



Joint Employment Standards: Where Does the Franchise Community Stand Now?

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iFA INTERNATIONAL
FRANCHISE
ASSOCIATION

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SYMPOSIUM**

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History of NLRB Joint Employment Standard

1984-2015 – NLRB focused on whether a putative joint employer actually exercised “direct and immediate control” over the essential terms and conditions of the relevant worker’s employment, such as hiring, firing, discipline, supervision, and direction. Although a fact-specific inquiry, this standard was widely seen as creating a fairly predictable legal regime for most businesses.

April 2020 – Trump-era NLRB issues final rule overturning *Browning-Ferris* and restoring previous standard requiring actual “substantial direct and immediate control” over terms and conditions (indirect control or the reserved but unexercised control insufficient)

August 2015 – *Browning-Ferris Industries of California, Inc.* where the NLRB overturned the traditional “direct and immediate control” standard in favor of a vague, expansive standard under which indirect control through an intermediary or the reserved right to control, even if unexercised, may be sufficient to find a joint-employer relationship.

New 2023 Rule— Would have rescinded the 2020 rule and reinstated and expanded the *Browning-Ferris* test allowing indirect or reserved control alone to suffice
(officially dead)

NLRB Joint Employment Standard

- As of now, the 2023 rule is dead and the 2020 rule is back in place
 - 2020 rule: requires a showing of “**substantial direct and immediate**” control over the essential terms and conditions of another entity’s employees
 - Meaning, “direct and immediate control that has regular or continuous consequential effect on an essential term or condition of employment of another employer’s employees” that is not “sporadic, isolated, or de minimis basis”
 - Two entities must “share or codetermine” terms or conditions of employment
- Non-exhaustive list of terms and conditions:
 - Wages
 - Benefits
 - Hours of Work
 - Hiring
 - Discharge
 - Discipline
 - Supervision
 - Direction

FLSA Joint Employment Rule

- Employer defined under the FLSA: any person acting directly or indirectly in the interest of an employer in relation to an employee
 - Very broad making it easy to make multiple entities jointly and severally liable
- Biggest question under the FLSA: whether the entities “share or codetermine...matters governing employees’ essential terms and conditions of employment”
 - Terms and conditions may include:
 - Wages, benefits, and other compensation
 - Hours of work and scheduling
 - The assignment of duties to be performed
 - The supervision of the performance of duties
 - Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline
 - The tenure of employment, including hiring and discharge
 - Working conditions related to the safety and health of employees



DOL's Final Rule on Economic Realities: Employee vs. Independent Contractor

- Final version of the rule published on January 10, 2024, effective March 11, 2024
- New rule in line with economic realities test
- Under FLSA, it is a non-exhaustive 6 factor test to determine if an individual is classified as an employee or independent contractor
 1. Worker's opportunity for profit or loss
 2. Investments made by worker and the potential employer
 3. Degree of permanence of the work relationship
 4. Degree of control an employer has over the work
 5. Extent to which work performed is integral to the employer's business
 6. Use of a worker's skill and initiative
- Rescinds rule issued under Trump administration which focused more narrowly on 2 factors of the economic realities test
- Many states have implemented different and broader tests of their own



Single Enterprise Defined Under the FLSA

- “Enterprise” means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements
 - Does not include the related activities performed for such enterprise by an independent contractor
 - Three factor test:
 1. the two entities are performing related activities AND
 2. the activities are performed under unified operations or common control AND
 3. the activities are done for a common business purpose
 - In theory alleges that the franchisee is an agent of the franchisor and the franchisor controlled the key areas of the business

Tort Related Joint Liability

Vicarious Liability

- Allows for another individual or entity to be liable for the tort by an individual when there is a master/servant agency relationship
 - Third party must have:
 - Control OR
 - The right to control the conduct of the individual
 - Franchisor vicarious liability for franchisee's employees' action:
 - Franchisor must control or have the right to control the daily conduct or operation of the particular "instrumentality" or aspect of the franchisee's business that is alleged to have caused the harm
 - High standard to prove, but can be met
 - Varies under state law

Current Advocacy

- Ongoing legislative efforts to:
 - Codify the current NLRB standard legislatively to prevent future flip flopping; or
 - Exempt franchise systems from the employer definition



IFA Advocacy

IFA will be holding Joint Employer Advocacy Briefings on **Wednesday, May 21st : 1pm EST and 3pm EST**

Audience: franchisees, franchisors, and suppliers based in the following states: **Maine, Michigan, Delaware, Colorado, Arizona, Oklahoma, Kansas, and Missouri**

During these important sessions, the IFA team will cover:

- History of the joint employer issue, and where we stand today
- Outline of the IFA advocacy strategy, including a briefing on your specific target Senator
- How you can effectively take action and make your voice heard

May 21st at 1pm EST

Register here if you are based in **Maine, Michigan,
Delaware, Colorado, Arizona**



May 21st at 3pm EST

Register here if you are based in **Oklahoma,**
Kansas, Missouri



Questions for the Panel



Strategies to Mitigate Joint Liability Risks

- Limit control over franchisee employment practices
- Maintain a clear entity distinction in contracts
- Minimize involvement in vetting, hiring and personnel decisions of franchisee employees
- Control the brand standards, not the workforce
- Limit involvement in employee benefits and compensation
- Encourage and provide third party resources for franchisee education on labor laws and best practices
- Leverage third-party vendors to educate franchisees
- Utilize franchisee acknowledgements regarding roles and responsibilities
- Regularly evaluate and update manuals to comply with current standards
- Regularly evaluate training materials and in-field visits utilizing a train the trainer approach
- Have a well-developed public relations strategy
- Use the franchise agreement to identify certain steps a franchisee should take to distinguish itself from the franchisor
- Avoid using franchisor's employees for franchisee operations
- Regularly review legal and compliance practices
- Empower franchisees with support services

Questions?