Lawyer Insights

Expanded Joint-Employer Rule Could 'Upend' Franchise World

By Kurt Larkin and Tyler Laughinghouse
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On October 26, the National Labor Relations Board released its hotly anticipated "final rule" setting forth the standards for determining whether an entity is a "joint employer" under the National Labor Relations Act.

The rule, which takes effect on December 26, promises to dramatically alter the concept of joint employment under the NLRA and has the potential to completely reshape certain sectors of the economy. Among other things, the rule significantly expands the types of business relationships that could give rise to joint employer liability and makes clear that joint employers will be required to bargain about any term and condition of employment over which they have authority to control (even if the joint employer has never and will never exercise such control).

These dramatic shifts threaten to upend traditional franchisor-franchisee arrangements and undermine businesses that rely on third-party staffing agencies other service providers.

The New Rule

The rule starts with a seemingly benign premise: that two or more entities will be found to be joint employers of particular employees where those two entities "share or codetermine those matters governing employees' essential terms and conditions of employment." To that end, an entity will be found to be a joint employer where it "exercise[s] the power to control" those terms and conditions of employment.

From there, however, the rule veers into unchartered territory, shifting the focus away from whether the entity actually exercises control over the terms and conditions of employment and relying, instead, on whether the entity merely possesses such control (even if it never uses it). Indeed, the rule states that merely "[p]ossessing the authority to control one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, *regardless of whether control is exercised*."

In other words, under the Board's final rule, an entity is at risk of being found to be a joint employer where the entity merely *reserves the right* to control some aspect of the employment relationship, even if it *never actually exercises that right*. Furthermore, the Board's final rule also states that exercising the power to control indirectly (through, for example, an intermediary) is likewise sufficient to establish joint employer status, regardless of whether the entity exercises such power directly.

The sheer breadth of the new rule is further compounded by its expansive definition of what are "essential terms and conditions of employment." The definition covers nearly every conceivable aspect of the employment relationship, including: (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties;

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(5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees. In practice, this means that an entity is at risk of being found to be a joint employer if that entity has the authority to control any *one* of these aspects of employment.

The rule marks a stark departure from the Board's prior joint employer rule. Under the prior rule, which was promulgated in 2020, the analysis focused on whether the putative joint employer actually exercised "direct and immediate" control over the essential terms and conditions of employment. Not only did this standard allow businesses to maintain traditional franchise relationships and other joint ventures, but it also allowed them to contract with third-party service providers without running the risk of joint employer liability based merely on reserving the contractual right to codetermine certain aspects of the relationship. So long as the putative joint employer did not attempt to exercise any direct, day-to-day control over the terms and conditions of employment, there was little risk of being found to be a joint employer under the NLRA. The new rule, on the other hand, will inevitably place renewed scrutiny on these longstanding arrangements.

The Ever-Evolving History of the Joint Employer Rule

In many ways, this radical shift is not surprising. The Board's joint employer rules have been in flux since 2015, volleying back and forth with each presidential administration.

In 2015, the Board under the Obama administration issued a decision in *Browning Ferris Industries of California d/b/a BFI Newby Island Recyclery* (BFI), which, at the time, departed from decades of established Board precedent to dramatically reformulate the Board's joint employer test. Much like the Board's new final rule, the standard announced in *BFI* allowed for a finding of joint employer status where an entity retained, but did not exercise, control over another entity's employees, and where it exerted only indirect control over the terms of employment.

The Board's *BFI* decision was short-lived. In 2020, the Board under the Trump Administration promulgated a final rule that administratively overruled the *BFI* decision and returned to the Board's prior formulations of the joint employer standard. Under the 2020 rule, an entity would only be found to be a joint employer if it actually and directly exercised control over the terms and conditions of employment.

Though the new rule has been seen by many as a return to the *BFI* standard, it arguably goes further than *BFI* in some respects. Indeed, though unprecedented at the time, the Board's decision in *BFI* rested on a showing that the entity's reserved or indirect control was actually material to collective bargaining. But the new rule simply presumes that *any evidence of indirect control* will be material to the collective bargaining process and is sufficient to establish joint employer status.

A Joint Employer Finding Has Significant Legal Consequences

Being found to be a joint employer under the NLRA has a number of legal and practical consequences.

Obligation to Bargain. The Board's final rule makes clear that a joint employer must engage in collective bargaining over any term and condition of employment that it possesses the authority to control, regardless of whether that term or condition is deemed to be an essential term and condition of employment. In other words, the joint employer will be required to bargain about any mandatory subject of bargaining under the

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NLRA, even if that subject is not one of the essential terms and conditions that caused the Board to determine that they were a joint employer in the first place.

Liability for Unfair Labor Practices. A joint employer could also be liable for unfair labor practices committed at the hands of the other employer if it concerns a term and condition over which the putative joint employer theoretically has the authority to control.

Striking and picketing. A joint employer could also find itself in the middle of a labor dispute and the target of striking and picketing, even if the labor dispute is primarily against the other employer. Though the NLRA generally protects entities from secondary boycotts and strike activities, those protections do not extend to employers—joint or otherwise.

This list is by no means exhaustive. In many ways, it is difficult to fully assess the full effect of the Board's final rule. Suffice it to say, the Board's new joint-employer rule will change legal and business landscapes in ways that cannot yet be fully understood.

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