

FEBRUARY 27, 2020 | TRADITIONAL LABOR RELATIONS

# NLRB Finalizes Joint Employer Rule

✘ On February 26, 2020, the National Labor Relations Board (“NLRB”) published its [final joint employer rule](#) in the Federal Register, which tightens the test used to analyze whether workers are jointly employed by affiliated businesses. The final rule is intended to roll-back the stricter Obama-era standard that business interests have longed to overturn.

## *History of Joint Employer Rule*

Under longstanding NLRB precedent, two employers could be joint employers if they shared or codetermined matters governing the employees’ essential terms and conditions of employment. Until 2015, to be a joint employer, a business had to exercise “direct and immediate” control over these employment matters

Then, the Obama-era NLRB overruled the old standard in its decision in *Browning-Ferris*, and substantially relaxed the standards for proving joint employment. Direct and immediate control was no longer necessary; even indirect, limited and routine, or contractually reserved but never exercised control over essential working conditions was sufficient. The Board’s decision touched off a large controversy in the business world, as employers argued that the new standard destabilized relationships and left businesses vulnerable to after-the-fact adjudication that it was the employer of another’s employees. In December 2017, a brief Republican majority overruled the *Browning-Ferris* standards in its *Hy-Brand Industrial Contractors* decision, but the victory was short-lived due to the vacation of the ruling a few months later when it was found that one Board member should have recused himself. As such, the *Browning-Ferris* standard for joint employment remained in place, although its applicability was seriously in-question.

Following this litigation, the NLRB proposed a regulation to formally revise the joint employer rule. Under the proposed regulation, 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.

## *The New Rule*

The new rule, which received over 30,000 public comments, reinstates the pre-*Browning Ferris* standard and provides further guidance and clarity. The rule was passed unanimously by the three-member quorum – all of whom were appointed by President Trump.

The rule provides that an employer “may be considered a joint employer of a separate employer’s employees only if the two entities share or codetermine the employees’ essential terms and conditions of employment.,

which are exclusively defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction." In addition, the putative joint employer "must possess and actually exercise substantial direct and immediate control" over those terms and conditions. Indirect or contractually reserved but never exercised control will generally not establish control sufficient to make one a joint employer of another's employees; nor will control of a limited and routine nature, such as instruction that is "limited and routine and consist[s] primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it."

Thus, to be found a joint employer under the final rule, an entity must "possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of employment as would warrant finding that the entity meaningfully affects matters related to the employment relationship, and joint-employer status is determined on 'the totality of the relevant facts in each particular employment setting.'" Thus, direct and immediate control over at least one essential term or condition is necessary, but the final rule makes clear that it is not necessarily sufficient. Moreover, control over mandatory subjects other than essential terms and conditions may be relevant to joint-employer status, depending upon the other evidence in the case.

The rule, which has an effective date of April 27, 2020, certainly provides employers more certainty and stability in structuring business relationships, especially in comparison to the former Obama-era rule. Additionally, it will make it less likely that a business will be found a joint employer by the NLRB.

Finally, the fact that this Rule was promulgated through APA notice and comment rulemaking is also significant because it will make it difficult for any future board to overturn. The NLRB may not disavow through adjudication a rule enacted through the rulemaking process. Any effort to amend or rescind the new standard will be required to follow APA notice-and-comment rulemaking, which is more difficult and can take years to complete.

Over the next two months leading up to the effective date, employers who are potential joint employers should carefully review the new rule and analyze how it might affect business relationships moving forward.