

WEBINAR

# JOINT EMPLOYER: ARE FRANCHISE COMPANIES IN THE CLEAR?

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DATE: April 23, 2024

TIME: 2:00 PM EST



SPEAKING



**MICHAEL LAYMAN**

Sr. VP Government and Public Affairs  
International Franchise Association



**Alex MacDonald**

Shareholder  
Littler



**Jim Parette**

Shareholder  
Littler

# Speakers



**Michael Layman**

*Sr. VP Government and  
Public Affairs*

International Franchise  
Association

[m Layman@Franchise.org](mailto:m Layman@Franchise.org)



**Jim Paretto**

*Shareholder*

Littler

[jparetto@littler.com](mailto:jparetto@littler.com)



**Alex MacDonald**

*Shareholder*

Littler

[amacdonald@littler.com](mailto:amacdonald@littler.com)

# The NLRB's Joint-Employer Rule

What It Is, What to Expect, and What You Should Do to Prepare

# Agenda

- What is joint employment?
- Why did the Board issue this rule?
- What does the rule do?
- How does the rule affect the franchising industry?
- What happens next?
- What should I do to prepare?



# What is Joint Employment?

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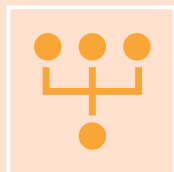
# What Is Joint Employment?



Joint employment is when separate businesses are both considered employees of the same employee.



Traditionally, joint-employer status depends on whether the businesses both control the employee and the employee's work.



If you're a joint employer, you're jointly liable for the employee.

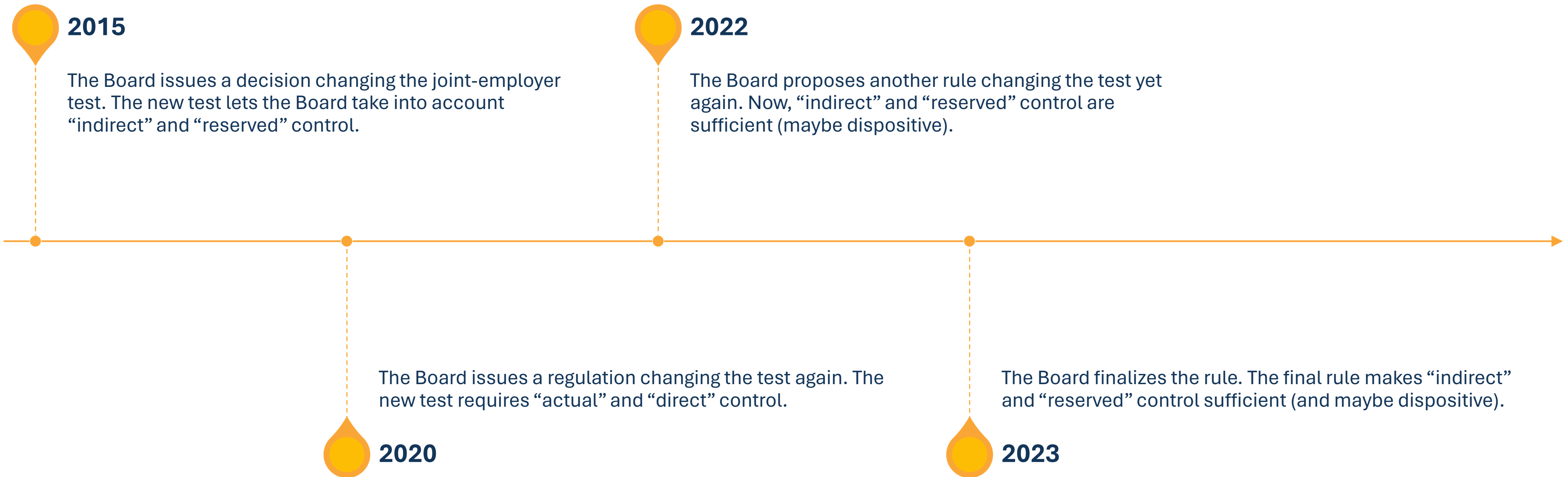


In the labor context, that means you have to bargain with the employee's union.

# Why Is This Happening?



# Why Is This Happening? Some History





# Why Is This Happening? Some Background

Throughout this period, unions were making a push to hold franchisors and franchisees jointly liable.

Union leaders like Mary Kay Henry, president of the SEIU, said it was “impossible” to organize workers going franchise to franchise. They wanted to organize brands in one swoop.

They brought multiple charges at the Board asking the Board to hold franchisors and franchisees jointly liable. The new rule makes it easier for them to do that.

Not coincidentally, two of the Board members who voted for the new rule are former SEIU attorneys.

