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The Joint Employer Reckoning: Federal Shifts, State Safeguards, and the Future of Franchise Liability

Ronald K. Gardner
Dady & Gardner, P.A.
Minneapolis, Minnesota

Marvin Kaplan
Jackson Lewis PC
New York, New York

Brian B. Schnell
Faegre Drinker Biddle & Reath LLP
Minneapolis, Minnesota

I. INTRODUCTION[1]

Joint employer liability risks have been a primary external regulatory factor negatively impacting franchising and its key stakeholders for more than ten years. One of the most frustrating aspects of the last decade is the regulatory whiplash on the joint employer standard, especially at the federal level as the standard has swung wildly depending on the then current administration, often without any precision or certainty as to what the standard means to thousands of franchisors and hundreds of thousands of franchisees relying on the franchise business model to grow, expand, evolve and protect local businesses across the country. The International Franchise Association (IFA) reports that the costs of uncertain joint employer standards and related regulatory chaos include a 93% spike in litigation costs and the elimination of hundreds of thousands of jobs.

The uncertainty surrounding joint employer standards has also had a profound impact on the franchise relationship between franchisors and their franchisees. Franchisors in many systems have curtailed the manner and means of franchise support rather than risk being deemed a joint employer with its franchisees regarding the franchisees' employees. Franchisees are also in limbo due to regulatory uncertainty, as a lack of clarity can make it difficult for them to make long-term investments in their businesses. This reality continues to have a meaningful effect on many systems, where franchisors and franchisees should now be collaborating more than ever before to build successful, sustainable franchise systems and businesses. The bottom line is that joint employer uncertainty and any potential for an expanded joint employer standard remain among the most consequential regulatory issues impacting the franchise business model.

Our objectives for this paper are to summarize (i) the current state of the joint employer regulatory environment, including the American Franchise Act under congressional consideration, and how we got here over the last ten years, and (ii) where do we go moving forward, including how to navigate these laws from a risk management perspective and encourage franchisor and franchisee collaboration on unit level profitability, which includes clarity on the roles and responsibilities of franchisors and franchisees.

II. HOW WE GOT HERE: POLITICS AND THE INFLUENCE OF SEIU – NLRA

The National Labor Relations Act does not contain the term "joint employer." As such, the Supreme Court has made clear that common-law agency principles are controlling.[2] Under the common-law, the joint employer test focuses on the control exercised by a putative employer over a person performing work for it.[3] Over 40 years, the National Labor Relations Board (NLRB) articulated a joint employer standard that required substantial direct and meaningful control over essential terms and conditions of employment. However, in 2015, the Board expanded that standard to include reserved, indirect, and limited control. Recognizing the need for greater clarity, in 2020, the Board turned to rulemaking. While still the subject of litigation, currently, under the NLRA, an entity is a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms or conditions of employment.

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[1] The authors would like to thank Luke Miller and Samuel William for their valuable contributions to this paper.

[2] *NLRB v. United Ins. Co. of America,* 390 U.S. 254 (1968).

[3] *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318 (1992).

A. NLRB Standard from 1965 to 2015

Applying the common-law agency principles, Board precedent has focused on whether employers share or codetermine those matters governing the essential terms and conditions of employment. In *Greyhound Corp.*, 153 NLRB 1488 (1965), on remand from the Supreme Court's decision in *Boire v. Greyhound Corp.*, the NLRB reaffirmed its determination that Greyhound was a joint employer of terminal maintenance workers supplied by an independent contractor. Applying its established standard, the Board found that Greyhound exercised substantial control over essential terms and conditions of employment, including supervision, wages, and work direction, notwithstanding the contractor's role as the nominal employer. The Board concluded that this shared control was sufficient to impose joint-employer status, thereby requiring Greyhound to recognize and bargain with the union representing the employees. The decision underscored the Board's view that joint-employer status turns on actual control and participation in the employment relationship, rather than formal contractual labels.

