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The Shifting Landscape of Joint Employer Liability and The Proposed American Franchise Act

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Key Takeaway: *Although the joint employer liability pendulum has swung to be more employer favorable, the franchise industry hopes that the AFA will establish pro-employer definitions that will not be subject to the swinging pendulum.*

Under certain circumstances, one employer can be liable to the employees of a second employer if the second employer violates the rights of its employees. That concept is referred to as *joint employer liability*, and it depends on the degree of control that the first employer possesses over the second employer's employees. The legal standard of what amount of control is necessary to prove joint employer liability has swung back and forth like a pendulum.

Under the prior administration, the National Labor Relations Board (NLRB) interpreted the National Labor Relations Act (NLRA) and the U.S. Department of Labor (DOL) interpreted the Fair Labor Standards

Act (FLSA) in a manner that made it easier to establish joint employer liability. Both agencies determined that the first employer could be liable as a joint employer of the second employer's employees if the fist employer only had *indirect control* over the second employer's employees. Under the current administration, both agencies have announced that they will return to their previous interpretation that the first employer would not be a joint employer unless it possessed *actual control* over the second employer's employees. The result of that significant pendulum shift will make it more difficult to establish joint employer liability.

In order to avoid the pendulum swing between changing interpretations of the "control" standard in the franchise industry, the American Franchise Act (AFA) (H.R. 5267) was introduced in Congress. It would provide significant guidance to franchisors and franchisees regarding the circumstances under which either party would be considered to be a joint employer. The intent of the AFA is "to preserve the franchise business model" by amending the NLRA and creating a new Section 20 entitled "Clarification Of Joint Employment For Franchising." Among the Congressional findings to support the AFA are the concept that "a franchisor must set and enforce uniform quality, marketing, and operational standards" and the concept that "franchisees are independent business owners." To harmonize those potentially conflicting concepts while preventing joint employer liability, the AFA specifically provides "a franchisor may be considered a joint employer of the employees of the franchisee only if the franchisor possesses and exercises *substantial direct and immediate control* over one or more essential terms and conditions of employment of the employees of the franchisee."

The AFA defines *substantial direct and immediate control* as the franchisor having a regular or continuous effect on *essential terms and condition of employment*, excluding effects that are on a sporadic, isolated, or de minimis basis.

The AFA provides specific examples of the types of substantial *direct and immediate control* by a franchisor regarding the following *essential terms and conditions of employment*:

1. *Wages*: actually determine the wages to be paid to individual franchisee employees
2. *Benefits*: actually determine the fringe benefits to be provided to franchisee employees, including selecting the benefit plans or the level of benefits
3. *Hours of Work*: actually determine the work schedules, hours of work, or overtime of franchisee employees (this does *not* include establishing the franchisee's operating hours or minimum staffing levels)
4. *Hiring*: actually determine who will be hired (this does *not* include minimum staffing levels or hiring standards)
5. *Discharge or discipline*: actually determine whether and how an employee of the franchise is disciplined or terminated (this does *not* include informing a franchisee of misconduct or poor performance, expressing negative opinions, or requiring minimal standards of work)
6. *Supervision*: consistently instruct franchisee employees or issue performance appraisals (this does *not* include providing limited instructions, training materials and performance standards, or directing what work to perform but not telling employees *how* to perform the work)
7. *Direction*: assign work schedules, positions, and tasks (this does *not* include providing resources to franchisees to use regarding these issues)

While joint employer liability remains in a state of flux, the enactment of the AFA would provide substantial clarity in the franchise industry. Although time and politics may affect its enactment, it would be interesting to watch if those definitions were applied in other industries.