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## ***New Standards for Joint Employer Tests from the NLRB***

The National Labor Relations Board's ["NLRB"] "joint employer" test has had tremendous implications for hospitality employers due to the industry's reliance on third-party employees to supplement their workforces. The NLRB finally released the new test on February 25, 2020, and effectively replaced the previous test outlined in its 2015 *Browning-Ferris Industries* decision. The new rule narrows the test the NLRB will use to determine when businesses will be liable for the work of third-party employees under federal law. The new rule **takes effect on April 27, 2020**.

Under the new test, a company must exercise "**substantial direct and immediate control**" over **at least one "essential term and condition"** of a third-party's employees to be considered a joint employer. The NLRB defines "substantial" as having "a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees. Such control is not 'substantial' if it is only exercised on a sporadic, isolated, or de minimis basis." While indirect control may be evidence of joint-employer status, it alone cannot establish joint-employer status without evidence of substantial direct and immediate control.

A noteworthy feature of the new rule is that it provides an exhaustive list of the activities that the NLRB will consider an essential term or condition of employment: "an entity may be considered a joint employer of a separate employer's employees **only if** the two share or codetermine the employees' essential terms and conditions of employment, which **are exclusively defined as** wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction." [Emphasis supplied.]

The NLRB explained that the purpose behind the exhaustive list of the terms and conditions of employment that may subject two entities to joint-employer status is to reduce litigation on this issue.

For more guidance on how to interpret the new rule, employers may consult the NLRB [final rule](#), [fact sheet](#), and [press release](#) provided by the NLRB. Contact your Stokes Wagner attorney for more information about how this new rule will impact your hospitality business!

Questions? Contact Stokes Wagner.