Almost 20 years later, in *TLI, Inc.*, 271 NLRB 798 (1984), the NLRB articulated a more restrictive standard for finding joint-employer status, holding that an entity will be deemed a joint employer only where it meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction. The Board emphasized that the putative joint employer must exercise direct and immediate control over employees' essential terms and conditions of employment, rather than merely possessing a contractual right to control or exerting indirect influence. Applying this framework, the Board concluded that the user employer's involvement was too limited and routine to establish joint-employer status, as its control was largely indirect and mediated through the supplier. The decision thus narrowed the joint-employer doctrine by requiring actual, substantial, and direct control, and became a foundational precedent for later cases emphasizing a constrained approach to joint employment under the Act.

While narrow, the NLRB standard did not foreclose a joint employer finding. In *CNN America, Inc.*, 361 NLRB 439 (2014), the NLRB found that CNN was a joint employer and successor employer with respect to technicians who had previously been employed by a contractor, Team Video Services, after CNN terminated the contractor and brought the work in-house. The Board held that CNN exercised substantial control over the essential terms and conditions of employment, including hiring decisions, supervision, and direction of work, both before and after the transition, thereby establishing joint-employer status. It further concluded that CNN was a successor obligated to recognize and bargain with the incumbent union because it continued substantially the same business operations, at the same locations, and using the same equipment. The decision reflects an expansive application of joint-employer and successorship principles, emphasizing functional control and continuity of the workforce.

1. *Essential Terms*

The Board identified some essential terms in *Laerco Transportation*, 269 NLRB 324 (1984). The NLRB held that joint-employer status turns on whether the putative employer exercises direct and immediate control over the essential terms and conditions of employment, specifically identifying such terms as including hiring, firing, discipline, supervision, and direction of employees. The Board emphasized that merely having a contractual right to control or exerting indirect influence is insufficient; rather, the entity must actually participate in determining these core aspects of the employment relationship. Because the alleged joint employer in *Laerco* did not meaningfully control these essential terms, the Board concluded that joint-employer status was not established.

2. Exercised vs. Reserved Control

The Board addressed exercised versus reserved control in a series of cases, ultimately, concluding that reserved control alone was insufficient to find a joint employer relationship. In *Hychem Constructors, Inc.*, 169 NLRB 274 (1968), the NLRB focused on whether the putative joint employer actually exercised control over the workforce, concluding that joint-employer status requires more than general oversight or theoretical authority. The Board found that while the general contractor monitored the progress of the work and ensured compliance with project specifications, it did not exercise direct control over essential employment matters, such as hiring, firing, discipline, or the day-to-day supervision of the subcontractor's employees. Because any influence the contractor had was limited to routine coordination and quality control, rather than active participation in employment decisions, the Board held that the requisite level of exercised control was lacking and declined to find a joint-employer relationship.

3. Limited and Routine

Control must also be meaningful. In *AM Property Holding Corp.*, 350 NLRB 998 (2007), the NLRB emphasized that joint-employer status cannot be established based on limited and routine oversight that is inherent in a contractual relationship. The Board found that the putative employer's involvement—such as monitoring performance, enforcing contract specifications, and ensuring satisfactory service—constituted ordinary, routine supervision rather than meaningful control over the workforce. Because the entity did not exercise direct and immediate authority over essential terms and conditions of employment, including hiring, firing, discipline, or day-to-day supervision, the Board concluded that its role was too attenuated to support joint-employer status. The decision underscores that limited and routine control, even if consistently exercised, is insufficient absent substantial participation in core employment decisions.

B. *Browning-Ferris Industries of California, Inc.*

In 2015, the Board broke from 40 years of precedent, adopting a broader joint employer standard in *Browning-Ferris Industries of California, Inc.* (*BFI*), 362 NLRB 1599 (2015). The NLRB held that an entity may be deemed a joint employer if it possesses the authority to control, directly or indirectly, essential terms and conditions of employment, even if that control is not actually exercised. Departing from prior precedent requiring direct and immediate control, the Board ruled that reserved authority and indirect control, including control exercised through an intermediary, are relevant to the analysis. Applying this expanded standard, the Board found that BFI was a joint employer with its staffing agency because it retained and exercised influence over matters such as hiring standards, work processes, and wages. The decision marked a significant shift in labor law by recognizing that indirect and potential control can suffice, thereby expanding the scope of joint-employer liability under the Act.

