joint employment.

The standard briefly reverted to its previous form in December 2017, when the Board effectively overturned *Browning-Ferris* in the *Hy-Brand Industrial Contractors, Ltd. case*. But just a few

months later, the Board was forced to vacate that decision due to allegations that one of the Board members involved had an unacceptable conflict of interest. As of today, employers are still subject to the *Browning-Ferris* standard.

Perhaps frustrated by the resulting uncertainty from the Board's forced reversal and the seemingly stalled litigation in the *Browning-Ferris* case sitting at the D.C. Circuit, newly installed Board Chairman John Ring announced in May that the Board was considering a rulemaking solution to the issue. In a June 5 letter responding to several U.S. Senators who had questions about this development, Chairman Ring indicated that the NLRB would issue a Notice of Proposed Rulemaking on the joint employment issue by the end of summer, "bringing far greater certainty and stability to this key area of labor law." With today's publication, Chairman Ring made good on his promise.

### **Today's Announcement: Rule Reversal Proposed**

If the proposed rule is adopted in its current form, an employer would only be considered a joint employer if it shared or codetermined the "essential terms and conditions" of employment over the workers of another business, and there must exist evidence of direct and immediate control before a joint employer relationship can be found. This includes pivotal human resource activities such as day-to-day supervision, hiring, discipline, and firing. The employer would need to not only possess but actually *exercise* "substantial direct and immediate control" over the essential terms and conditions of employment in a way that is not considered "limited and routine." As the Board explains, if the proposed rule is adopted, it will be insufficient to establish joint employer status "where the degree of a putative joint employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer)." By including such requirements, the proposal would almost certainly mean that fewer businesses would be found to be a joint employer by a court or agency.

The announcement that preceded publication of the planned rule stated that the proposal "reflects the Board's preliminary view, subject to potential revision in response to comments, that the NLRA's purposes of promoting collective bargaining and minimizing industrial strife are best served by a joint-employer doctrine that imposes bargaining obligations on putative joint employers that have actually played an active role in establishing essential terms and conditions of employment."

The Board went on to say that its "preliminary belief is that, absent a requirement of proof of some 'direct and immediate' control to find a joint employment relationship, it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers. The Board is inclined toward the conclusion that the proposed rule will provide greater clarity to joint employer determinations without leaving out parties necessary to meaningful collective bargaining."

### **What's Next?**

Now that the Notice of Proposed Rulemaking has been officially published, the Board will begin a formal process that includes receiving and considering comments from interested parties and

formal process that includes receiving and considering comments from interested parties and members of the public before any new rule can be officially established. The due date for comments is 60 days from today's publication date: November 13, 2018.

After the comment period closes, it could take months for the rule to be finalized, as the Board will need to hold public hearings and will need to sufficiently address the substantive comments received (many of which will no doubt come from unions and other worker advocates). Moreover, critics of the rule could seek to block or delay it through the court system, especially if the notice-and-comment period is seen as lacking in substance. Still, this may be an easier fix than awaiting congressional action. The [Save Local Business Act](#), which would narrow the definition of "joint employment" to eliminate many employer headaches, has long been stalled in Congress due to opposition from Senate Democrats, and may face a tenuous future after this November's midterm elections.

If you have any questions about this development and how it may affect your business, or if you would like guidance in submitting comments in support of the proposed rule, please contact any member of the [Staffing and Contingent Workers Practice Group](#) or your Fisher Phillips attorney.

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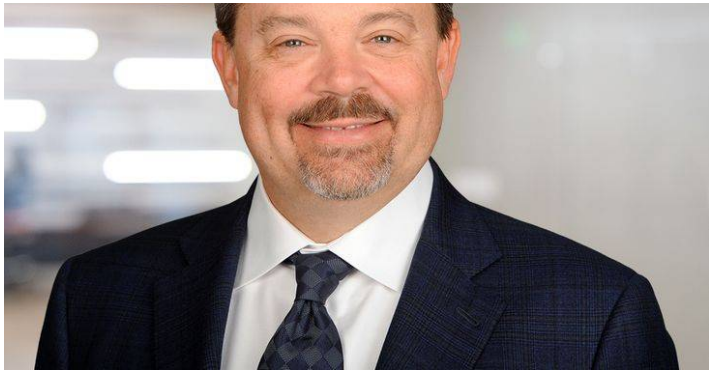
*This Legal Alert provides an overview of proposed rulemaking. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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