



US: NLRB issues final rule clarifying joint-employer standard

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A [final rule](#) governing joint-employer status under the National Labor Relations Act (NLRA) was issued by the National Labor Relations Board (NLRB) on Feb. 26, 2020 and will be effective on Apr. 27, 2020. To be a joint employer, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees.

Background

The joint-employer standard under the NLRA determines whether a business is an employer of employees directly employed by another employer altogether. If two entities are joint employers, both:

- Must bargain with the union that represents the jointly employed employee
- Are potentially liable for unfair labor practices committed by the other
- Are subject to union picketing or other economic pressure if there is a labor dispute.

The final rule restores the NLRB's joint-employer standard prior to its Obama-era 2015 [Browning-Ferris decision](#), and also provides greater clarity and details.

Highlights of the final rule

- A business is a joint employer of another employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment.
- The list of essential terms and conditions include wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction.

- To be a joint employer, a business must possess and exercise such substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees to warrant a finding that the business meaningfully affects matters relating to the employment relationship.
- Evidence of indirect and contractually reserved, but never exercised control over essential terms and conditions, and of control over mandatory subjects of bargaining other than essential terms and conditions, shows joint-employer status, but only to the extent that it supplements and reinforces evidence of direct and immediate control.
- Key terms are defined, including what does and does not constitute "substantial direct and immediate control" of each essential employment term. The rule makes clear that control exercised on a sporadic, isolated, or de minimis basis is not "substantial."
- Joint-employer status can't be based solely on indirect influence or a contractual reservation of a right to control that has never been exercised — there must be substantial direct and immediate control.
- Routine elements of an "arm's length" contract cannot turn a contractor into a joint employer.

Other guidance

The Department of Labor recently issued a [final rule](#) that aims to clarify the standard for joint-employer status under the federal Fair Labor Standards Act and will likely reduce the number of situations under which the status will apply. Effective Mar. 16, 2020, the rule sets out a new four-factor balancing test that focuses on the employer's actual — not theoretical — control over an employee's terms and conditions of work.

Related resources

Non-Mercer resources

- [Final rules](#) (Federal register, Feb. 26, 2020)
- [Press release](#) (NLRB, Feb. 25, 2020)
- [Fact Sheet](#) (NLRB, Feb. 25, 2020)
- [Press release](#) (NLRB, Aug. 27, 2015)

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- [US: DOL rule narrows joint employer standard](#) (Jan. 15, 2020)

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