In *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018), the D.C. Circuit upheld in part the NLRB's broadened joint-employer standard, holding that the common-law agency test permits consideration of both indirect control and reserved authority over employees' essential terms and conditions of employment. The court rejected the Board's prior rigid requirement of direct and immediate control as inconsistent with common-law principles, concluding that such limitations improperly excluded relevant evidence. However, the court also found that the Board had failed to confine the indirect-control factor to essential terms and conditions of the workers' employment, and it remanded for further clarification. The decision thus affirmed that indirect and unexercised control may be probative, while requiring the Board to more precisely articulate the contours of the joint-employer standard.

C. 2020 Joint Employer Rule

Recognizing the need for clarity, in 2020, the NLRB issued the Joint Employer Rule, 85 Fed. Reg. 11184 (Feb. 26, 2020), codified a standard based on the traditional joint employer test while incorporating court precedent. The narrower joint employer test provided that an entity is a joint employer only if it possesses and exercises substantial direct and immediate control over one or more essential terms and conditions of employment. The rule defined such terms to include wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction, and required that the control be more than limited and routine to be probative. While the Board acknowledged that indirect control and contractually reserved authority may be considered, it held that such factors cannot establish joint-employer status without evidence of actual, direct control. The rule thus largely reinstated the pre-*BFI* standard, emphasizing active and substantial control as the touchstone of joint-employer liability under the Act.

D. 2023 Joint Employer Rule

In 2023, the Biden Board tried to expand the joint employer standard through rulemaking. The NLRB's 2023 Joint Employer Rule significantly expanded the standard for joint-employer status under the NLRA by holding that two entities are joint employers where they share or codetermine one or more essential terms and conditions of employment, based on common-law agency principles. The rule eliminated the prior requirement that control be substantial, direct, and immediate, instead providing that reserved authority and indirect control—whether exercised or not—are sufficient to establish joint-employer status if they relate to essential employment terms such as wages, hours, or supervision. By broadening the scope of relevant control, the rule made it easier to find joint-employer relationships and imposed corresponding bargaining and unfair labor practice obligations on both entities.

However, the rule was vacated by a federal district court before taking effect. In *Chamber of Commerce of the United States of America v. NLRB*, No. 6:23-CV-00553, 2024 WL 1045231 (E.D. Tex. Mar. 8, 2024), the U.S. District Court for the Eastern District of Texas vacated the NLRB's 2023 Joint Employer Rule, holding that the rule was contrary to law and arbitrary and capricious because it impermissibly expanded joint-employer liability beyond common-law agency principles. The court concluded that the rule's reliance on indirect control and unexercised (reserved) authority—without requiring meaningful direct control over essential terms and conditions of employment—exceeded the bounds of the common law and lacked a coherent limiting standard, potentially sweeping in "virtually every entity that contracts for labor." The court further held that the Board failed to adequately justify its rescission of the 2020 rule, rendering that action arbitrary and capricious. Accordingly, the court granted summary judgment for the plaintiffs, vacated the 2023 rule in its entirety, and effectively reinstated the 2020 joint-employer standard requiring substantial direct and immediate control.

On February 26, 2026, the NLRB issued a final rule withdrawing the 2023 Joint Employer rule, thereby, officially reinstating the 2020 Joint Employer rule, providing that an entity is a joint employer only if it possesses and exercises substantial direct and immediate control over one or more essential terms and conditions of employment.

E. Continuing Legal Challenges and Legislation

While the 2020 Joint Employer rule is controlling, it continues to be subject to challenge. A petition for review of the 2020 Joint Employer rule, filed by Service Employees International Union and supported by the AFL-CIO, is pending in the U.S. Court of Appeals for the D.C. Circuit.

As such, it is no surprise that employers have looked to legislation to settle the joint employer issue for good.

The American Franchise Act, H.R. 5267, a bipartisan bill introduced in the U.S. House of Representatives by Representatives Kevin Hern (R-OK) and Don Davis (D-NC) would codify the 2020 Joint Employer standard in the NLRA for franchises. Legislation is the most viable option to end the uncertainty and create an environment conducive to growth.

