

# HOW THE NLRB'S GENERAL COUNSEL PLANS TO CHANGE THE BOARD'S "JOINT EMPLOYER" RULES FOR FRANCHISES

BEFORE	AFTER
<p><b>Old (Current) Joint Employer Standard</b></p> <ul style="list-style-type: none"> <li>• Franchise businesses are joint employers only when they share “direct and immediate” control over matters governing the essential terms and conditions of employment.</li> <li>• Focus is on terms and conditions of employment including hiring, firing, discipline, supervision and direction.</li> </ul>	<p><b>New (Proposed) Joint Employer Standard</b></p> <ul style="list-style-type: none"> <li>• Franchise businesses would be joint employers whenever the franchisor exercises “indirect control” over the franchisee.</li> <li>• Focus would be on “industrial realities” that make the franchisor a necessary party to meaningful collective bargaining</li> <li>• Joint employer status may be found even though the franchisor plays no role in hiring, firing, or directing the franchisee’s employees.</li> </ul>
<p><b>Factors indicating direct control (currently):</b></p> <ul style="list-style-type: none"> <li>▪ Detailed control of employees’ daily activities by Franchisor’s supervisors</li> <li>▪ Franchisor authority to discipline and discharge franchisee’s employees</li> <li>▪ Cost plus arrangements for labor costs</li> <li>▪ Franchisor hiring or rejection of Franchisee employees</li> <li>▪ Franchisor making labor relations decisions for both companies</li> <li>▪ Franchisor plays direct role in hiring, firing, discipline, discharge, promotion or evaluation of franchisee’s employees.</li> </ul>	<p><b>Factors indicating indirect control (according to GC):</b></p> <ul style="list-style-type: none"> <li>▪ Franchisor sets &amp; monitors operational procedures</li> <li>▪ Franchisor requires franchisee’s employees to follow franchisor’s rules or handbooks</li> <li>▪ Franchisor regulates allocation of product</li> <li>▪ Employees wear Franchisor’s uniforms</li> <li>▪ Employees follow Franchisor reporting and documentation requirements</li> <li>▪ Franchisor conducts training &amp; sets training requirements</li> <li>▪ Franchisor establishes safety rules &amp; standards</li> <li>▪ Franchisor meets with suppliers and sets price of goods</li> <li>▪ Employees and supervisors transfer between Franchisor’s locations</li> <li>▪ Franchisor sets pay rates for local level</li> <li>▪ Franchisor sets speed and frequency of employee tasks</li> <li>▪ Franchisor determines equipment employee uses and how used</li> </ul>

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## WHY IT MATTERS AND WHAT TO DO NOW

### FAQ'S ABOUT THE NLRB GENERAL COUNSEL'S PROPOSED NEW JOINT EMPLOYER STANDARD

**If the NLRB General Counsel succeeds in changing the joint employer standard, how will that affect traditional franchise businesses?**

- When joint employer status is established, both entities may be liable for the other's unfair labor practices, including unlawful discipline or discharge of employees under the National Labor Relations Act.
- A new joint employer standard may make it easier for unions to organize multiple franchisees of a single franchisor.
- A new joint employer rule would impose new bargaining obligations on franchisors and could also give unions the right to strike or picket at any franchisor location, not just the location where a dispute arises.
- Faced with liability for their franchisees' employment decisions and forced to the bargaining table, franchisors may have no choice but to take on even greater operational control of their franchises, undermining the entire business model.

#### **What should franchisors and franchisees do now?**

Right now, the old joint employer standard continues to be the law. It is up to the five members of the Board itself to make any official change. Meanwhile, the General Counsel decision to issue a complaint against one of the country's leading franchisors should serve as a "wake up call" for all franchise businesses. At a minimum, franchise businesses should monitor this situation closely through the IFA. Here are some other suggested action items:

- Audit franchise practices to minimize or eliminate factors showing "indirect control" in the franchisor/franchisee relationship.
- Review franchise agreements to be sure they expressly give franchisees control over production and ordering decisions, scheduling and use of equipment to the extent possible.

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- Limit exposure of franchisee employees to franchisor representatives. Franchisor managers should primarily interact only with the franchisee's managers.
- To the extent possible, minimize Franchisor monitoring of Franchisee's standard operational procedures.
- Consider insurance products that include joint liability coverage.
- Monitor NLRB rulings for the latest directives provided by the agency.
- Speak out! Either through trade associations or franchise groups, help make the case against changing the joint employer standard at the NLRB and in Congress.