

Clarity At Last: Joint Employers Must Exercise Substantial Direct and Immediate Control

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The NLRB announced today that it is set to publish its long awaited [joint employer rule](#) on Feb. 26, 2020. To be a joint employer under the final rule, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees.

The final rule defines key terms, including what are considered "essential terms and conditions of employment," and what constitutes "direct and immediate control" as to the essential employment terms. The final rule also defines what constitutes "substantial" direct and immediate control and makes clear that sporadic and isolated control is not "substantial."

The clarity provided by this rule will be welcomed by employers that have been operating under a tenuous joint employer standard for many years. In 2015, the NLRB issued a [decision in *Browning-Ferris*](#) that changed the previous "direct control" test to a more lenient test that would establish joint employment even if the company exercised "indirect control" or "reserved" the right to control, essential employment terms of another employer's employees. The NLRB [reversed course in 2017](#), only to later vacate that decision after one of the NLRB members was found to have an [ethical conflict](#). The NLRB then decided to address the joint employer issue through its rulemaking powers, and it issued a Notice of Proposed Rulemaking in [September 2018](#).

Under the new rule, evidence of indirect or contractually reserved control over essential employment terms may be a consideration for finding joint-employer status, but it will not be determinative without substantial direct and immediate control.

The rule, which will become effective April 27, 2020, received more than 28,000 comments from the public. The rule will have a profound positive impact on businesses engaged in franchising and those that heavily utilize staffing agencies or third party labor providers. Under the new rule, it will be less likely that one company will be liable for the unfair labor practices of another. Similarly, it will be less likely that a company will be subjected to union picketing and other economic pressure during a labor dispute between a union and another entity.

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