III. NLRB/AMAZON

The National Labor Relations Board ("NLRB") enforces the National Labor Relations Act ("NLRA") through regional investigations of unfair labor practice ("ULP") charges, merit determinations, issuance of complaints, Administrative Law Judge ("ALJ") hearings, Board review, and (if necessary) federal-court enforcement or review. A central point of interest in recent enforcement is the "fissured workplace" model—where lead companies (e.g., Amazon) outsource core operations to smaller contractors or Delivery Service Partners ("DSPs") while retaining extensive operational control over branding, metrics, technology, scheduling, and performance standards. The joint employer doctrine addresses accountability in these arrangements: if the lead entity exercises sufficient control over essential terms and conditions of employment, it shares NLRA liability (bargaining obligations, ULP remedies, etc.) with the nominal employer.

On May 2, 2023, Teamsters Joint Council 42 and Local 396 filed the initial ULP charge against Amazon Logistics, Inc., expressly naming it as a single and/or joint employer with DSP Battle Tested Strategies ("BTS") at the DAX8 facility in Palmdale, California.[4] The charge alleged that Amazon violated NLRA §§ 8(a)(1), (3), and (5) by retaliating against the newly unionized drivers and dispatchers—announcing termination of the BTS contract to eliminate the union workforce after the Teamsters won recognition and a Collective Bargaining Agreement ("CBA") was signed. The charge stemmed from allegations regarding the imposition of harsher working conditions through increased Amazon managers and new security for surveillance, stricter rule enforcement, more frequent vehicle inspections, delayed starts, refusing to recognize or bargain with the Teamsters, failing to execute the agreed CBA, and committing coercive acts like threatening jobs, captive-audience meetings with anti-union rhetoric, directing non-union employees to shun union workers, soliciting grievances, granting benefits, and calling police on a lawful union representative. The charge requested immediate injunctive relief, including a Temporary Restraining Order ("TRO"). Related charges followed on June 9, 2023[5] and June 26, 2023.[6] In August 2024, multiple amended charges were filed, expanding allegations to include Amazon.com Services, LLC as a joint employer with BTS.

On August 22, 2024, the NLRB Region 31 (Los Angeles, CA) Regional Director issued a merit determination finding that Amazon was a joint employer with BTS based on widespread control over essential employment terms. This paved the way for the issuance of a formal complaint.

After internal merit review, on September 30, 2024, NLRB Region 31 issued the Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, formally consolidating Cases 31-CA-317349, 31-CA-319781, and 31-CA-320596 against Amazon.com Services, LLC and its agent Amazon Logistics, Inc. (collectively "Amazon"), as a joint employer with BTS. The

[4] Case 31-CA-317349.

[5] 31-CA-319781.

[6] 31-CA-320596.

complaint alleged dozens of consolidated ULPs under the NLRA, alleging that Amazon possessed and exercised control over BTS's labor relations policy and administered a common labor policy with BTS at the DAX8 facility.

Additionally, similar complaints emerged in other regions, challenging Amazon's DSP model nationwide. For example, Cases 10-CA-333136 and 10-CA-333913 in NLRB Region 10 (Atlanta, GA) alleged that Amazon and MJB Logistics (out of the DAT6 facility) unlawfully discouraged drivers from unionizing with the Teamsters through threats, coercive statements, and by creating the impression of surveillance. In Region 29 (Brooklyn, NY), Amazon faced numerous charges/complaints explicitly naming it as a single and/or joint employer with multiple DSPs at New York-area facilities. Examples include Case 29-CA-353162 and 29-CA-358606.

Amazon filed suit in federal district court (Central District of California) seeking declaratory/injunctive relief on grounds that NLRB structure, i.e., removal protections for Board members and ALJs, is unconstitutional (violating Article II of the U.S. Constitution). Amazon moved for a preliminary injunction to halt NLRB proceedings.

