

## Howdy Stranger, You're My Employee? NLRB Issues Final Rule on Joint-Employer Status

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October 26, 2023

On October 26, 2023, the National Labor Relations Board (NLRB) issued a Final Rule that makes it much easier for the NLRB to find a company to be a "joint employer" of persons directly employed by its contractors, vendors, suppliers, and franchisees. The consequences of a joint employer finding are significant and can lead to liability of the indirect employer for unfair practices committed by the direct employer; a duty to bargain with a union representing the direct employer's employees; exposure to liability for one's own conduct that fails to take into account the indirect employer relationship and spread of a union from the direct employer's employees to the indirect employer.

Joint-employer theory creates far more risk for employers than related doctrines such as single employer or alter ego because, unlike those theories, joint employer status does not require any common ownership or corporate control. Two companies operating entirely at arm's length can be found joint employers.

The major change relates to the degree of influence that an indirect employer must have to justify a finding of single employer status. Under the now superseded NLRB standard, the indirect employer must actually exercise "immediate and direct" control over key terms of employment, normally limited to wages, benefits, hours and termination.

The new rule relaxes that standard in three key ways. First, it eliminates the actually exercise requirement and states that possession of even unused authority to control can be sufficient.

Second, it does away with the immediate and direct requirement so that influence exercised by the indirect employer through the direct employer can be used to support a finding.

Third, it expands, beyond the list enumerated in the current rule, the types of employment terms control that will justify a finding of joint employer status to include assignment of duties, supervision of performance and work rules or other directions that govern the performance of employee duties or grounds for discipline. The Obama-era Board had adopted the currently proposed standard by an NLRB decision, *Browning-Ferris Inds.* 362 NLRB No. 186 (2015). However, that decision was overturned by the Trump-era Board's adoption of the current regulations, 85 FR 11184, codified at 29 CFR 103.40, (Feb. 26, 2020). The new rule completely replaces the Trump-era regulations and effectively reinstates *Browning-Ferris* as the governing law.

Because *Browning-Ferris* and the comments to the new Final Rule endorse pre-1984 NLRB decisions regarding joint employer status, those decisions provide guidance for how the new rule may be enforced. The NLRB and courts frequently relied on what authority was given to the alleged indirect employer in its agreement with the contractor or vendor. Clauses that required or allowed the indirect employer to approve hirings, terminations, or wage adjustments to contractor employees usually resulted in finding joint employer status. In addition, cost-plus arrangements, particularly those that were terminable on short notice were often found to support a joint employer finding. Finally, clauses allowing the indirect employer to set work schedules, production rates, or requiring contractor employees to abide by the indirect employer's work rules and other policies governing conduct also were found supportive of joint employer status.

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The new rule is expected to be officially published in the Federal Register on October 27, 2023, and to become effective 60 days later. Employers should use this period to examine existing contractual relationships with vendors, franchisees, or other affiliates to identify and modify those terms that may potentially support joint employer status, or, if modification is untenable, to manage the risk through indemnity agreements with the vendor.

Please contact your Miller Canfield attorneys if you would like to learn more about how the NLRB's new Final Rule may affect your business.