

## NLRB Issues Final Rule Returning to Traditional Joint-Employer Standard

Alert

03.05.2020

By Matt Tews and Anne Marie Buethe

On February 26, 2020, the National Labor Relations Board (NLRB) issued its long-awaited [final rule](#) narrowing the circumstances that will give rise to joint-employer liability. As expected, the NLRB returned to its longstanding precedent that was overruled in the board's highly-controversial 2015 [Browning-Ferris](#) decision. The final rule varies somewhat from its proposal published in 2018, ultimately providing more clarity.

Under the new rule, two employers are joint employers under the National Labor Relations Act if they share or codetermine the "essential terms and conditions of employment" by possessing and exercising "substantial direct and immediate control over one or more essential terms or conditions" so that the employer "meaningfully affects matters relating to the employment relationship." The rule further defines "substantial direct and immediate control" as influence that has a "regular or continuous consequential effect on an essential term or condition of employment of another employer's employees," but *does not* include control that is "sporadic," "isolated," or inconsequential.

The new rule limits essential terms and conditions of employment to wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction. To have substantial direct and immediate control over any of these essential terms and conditions, the employer must actually exercise decision-making authority over the employees, such as determining their wage rates, work schedules and performance assessments.

# NLRB Issues Final Rule Returning to Traditional Joint-Employer Standard

## ROLE OF INDIRECT CONTROL

While evidence of an employer's indirect control over another's employees cannot be relied upon on its own to establish a joint-employer relationship, it may be used to reinforce evidence of an employer's direct and immediate control. The new rule provides some guidance as to what type of "indirect" control evidence could be used to reinforce a showing of direct and immediate control. For example, the following could be used as evidence supporting a joint-employer finding:

- An employer's indirect control over essential terms and conditions of employment
- An employer's contractually reserved, but never exercised, control over the essential terms and conditions of employment
- An employer's control over mandatory subjects of bargaining other than the essential terms and conditions of employment

However, an employer's influence over setting the objectives, basic ground rules or expectations for another employer's performance under a contract does not constitute evidence of indirect control. The rule notes that what constitutes indirect control versus merely setting objectives, basic ground rules or expectations for performance is an issue of fact that must be determined using the totality of the circumstances on a case-by-case basis.

## BOTTOM LINE

The new joint-employer rule comes as part of the [recent and rapidly evolving changes](#) to NLRB law. If it goes into effect, it will provide clarity to employers and employees alike as to which entity is an "employer" and what type of business relationships will create risk of joint-employer liability. Accordingly, employers should be proactive about understanding their risks under the new joint-employer standard and avoiding potential pitfalls. However, like the *Browning-Ferris* decision, this rule is particularly contentious, and employee advocacy groups and some lawmakers have already expressed dissatisfaction. While this new rule is slated to become effective on April 27, 2020, litigation that may delay its effective date is likely, and we will provide updates as they occur.

## CONTACTS

Anne Marie Buethe

Matthew C. Tews

## RELATED CAPABILITIES

Labor Relations

Labor, Employment & Benefits

**STINSON**

STINSON LLP \ STINSON.COM