On February 5, 2025, the Court denied Amazon's motion for a preliminary injunction to halt the NLRB Region 31 BTS/DAX8 joint employer ULP proceeding.[7] The court held the Norris-LaGuardia Act[8] stripped it of jurisdiction to issue any injunction in a case "involving or growing out of a labor dispute," as the suit directly arose from the Teamsters' charges over union recognition, bargaining over the BTS contract termination, retaliation, and coercive conduct.[9] Independently, the court found no likelihood of irreparable harm, ruling that mere subjection to an allegedly unconstitutional agency structure does not suffice without proof that the removal protections actually altered the proceeding.[10]

On February 10, 2025, Amazon appealed the district court's denial of its preliminary injunction motion to the Ninth Circuit.[11] The same day, it filed an emergency motion in the district court under Fed. R. Civ. P. 62(d) and Fed. R. App. P. 8(a) seeking an injunction pending appeal to immediately halt the NLRB Region 31 proceeding.

On June 9, 2025, the Court denied the emergency motion, reaffirming that the Norris-LaGuardia Act[12] jurisdictionally bars injunctive relief in this labor-dispute case and that Amazon failed to show irreparable harm under *Collins v. Yellen*.[13]

Meanwhile, on August 19, 2025, in a consolidated appeal, the Fifth Circuit held that (1) the appeals were not moot despite the NLRB's partial concession; (2) the Norris-LaGuardia Act did not divest district-court jurisdiction because the suits were structural constitutional challenges between employers and the agency, not "labor disputes" concerning terms/conditions of

[7] *Amazon.com Servs. LLC v. Nat'l Labor Rels. Bd.*, No. 2:24-cv-09564-SPG-MAA, 2025 WL 466262, at *8 (C.D. Cal. Feb. 5, 2025).

[8] 29 U.S.C. § 107

[9] *Amazon*, 2025 WL 466262, at *3.

[10] *Id.* at *7–9.

[11] *Amazon.com Servs. LLC v. Nat'l Labor Rels. Bd.*, No. 2:24-cv-09564-SPG-MAA, 2025 WL 1766349 (C.D. Cal. June 9, 2025) (slip copy).

[12] 29 U.S.C. § 107.

[13] 594 U.S. 220 (2021).

employment; (3) the possibility of severance did not bar preliminary relief at this stage; (4) the employers were likely to succeed on the merits; (5) they faced irreparable harm from subjection to an unconstitutional proceeding; and (6) the balance of equities and public interest favored enjoining the proceedings.[14]

Then, on December 3, 2025, the Third Circuit vacated the district court's denial of a preliminary injunction and held that the Norris-LaGuardia Act strips federal courts of jurisdiction to enjoin ongoing NLRB unfair-labor-practice proceedings when an employer challenges the constitutionality of Board Members' and ALJs' for-cause removal protections.[15] The Fifth and Third Circuit decisions created a split.

On December 29, 2025, a unanimous Ninth Circuit panel affirmed the district court's denial of Amazon's preliminary injunction.[16] The court held that the Norris-LaGuardia Act strips federal courts of jurisdiction to enjoin the NLRB proceedings because Amazon's constitutional challenge to the Board's removal protections and structure "involves or grows out of a labor dispute."[17] Applying 29 U.S.C. § 113(a), the panel found that the federal case satisfies the "case-related" requirements and that the underlying Board proceeding is itself a classic labor dispute concerning terms of employment and union representation.[18] The Ninth Circuit explicitly rejected Amazon's arguments and the Fifth Circuit's *SpaceX* reasoning, aligning instead with the Third Circuit's *Spring Creek* decision.

The NLRB proceeding remains open and active post-Ninth Circuit ruling, with potential for an ALJ decision, exceptions to the full Board, a Board decision, enforcement/review in the federal court of appeals, and a possible Supreme Court petition. After years of oscillation, in February 2026, the NLRB reinstated its narrower 2020 joint employer rule,[19] which requires proof of substantial direct and immediate control over essential terms rather than mere indirect influence or reserved rights. This fact-specific, narrower standard has heightened stakes in test cases like Amazon's DSP litigation because even modest control findings can expose lead companies to massive bargaining, liability, and restructuring risks while deepening a circuit split over related procedural barriers (Norris-LaGuardia Act jurisdiction).

