

## Joint Employer Rule

**Add the following to end of Chapter 2, Section A.5, Note 4 (page 57) or in place of *Browning-Ferris* (page 52):**

The NLRB's joint employer analysis has been in flux over the last several years. This most recent period started in 2015 with the Obama NLRB's decision in *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. No. 186 (2015), *enforced in relevant part*, 911 F.3d. 1195, 1209 (D.C. Cir. 2018), which expanded the definition of joint employer. In particular, the Board in *Browning-Ferris* established a test no longer required a joint employer to exercise direct and immediate control over terms and conditions of employment. In the lead up to *Browning-Ferris*, the NLRB's General Counsel pursued a major joint employer case against McDonald's, which led to a significant amount of political turmoil over the new test. It was no surprise, therefore, that the Trump Board attempted to reverse the *Browning-Ferris* standard in *Hy-Brand Industrial Contractors, Ltd.*, 365 N.L.R.B. No. 156 (2017), *vacated* 366 N.L.R.B. No. 26 (2018). However, the NLRB vacated *Hy-Brand* two months later because the NLRB's Inspector General determined that one of the Board members should have recused himself. *See Hy-Brand Industrial Contractors, Ltd.*, 66 N.L.R.B. No. 26 (2018).

Rather than seek another case to reverse *Browning-Ferris*, the NLRB instead issued a regulation in 2020 changing its joint employer analysis. Under this rule, a business will be considered a joint employer only if it possesses and exercises "substantial direct and immediate control over one or more essential terms and conditions of employment" of another employer's employees. 29 C.F.R. § 103.40(a). The existence of indirect control, reserved but unused control, or control over mandatory but non-essential terms and conditions, will not—by themselves—support a finding of joint employment, although they can be used to reinforce the existence of direct and immediate control over a particular term. *Id.*

The rule also states that "substantial direct and immediate control" will mean "direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment." *Id.* § 103.40(d). In contrast, control exercised only on a "sporadic, isolated, or de minimis basis" is not "substantial." *Id.* Moreover, the rule defines "essential terms and conditions of employment" exclusively as "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction" and provides examples of substantial direct and immediate control for each of these terms. *Id.* § 103.40(b), (c).