

NLRB Issues Final Rule on Joint Employer Standard.

On February 26, 2020, the NLRB issued its Final Rule adopting the “direct and actual control” test for Joint Employer status under the National Labor Relations Act (NLRA).

The starting point for this development is the NLRB’s 2015 decision in *Browning-Ferris Industries*, in which the Board adopted an especially broad standard for joint employer status, and ruled that the following relevant facts, among others, established a joint employer relationship between BFI and Leadpoint, a staffing agency that leased employees to BFI:

BFI owns and operates the.... recycling facility, which receives.... waste and mixed recyclables. The essential part of its operation is the sorting of these materials into separate commodities that are sold to other businesses... BFI solely employs approximately 60 employees, including loader operators, equipment operators, forklift operators, and spotters. Most of these BFI employees work outside the facility.... These BFI employees are part of an existing separate bargaining unit that is represented by the Union. * * * *

BFI, the user firm, contracts with Leadpoint, the supplier firm, to provide the workers who manually sort through the material on the streams (sorters), clean the screens on the sorting equipment and clear jams (screen cleaners), and clean the facility (housekeepers). The Union seeks to represent... 240 full-time, part-time, and on-call sorters, screen cleaners, and housekeepers who work at the facility.

In 2017, based on the *Browning-Ferris* decision, the NLRB issued complaints, alleging that McDonald’s, Inc. and 30 of its franchisees are joint employers liable for 181 labor law violations committed at 31 McDonald’s restaurants located in six NLRB regions, all in response to employee involvement in “Fight for \$15 protests.” The NLRB alleged that McDonald’s and its franchisees jointly interfered with the exercise of Section 7 rights and discharged workers for exercising such rights. The NLRB held over 150 days of hearings; the presiding ALJ called it “the largest case ever adjudicated by this agency, and the longest hearing the agency has ever conducted in six different venues, requiring appointment of a Special Master.”

In July 2018, however, newly appointed NLRB General Counsel, Peter Robb, announced a proposed settlement agreement with McDonald’s and its franchisees. The proposed settlement agreement provides back pay remedy totaling \$172,000 to 20 former employees, but otherwise disavows any admission of joint employment. In December 2019, the NLRB approved the proposed settlement agreement, over the strenuous objections of the charging parties and the presiding ALJ.



In September 2018, the NLRB published a Notice of Proposed Rule Making on Joint Employer status, which adopted the “direct and actual control” test, and rejected the “indirect or potential control” test established by *Browning-Ferris*.

The NLRB’s Joint Employer Final Rule goes into effect **April 27, 2020**. The NLRB published a related Fact Sheet; below is a two-part quoted passage from the NLRB’s Fact Sheet:

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;



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- 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; and
- 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.

For the entire Fact Sheet -- <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7581/fact-sheet-joint-employer-final-rule.pdf>.

If you have questions, please contact a member of our Labor and Employment Law Practice Group.



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