



FACT SHEET

Joint Employer Final Rule

On February 26, 2020, the National Labor Relations Board (NLRB) issued its final rule on the standard for determining joint-employer status under the National Labor Relations Act (NLRA). The final rule will guide the NLRB and those covered by the NLRA in determining whether a business is a joint employer of employees directly employed by another employer.

IMPACT OF THE FINAL RULE

A joint employer finding has significant implications for rights and obligations under the NLRA relative to collective bargaining, strike activity, and unfair labor practice liability:

- If the employees are represented by a union, the joint employer must participate in collective bargaining over their terms and conditions of employment.
- Picketing directed at a joint employer that would otherwise be secondary and unlawful is primary and lawful.
- Each business comprising the joint employer may be found jointly and severally liable for the other's unfair labor practices.

Because of these important consequences, the purposes of the NLRA are not furthered by drawing into a collective-bargaining relationship, or exposing to secondary coercion and joint-and-several liability, a direct employer's business partner that does not actively participate in decisions setting employees' wages, benefits, and other essential terms and conditions of employment.

JOINT-EMPLOYER STANDARD OVERVIEW

The Final Rule:

- Specifies that a business is a joint employer of another employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment;
- Clarifies the list of essential terms and conditions: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction;
- Provides that to be a joint employer, a business must possess and exercise such substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees as would warrant a finding that the business meaningfully affects matters relating to the employment relationship;
- Specifies that evidence of indirect and contractually reserved but never exercised control over essential terms and conditions, and of control over mandatory subjects of bargaining other than essential terms and conditions, is probative of joint-employer status, but only to the extent that it supplements and reinforces evidence of direct and immediate control;

- Defines the key terms used in the final rule, including what does and does not constitute “substantial direct and immediate control” of each essential employment term;
- Makes clear that joint-employer status cannot be based solely on indirect influence or a contractual reservation of a right to control that has never been exercised.

WHY RULEMAKING?

The Board’s 2015 decision in *Browning-Ferris* unsettled the law in this vitally important area by holding that a company could be deemed a joint employer if its control over the essential terms and conditions of another business’s employees was merely indirect, limited and routine, or contractually reserved but never exercised. Although the Board could have addressed this issue in yet another decision, it decided to do so through rulemaking, for several reasons:

- Rulemaking provides a means to give this complex, nuanced, and vitally important issue the kind of comprehensive and detailed explication it deserves and to which the public is entitled, resulting in greater clarity and certainty of the law under the NLRA.
- More generally, although the NLRB, throughout much of its history, has done most of its work through decision-making, it possesses statutory authority to engage in rulemaking, and the current Board intends to exercise that authority where it believes—as it does here—that doing so will enable it to provide more clarity and certainty in the law it administers.
- Rather than issuing a decision based on, and potentially limited to, the specific facts of a particular case, rulemaking allows the Board to provide broader and more detailed guidance.
- Cases are typically briefed by lawyers hired by the parties. In contrast, notice-and-comment rulemaking enables everyone who wants to weigh in on an issue to do so—including those who cannot afford to hire a lawyer to write and file a brief. The NLRB received nearly 29,000 comments on the joint-employer rule it proposed in 2018. A comparison of the proposed and final rules will demonstrate that the NLRB gave those comments the serious consideration they deserved.
- Rulemaking under the Administrative Procedure Act is strictly prospective. Thus, employers, employees, and unions will know what is coming and can prepare accordingly.

IMPLEMENTATION TIMELINE

The final joint-employer rule will go into effect April 27, 2020.