The stakes are very high for franchisors (and any businesses using contractor/subcontract models) because the Amazon DSP litigation serves as a high-profile test case for "fissured workplace" accountability under the joint employer doctrine, with direct analogies to franchising. DSPs function in certain ways that are similar to the system standards that franchisors require franchisees to follow: Amazon sets brand standards, ops manuals/protocols, performance KPIs, and revenue dependence while shifting employment-related responsibilities to the franchisees who operate the local business, which is the structure many franchisors use to maintain uniformity without assuming responsibility for the employees who deliver the products and services to customers.

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[14] *Space Expl. Techs. Corp. v. Nat'l Labor Rels. Bd.*, 151 F.4th 761 (5th Cir. 2025) (hereinafter "*SpaceX*").

[15] *Spring Creek Rehab. & Nursing Ctr. LLC v. Nat'l Labor Rels. Bd.*, 160 F.4th 380, 382 (3d Cir. 2025) (hereinafter "*Spring Creek*").

[16] *Amazon.com Servs., LLC v. Teamsters Amazon Nat'l Negotiating Comm.*, 163 F.4th 624 (9th Cir. 2025).

[17] *Id.* at 631–33.

[18] *Id.*

[19] 91 Fed. Reg. 9707 (to be codified at 29 C.F.R. Part 103.40).

If upheld and applied broadly, franchisors could face:

- union attempts to impose bargaining obligations with unionized franchisee employees.
- allegations imposing shared liability for ULPs, terminations, wages, or discrimination at franchise locations, and
- pressure to loosen system standards/controls (risking brand dilution) or consider compliance/restructuring costs to address the joint employer-related risks.

IV. THE DEPARTMENT OF LABOR ("DOL") STANDARD

A. The Current Joint Employment Rule

The Fair Labor Standards Act ("FLSA") specifically imposes obligations on employers in joint employment relationships. The Department of Labor defines joint employment as "a condition in which a single individual stands in the relation of an employee to two or more persons at the same time."[20] But what this means practically is dependent on both the facts of the case and the test the court applies.

The DOL applies the economic realities test to determine when there is a joint employment relationship."[21] Under the test, a court determines the nature of the relationship based "upon the circumstances of the whole activity."[22] While various circuits have articulated different factors under the test, courts commonly consider whether the alleged employer (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.[23] Additional factors sometimes include (5) the degree of permanency and duration of the relationship between the putative joint employers; (6) whether the work is performed on premises owned or controlled by one or more of the putative joint employers; and (7) whether the putative employers share responsibility for employment-related activities.[24] However, these factors are not exhaustive, and courts may find joint employment even when an entity does not hire and fire its workers, directly dictate their hours, or pay them.[25]

The economic realities test is liberal and broad in its application, meaning it is easier for plaintiff-workers to establish an employer-employee relationship than under other tests courts use

[20] 29 C.F.R. § 500.20(h)(5) (defining the term under the MSPA); *see also New York v. Scalia*, 490 F. Supp. 3d 748, 758 (S.D.N.Y. 2020) ("the MSPA and the FLSA define 'employ' identically, so the scope of employment relationships under MSPA is identical to the FLSA.") (quoting Opinion Letter Fair Labor Standards Act (FLSA), 2016 WL 284582, at *2).

[21] *Scalia*, 490 F. Supp. 3d at 760.

[22] *Id.* at 758.

[23] *Brown v. J&W Grading, Inc.*, 390 F. Supp. 3d 337, 349 (D.P.R. 2019).

[24] *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997).

[25] *Zachary v. Rescare Oklahoma, Inc.*, 471 F. Supp. 2d 1175, 1179 (N.D. Okla. 2006).

in different contexts, such as the common law control test[26] and the IRS 20-factor test.[27] This puts franchisors at greater risk of liability under the FLSA, even if their role in a worker's day-to-day activities is limited.

