

Alert | Labor & Employment



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NLRB Proposes New Joint-Employer Standard

On Sept. 6, 2022, the National Labor Relations Board (the “Board”) released a **Notice of Proposed Rulemaking** addressing the standard for determining joint-employer status under the National Labor Relations Act (NLRA). The Board proposes rescinding and replacing the narrower joint-employer rule that took effect under the Trump administration Board April 27, 2020, with the broader Obama-era standard of joint employment set forth in *Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599 (2015).

In 2015, the Board in *Browning-Ferris* expanded the definition of joint employment, providing that an otherwise independent business should be considered a joint employer under the NLRA if it possessed “reserved or indirect” control over essential terms and conditions of employment, even if it did not actually exercise direct and immediate control over such employment terms.

In 2020, the Trump administration Board promulgated a final rule stating that joint-employer status may be established only where a company exercises “substantial direct and immediate control” over the essential terms and conditions of another company’s employees, largely rejecting the *Browning-Ferris* standard.

The current Board’s proposed rule seeks to shift the standard once more and largely would restore the *Browning-Ferris* “indirect, reserved” control standard, clarifying that indirect or reserved control standing alone may be sufficient to prove joint-employer status. Under the proposed rule, two or more employers would be considered joint employers if they “share or codetermine those matters governing

employees' essential terms and conditions of employment." Notably, the rule also would expand the scope of what is considered "essential terms and conditions of employment." Under the Trump-era standard, the Board only considers control over "wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction." The new rule proposes to also consider control over workplace health and safety, assignments and "work rules and directions governing the manner, means or methods of work performance."

Businesses that utilize third parties for the provision of labor or services may wish to examine their contractual and business relationships in light of the proposed rule. While the rule still may undergo revisions through the regulatory process, changes to the joint-employment standard are likely given the current Board's actions. In any event, passage of the proposed rule is likely to impact companies in a wide range of businesses, particularly contracting and franchising.

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