

# Alert

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## NLRB Proposes New Joint Employer Standard, Requiring Mere "Indirect" Control

On September 6, 2022, the National Labor Relations Board (NLRB or Board) issued a Notice of Proposed Rulemaking (NPRM) that would significantly broaden the standard for determining whether two employers are joint employers under the National Labor Relations Act. The NPRM would overturn a Trump-era standard and add new uncertainty to an area of federal labor law that, in recent years, has changed with the political winds after decades-long consistency.

The proposed rule would overturn a more stringent 2020 rule requiring "direct and immediate control" over essential terms and conditions of employment. The 2020 rule was in reaction to the Board's majority decision in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015), in which the Board, for the first time in decades, announced that it would consider evidence of "reserved and indirect" control over employees' essential terms and conditions of employment when analyzing joint-employer status. According to the NPRM, the 2020 rule incorporated "control-based restrictions that unnecessarily narrow the common law and which threaten to undermine the goals of Federal labor law."

Under the proposed rule, exercising even "indirect control" will be "sufficient to establish status as a joint employer, regardless of whether the power is actually exercised directly." Additionally, "[c]ontrol exercised through an intermediary person or entity is sufficient to establish status as a joint employer." Essential terms and conditions of employment will generally include, but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance. According to the NPRM, the proposed rule "would restore the Board's focus on whether a putative joint employer possesses the authority to control or exercises the power to control particular employees' essential terms and conditions of employment, consistent with the common law and relevant court decisions."

Significantly, under the proposed rule, "Possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised." In other words, the mere existence of a contractual right to exercise authority over essential terms and conditions of employment can give rise to a joint employer determination, even if, as a practical matter, such authority has been delegated to an independent contractor or has historically gone unused. This represents a sharp departure from the 2020 rule and a departure from Board precedent.

From a practical perspective, before the NLRB, this issue is significant for both franchisors and those employers who engage contract services in their operations. A joint employer may be required to engage in collective bargaining with a labor union and may be liable for unfair labor practices committed by another joint employer.

In dissent, two Republican-appointed Board members argued, among other things, that the NPRM violates the Administrative Procedure Act, which prohibits administrative agencies from acting arbitrarily and capriciously. According to the dissenting members, the majority failed to "provide a reasoned explanation for its action" and noted that the standard established in the 2020 rule had not been applied by the Board or in any court decision. The dissent could portend litigation under



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the Administrative Procedure Act and a potential delay in the implementation of any final rule.

The Board must receive comments regarding this proposed rule on or before November 7, 2022. The Board must receive comments replying to comments submitted during the initial comment period on or before November 21, 2022. A final rule likely will not issue until 2023. For now, employers should examine any language in their service contracts reserving the right to exercise direct or indirect control over the essential terms and conditions of their contractors' employees.

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