

Fox Rothschild Podcast

Featuring Partner John Gotaskie

We're talking today on FoxCast with partner John Gotaskie in Pittsburgh about the National Labor Relations Board's proposed new regulations and their impact on the franchising community. John represents individuals, partnerships and companies in diverse legal matters including franchising issues, complex commercial litigation and bankruptcy litigation. He also edits the firm's [Franchise Law Update](#) blog. John, good morning.

John Gotaskie: Good morning.

Question: *In a major policy announcement, the NLRB recently proposed a new regulation establishing new standards for employers, including franchisors. What can you tell our listeners?*

John Gotaskie: That is true. The proposed rulemaking establishes a new definition of whether two employers, as defined by the National Labor Relations Act, are a joint employer of any single employee, or a group of employees, under the provisions of the law.

Question: *What are some of the details?*

John Gotaskie: Under the proposed rule, one may be considered a joint employer of a separate employer's employees *only if* the two employers share or codetermine the employees' essential terms and conditions of their job, including hiring, firing, discipline, supervision and direction. And more specifically, to be deemed a joint employer under the proposed regulation, an organization must possess *and actually exercise* substantial *direct and immediate* control over the essential terms and conditions of employment of another entity's employees in a way that is routine and not limited.

Question: *What is the current legal situation respecting joint employer issues?*

John Gotaskie: Well, that's a good question. Right now there isn't any rule. Currently, whether an employee is jointly employed by two people is governed by the *Browning-Ferris* decision, under which a company could be deemed a joint employer even if its "control" over the essential working conditions of another business's employees was indirect and limited, or contractually reserved but never even exercised. This was a relaxation of the old traditional standard, and the NLRB, in commentary that accompanies the proposed rule, explains that *Browning-Ferris'* relaxation of the concept that both of the alleged employers of an employee must have "direct and immediate" control over the employee to have been particularly troubling to it.

Question: *Do all of the members of the NLRB unanimously support the new rule?*

John Gotaskie: No. There was a dissent from one member of the board. The dissent argues that the proposed standard of “direct and immediate” is no more clear than the *Browning-Ferris* standard, and that the Board is interfering with the “natural development” of the Act through the common law. I think it’s fair to criticize the proposed rule due to the proposed standard of “direct and immediate” really being less than crystal clear, but I expect that concept will be further developed in the rulemaking process. Any proposed rule, however, is intended to short circuit the common law, and so I frankly find that criticism to be extremely weak.

Question: How may the public comment on these proposed rules?

John Gotaskie: Comments, as always, are a key element of the rulemaking process. They *must* be received by no later than November 13, 2018. And reply comments to initial comments must be received by the Board by November 20, 2018. Comments may be submitted electronically online, by mail or by hand delivery. My recent post on the Fox Rothschild [Franchising and Distribution Blog](#) has the details of how you can make those comments. By the way, the NLRB cautions that comments sent via mail often are delayed due to security concerns in Washington.

This is *the* time for our listeners to be heard on the joint employer question. You really should if you have an interest in this, and all of our franchise clients do. Comment now and let your voice be heard.

Narrator: Well, thank you John. Listeners, to confidentially discuss the impact of the proposed NLRB regulations on your franchise, please contact John Gotaskie in Pittsburgh at 412-394-5528 or at jgotaskie – that’s J-G-O-T-A-S-K-I-E – at foxrothschild.com.

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