NLRB JOINT EMPLOYER RULE FAQS

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FAQs

1. What are the potential implications of being found to be a joint employer under the National Labor Relations Act (NLRA)?

Under the NLRA, a business enterprise, other than the one that hired an employee(s), can be treated as their employer if it shares or codetermines employees' terms or conditions of employment such as wages, work hours, mandatory training, etc. If the enterprise is labeled as a joint employer, they will have to share liability with the other joint employer(s) for unfair labor practice claims and negotiate with all unions representing the shared employees.

A broader joint employer status potentially affects and disincentivizes relationships such as owner-manager, franchisor-franchisee, staffing agency labor, and the performance of services. Expanding the joint employer standard will limit access to entrepreneurial opportunities for small business owners and will disincentivize franchising as a business model entirely. Franchisors, enterprises, and owners will either impose greater control over daily business operations or abandon their model (especially franchising) altogether. This will harm managers and franchisees who will lose substantial if not all control over their business.

2. What does the new National Labor Relations Board (NLRB) joint employer rule change about the law?

The new rule replaces the existing rule from 2020 with a broader definition of a joint employer which will cause more business entities to be classified as joint employers.

Under the 2020 rule, a business entity had to exercise direct and immediate control over employee's "essential" employment terms (e.g., hiring, firing, wages, benefits, supervision, hours of work) to be found to be a joint employer.

Under the new NLRB joint employer rule, a business entity only needs to "possess the authority to control or exercise the power", it does not need to exercise the power. The rule describes this authority as "indirect" and "reserved" control. Indirect control occurs when an enterprise exercises control through a third party. An example of "indirect" control would be a hotel owner contracting a temporary staffing agency to hire supplemental employees and having the contractual right to supervise the temporary workers even if they never exercise it. Reserved control occurs when an

enterprise has the authority to control employment terms and conditions but remains passive in day-to-day operations. An example of "reserved" control would be a right included in a hotel management agreement for the owner to intervene in the employment decisions of their manager at any time, even if the owner never plans on acting on that right.

The new rule also redefines what constitutes "essential" employment terms: (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; (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.

3. Does the NLRB joint employer rule automatically determine whether an enterprise is found to be a joint employer?

No. Joint-Employer status will be adjudicated on a case-by-case basis, and a complaint must first be brought to the NLRB to determine status. As with any NLRB unfair labor practice finding, an enterprise that is adversely affected by their joint employer classification can seek judicial review in the United States Court of Appeals. Although courts tend to defer to the NLRB's findings regarding the facts of a situation, the court is not bound to accept the NLRB's view of the common law if it disagrees.

4. How might a third-party relationship, such as contracting, impact a business's chance of being classified as a joint employer classification?

Participating in business with a third party will increase the business's likelihood of being reclassified as a joint employer. The specifics of the third-party arrangement are key to joint employer status determination. For many of these cases joint employment classification comes down to ends versus means.

For example, it is accepted that, in a recognized contractor relationship, the business entity is engaging a specialist or expert to perform certain objectives or conform to certain performance standards – and because they are specialists/experts, the business does not manage <u>how</u> they do so. Therefore, factors related to the completed objectives and standards set by the business entity tend to be irrelevant to joint employer classification. Alternatively, if the business has authority over the way in which the contractor performs their duties, they may be subject to joint employer classification. Simply put, *what* work is done can be determined by the enterprise, *how* the work is done, cannot.

As a result, at least some courts have recognized the following considerations to be irrelevant when determining a joint employer relationship:

- Establishment of performance objectives and duties
- "Routine" ground rules for performance
- Monitoring/evaluating performance expectations and objectives

- Minimum/maximum staffing requirements (viewed as cost control)
- Cost-plus contractor compensation negotiated at arms' length
- Quality control standards
- Productivity standards
- Timing of performance
- Legal requirements and government-imposed standards
- Intellectual property and brand design
- Generalized brand standards akin to performance ends and not means
- Basic contractor qualifications (e.g., initial background checks/drug testing)
- Initial orientation to a client's premises
- Third party customer demands outside of the enterprise's control
- Premises liability or basic safety training that does not turn on a visitor's status as an employee

Courts may vary in their consideration of this distinction.

5. What information is missing from the new NLRB joint employer rule?

The rule does not define how much control is sufficient to have control over an essential employment term.

The rule is unclear regarding whether control over one aspect of an essential employment condition constitutes control over the entire condition. For example, does co-control over a particular employee bonus correspond to control over the "essential" term of "wages, benefits and other compensation"? If the answer is yes, control over one bonus equals control over "wages, benefits, and other compensation" then the business entity would be found to be a joint employer. If that is the case, a second question arises which is: would the business have to negotiate with unions over the subject of "wages" as a whole, or just regarding the particular bonus?

The rule is also vague with regards to control over "hours of work and scheduling". Without clarity, the rule could be interpreted to suggest that a request for specific timing of a service made by a client constitutes control over its facility's hours of operation, thus making the client a joint employer. This is unlikely to be held up in court. Courts would not find, for example, that a client becomes a joint employer with their local pizza parlor if they want their pizza delivered at 5 p.m. instead of 6 p.m.

6. Are there special considerations for maintaining franchise relationships, brand standards, training programs and the like?

The NLRB expressly refused to give franchise relationships any special consideration under the new joint employer rule. As mentioned, courts may disagree with the NLRB and have been sensitive to and supportive of the franchise model in the past. Obviously, though, potentially entering litigation through the NLRB to the point of appellate review is not optimal.

As noted, the franchise v. joint employer issue often boils down to control over ends v. means. In a franchise relationship, the franchisor provides standards, brand expectations, and a general objective for the end product. These provisions constitute ends and therefore *should* not qualify

the franchisor for joint employer classification. But if a franchisor manages or directs the means, manner and methods of how those ends are achieved, i.e., the employment terms and working conditions utilized to satisfy them, then there is greater risk of a joint employer determination. Along those lines, initial orientation or training on brand standards is more likely to be seen as establishing expectations. But ongoing training – especially when coupled with actual or potential directives to perform work in a certain manner – is riskier.

A franchisor has to ask themselves: what do I really care about? What forms of actual or potential control can I live without while sufficiently protecting the brand? To what extent can I empower the franchisee to exclusively control their own workforce? Can I adequately police the brand at a more macro, holistic level of overall review? Understandably, many franchisors may be unwilling to give up control to the point of eliminating joint employer risk, but the more control you are willing to cede, the less a union may feel you need to be deemed a joint employer for the employees to be able to meaningfully bargain over their greatest concerns.

7. What can be done to reduce NLRB joint employer risk?

The new joint employer rule is intended to maximally broaden the definition of a joint employer. At a certain level, an enterprise will need to decide for itself: what is important enough to my business model or operation that I'm willing to risk reclassification as a joint employer?

Given the new importance of reserved and indirect control, an enterprise should carefully review its service, vendor, management, franchise and other such agreements and consider removing as much potential control over the other party's employees as possible. Even if you find it impossible to avoid joint employer risk, such as in the case of franchising, minimizing the amount of control you – especially over core issues such as wages and hours – could make you a less inviting target to unions as a potential joint employer.

Also, as supervision, direction and work assignments are "essential" employment terms under the new rule, it will be challenging to maintain a joint employer risk-free situation where you are utilizing contract laborers who are not being supervised by the staffing agency or service provider. Such relationships should be carefully evaluated.