

# What does the NLRB's proposed new 'joint employment' rule mean for businesses?

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True story. Late 1980s. Early days of fantasy baseball. One of my high school buddies — we'll call him The Beast — finishes last but decides he's ready to turn things around. The Beast stands up at the next year's draft and announces his new team name, intending to show us that he's about to reverse last year's standings: 360 degrees.

No one had the guts to say it. Only later did someone tell him he probably meant 180 degrees. He finishes last again. The Beast no longer plays fantasy baseball but lives a comfortable life as a tax lawyer in Florida.

A complete turnaround may now be in the works when it comes to defining "joint employment." Recent actions by the National Labor Relations Board signal an upcoming 180-degree shift.

## THE NLRB AND ITS RECENT 360S

For those of you keeping score at home, the test for determining joint employment under the National Labor Relations Act, 29 U.S.C.A. § 151, has teeter-tottered via the board's rulings in *Browning-Ferris Industries of California Inc.*, 362 NLRB No. 186 (Aug. 27, 2015), and *Hy-Brand Industrial Contractors Inc.*, 365 NLRB No. 156 (Dec. 14, 2017).

Here is the box score:

- Direct control is required (*pre-Browning-Ferris*, 1984-2015).
- Indirect control is sufficient (*Browning-Ferris*, August 2015-December 2017).
- Direct control is required (*Hy-Brand* overrules *Browning-Ferris*, December 2017-February 2018).
- Indirect control is sufficient (board vacates *Hy-Brand*, restoring *Browning-Ferris*, February 2018-present).

## SHE LOVES ME. SHE LOVES ME NOT.

The NLRB is now trying a new approach — one that it hopes will bring more certainty and less flip-floppiness.

The board issued a notice of proposed rulemaking Sept. 14, proposing a new federal regulation, to be codified at 29 C.F.R. § 103.40, that requires the actual exercise of substantial, direct

and immediate control over essential terms and conditions of employment before a business can be deemed a joint employer.

More specifically, the board's proposed regulation includes a direct control test that says:

An employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

"Limited and routine" control means telling another business's employees what work to perform, or where and when to perform it. Under the new rule, that type of direction would not be enough to show joint employment. In contrast, control that is not "limited and routine" (and which could support joint employment) may include, for example, directing individuals on how to do the work — in other words, supervision.

The proposed new test sets a high bar.

In sharp contrast, the current "indirect control" test (from the board's 2015 *Browning-Ferris* decision) permits a finding of joint employment if a business has the mere ability to exercise indirect control over the work conditions of a different company's W-2 employees, even if that control is never actually exerted, and even if the control is over tangential aspects of the work being performed.

Big difference. 180 degrees.

## WHAT NOW?

Under administrative rulemaking procedures, there is a 60-day period for public comment. The board will then consider the comments and make any changes it deems appropriate.

The new rule, if implemented, would likely take effect in 2019.

## WHO DOES THE NEW TEST BENEFIT?

The new test will help franchisors, who need to exert sufficient control to protect their brand and marks but have no need to control the franchisee's hiring and scheduling practices. The new

test will also help businesses that subcontract labor, directing the subcontractor's employees on what tasks to complete but not supervising their actual work.

Under the proposed new test, neither of these scenarios would support a finding of joint employment. Under the current *Browning-Ferris* indirect test, a finding of joint employment would be very possible.

### WHY IS JOINT EMPLOYMENT PROBLEMATIC?

Being named a joint employer under federal labor law means incurring obligations that otherwise attach only to the employees' primary employer, such as the franchisee, the staffing agency or the subcontractor that issues their W-2s.

Being a joint employer means having to bargain with another employer's union. It means being held jointly liable for another business's unfair labor practices. It means being drawn into labor disputes with another company's employees.

The proposed rule is strongly pro-business and will face stiff opposition from unions, which will expect to see their influence decline if the new regulation is implemented.

### HOW CAN I SUBMIT A COMMENT?

Comments can be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>.

Alternatively, comments can be mailed to Roxanne Rothschild, Associate Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001.

Electronic submissions are preferred. All comments are public. Personal information such as telephone numbers or email addresses should not be included if the author wants that information to remain private.

Comments will be available for public inspection at <http://www.regulations.gov>.

All comments must be received by the board by Nov. 13. Comments submitted in reply to others' comments may be submitted through Nov. 20.

### CONCLUSION

Whether a 180-degree shift will occur remains to be seen. But after the comment period closes, we may well yet again be looking at a new — and decidedly pro-business — definition of what it means to be a joint employer.

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### ABOUT THE AUTHOR



**Todd H. Lebowitz** is a partner in the Cleveland office of **BakerHostetler**. A member of the firm's national Employment Group, Lebowitz has a practice niche handling independent contractor misclassification disputes and joint employment issues. He also defends businesses in lawsuits, charges and audits alleging joint employment and independent contractor misclassification. He frequently speaks to groups around the country on these topics, and he regularly publishes updates and best practices on the blog *Who Is My Employee*.

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