# What Does The Rule Do?



# What Does the Rule Do?

- Bottom line: you are now a joint employer if you control any one of a worker's "essential terms and conditions" of employment



# Biggest Changes

Indirect control

Reserved  
control

Essential terms  
and conditions

# Indirect Control: Control Through an Intermediary or Contract

**Example:** A building manager contracts with a security firm on an hourly cost-plus basis. The cost-plus payment effectively caps the amount the service provider can pay its employees.

**Example:** A hotel contracts with a cleaning firm to clean its rooms. The hotel requires the firm to verify that the workers have passed background checks.

**Example:** A restaurant franchisor requires a franchisee to meet cleanliness and sanitation standards. The franchisee then requires its employees to meet those same standards.

# Reserved Control: Control You Have on Paper But Never Exercise



**Example:** A hotel contracts with a catering service for big events. The contract says the caterer must take a worker off the contract if the worker provides bad service, and the hotel gets to decide what service counts as bad.



**Example:** A restaurant contracts with a delivery service. The contract says that the delivery service has to take a worker off the contract if the worker repeatedly misses the restaurant's delivery windows.

# “Exhaustive” List of “Essential Terms and Conditions”

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.

If you control any one of these conditions, you must bargain about *all* mandatory bargaining subjects you can control.

# How Does This Rule Affect The Franchising Industry?





# How Does This Rule Affect The Franchising Industry?

Of the 13,000 comments filed, many discussed franchising

Even so, the Board mostly refused to address their concerns directly

The Board left many questions open:

Sanitation and cleanliness standards?

Operating hours?

Training materials?

Uniforms?

Manuals and other standard operating procedures?

# What Is Clear?

- No safe harbor for protecting brand standards
- No safe harbor for safety or health standards
- No safe harbor for specific industries or business models
- No safe harbor for small businesses
- No safe harbor for standard industry practices
- Any “work rules” are risky
- Regulatory-compliance requirements are safe only if they’re directly mandated by law



**What Happens Next?  
To the courts!**



# Dueling Lawsuits: Eastern District of Texas

- Coalition of trade associations (including IFA) filed suit challenging J/E Rule as impermissibly unlawfully overbroad and arguing that withdrawal of prior “direct control” standard was unlawful. Board moved to transfer the case to the D.C. Court of Appeals
- March 8, 2024, *held*: judgment on all counts for employers:  
(a) motion to transfer denied; (b) rescission of 2020 Rule was unlawful; (c) 2024 Rule was unlawfully broad; 2020 Rule restored
- Board has until early May to appeal to Fifth Circuit Court of Appeals

# Dueling Lawsuits: DC Circuit Court of Appeals

- SEIU has sued Board claiming that new J/E Rule is not broad enough (limits terms and conditions of employment Board will consider)
- IFA and trade associations intervened in the lawsuit and have filed motion to dismiss based on lack of jurisdiction
- In wake of Texas decision, have moved to stay case in DC Appeals Court pending final resolution of Texas case
- Motions pending
- Board may appeal an unfavorable decision
- Supreme Court?

# Congressional Review Act (CRA) Resolution

- Would permanently repeal the J/E Rule and prohibit Board from promulgating any “substantially similar” rule without direction from Congress
- U.S. House of Representatives
  - H. J. Res. 98
  - Passed January 12, 2024
  - 206-177 (8 Democrat “aye” votes)
- U.S. Senate
  - S. J. Res. 49
  - Passed April 10, 2024
  - 50-48 (3 Dem/Independent “aye” votes)



**N E X T**

NORMAL

# Where We Are... TODAY

To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, **the entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment** as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees.

# What Should I Do To Prepare?

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# What Should I Do To Prepare?

## Thorough contract reviews

### Risky Provisions

Right to exclude workers from the contract

Training requirements

Background-check requirements

Other minimum qualifications

Staffing levels

Coverage for specific hours

# What Should I Do To Prepare?

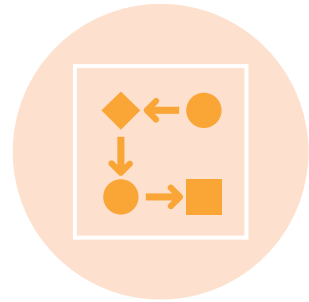
## **Safer Provisions**

Clear assignment of responsibility for all seven essential terms and conditions—list them

Emphasis on brand standards over worker standards

Duty to comply with specific laws and regulations

# Examine Business Arrangements



Minimize manuals, SOPs, and training related to any “essential factor”



Avoid dictating specific work hours or coverage levels



Avoid specific health or safety rules not required by law



Minimize involvement with timekeeping, recordkeeping, pay policies



Minimize involvement in recruiting and onboarding (e.g., shared hiring websites)



Clearly identify the employer in all employee materials



Minimize on-site time



Tie all reporting and inspections to brand standards, not worker standards

# Evaluate Contracting Relationships

Reduce reliance on nonessential vendors—especially if those vendors have to come on site

Train your supervisors on how to interact with essential vendors

Contract with reliable partners

# Questions?



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Littler

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# Thank you!