



AARON C. SCHLESINGER

**For More Information  
Please Contact**

Aaron C. Schlesinger  
aschlesinger@pecklaw.com  
201.343.3434

## NLRB Issues Final Rule Providing Clarity on the Factors Governing Joint-Employer Status

On February 26, 2020, the National Labor Relations Board issued its final rule governing joint-employer status under the National Labor Relations Act (NLRA). The final rule restores the joint-employer standard that was applied for several decades prior to the 2015 decision in *Browning-Ferris*, giving greater clarity and guidance.

The new rule will benefit employers in the construction industry who utilize paymaster agreements. Under a paymaster arrangement, an employer who is signatory to a union collective bargaining agreement leases its bargaining unit employees to perform labor covered by that agreement to a non-signatory on a construction project. Unions have historically sought to bind the non-signatory their collective bargaining agreements as a joint employer based on its control over the leased employees on the project. The new rule, by increasing the requirement to show control over the non-signatory's employees, makes it harder for unions to assert a joint employer cause of action against the non-signatory.

The joint-employer standard under the NLRA determines whether a business can be considered an employer of employees directly employed by another employer. If two entities are considered joint employers, they each face the same consequences, as both:

1. must bargain with the union that represents the jointly employed employees;
2. are potentially liable for unfair labor practices committed by the other; and
3. are subject to union picketing or other economic pressure if there is a labor dispute.

To be a joint employer under the final rule, 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. The final rule defines key terms, including what are considered "essential terms and conditions of employment," and what does, and what does not, constitute "direct and immediate control" as to each of these essential employment terms. The final rule also defines what constitutes "substantial" direct and immediate control and makes clear that control exercised on a sporadic, isolated or *de minimis* basis is not "substantial."

Evidence of indirect and/or contractually reserved control over essential employment terms may be a consideration for finding joint-employer status under the final rule, but it cannot give rise to such status without substantial direct and immediate control. Importantly, the final rule also makes clear that the routine elements of an arm's-length contract cannot turn a contractor into a joint employer.

In summary, this new standard narrows the scope of who will be considered a joint-employer under the NLRA, thereby making it easier for non-signatory employers in the construction industry to utilize signatory paymasters without incurring liability from the signatory's collective bargaining agreement.



# CLIENT ALERT

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