Some legal analysts argue that the economic realities test means workers' attorneys have a twofold advantage. First, they have more avenues to pursue (i.e., categories of facts to include) in their complaints to establish a joint employer relationship.[28] Second, they can name additional entities as defendants that have some relationship to the direct employer, which may include partnerships, parent, subsidiary, predecessor, successor, affiliated, and related companies and entities, and their officers, directors, and various agents.[29]

Some scholars also assert that the test is practically unworkable. They say, for example, that it results in "various (and not always consistent) multifactor tests" and "less certainty for employers as to when they may be liable for wage and hour violations under the FLSA as a 'joint employer' of an unrelated company's employees."[30] Under the test, courts consider several non-exhaustive factors in determining whether the "economic realities" of the situation demonstrate a joint employment relationship, with some acknowledging that there is "no definition that precisely delimits the scope of the employer-employee relationship under the FLSA."[31]

B. Recent Regulations, Amendments, and Recissions

The DOL's standard for assessing joint employment status (or lack thereof) has been the product of a see-saw effort between presidential administrations in recent decades. But due to the Biden Administration's rescission of a previous DOL rule that significantly narrowed the factors courts were to consider and the second Trump Administration's inaction on proposing a new standard, the economic realities test remains the law.

Historically, the DOL has used the economic realities test to analyze joint employer status under the FLSA, articulating the modern standard in an Administrator's Interpretation in 2014.[32] To create a clearer, more business-friendly standard, in January 2020, the DOL, under the First Trump Administration, issued a formal rule delineating the standard to be applied in determining whether an entity qualifies as a joint employer. The rule established a four-factor test, inquiring whether the putative joint employer (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3)

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[26] *See e.g., Danielson for & on Behalf of N. L. R. B. v. Loc. 814, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 355 F. Supp. 1293, 1297 (S.D.N.Y. 1973) ("Under [the control] test, a person is an employee when the employer reserves both the right to control the ends and the means to be achieved. On the other hand, when only the former is controlled by the employer, an independent contractor relationship exists.").

[27] *See e.g.*, *In re Rasbury*, 141 B.R. 752, 759–60 (N.D. Ala. 1992) (listing 20 factors to consider for determining classification for purposes of federal income tax).

[28] Kacey R. Riccomini, *The Fall of The Joint Employer Rule*, 21-12 Bender's Labor & Employment Bulletin 02 (2021).

[29] *Id.*

[30] *United States: Department Of Labor Withdraws Joint Employer Regulations*, Mondaq Business Briefing (July 30, 2021).

[31] *Scalia*, 490 F. Supp. 3d at 758 (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947) (cleaned up)).

[32] Opinion Letter Fair Labor Standards Act (FLSA), 2014 WL 2816951, at *2.

determines the employee's rate and method of payment; and (4) maintains the employee's employment records.[33]

Though using factors that are commonly used in an economic realities analysis, the new rule attempted to articulate a narrower principle based on *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). Notably, the new rule limited the test to the above four factors alone and modified the first factor to require that the potential joint employer actually hire or fire the employee, rather than merely have the unexercised right to do so.[34]

Almost immediately, the rule faced scrutiny. In February 2020, before the rule went into effect, a group of state attorneys general filed a complaint in the Southern District of New York, seeking to invalidate the rule. In September 2020, the court vacated the rule, reasoning, among other things, that the DOL's new test reflected an impermissibly narrow interpretation of the FLSA, that the rule departed from the DOL's prior interpretations without adequate explanation, and that the DOL had failed to consider the rule's costs to workers.[35]

The DOL appealed that decision to the Second Circuit and submitted briefing in January 2021 in support of the challenged rule. Following President Biden's inauguration, however, the DOL reversed course. The DOL formally issued its notice of rescission in July 2021 without issuing a new standard.[36] This ostensibly returned the DOL's policy to its pre-2020 standard of "economic reality" that is relatively less favorable to businesses and less clear and predictable in general. A short time later, the Biden Administration dropped the *Scalia* appeal altogether.

C. Interpretive Guidance

Recent cases have reflected the uphill battle that purported joint employers have often faced under the economic realities test.[37] Some recent cases offer insight into key factors:

- In *Stanton v. Wormuth*, the court found no joint employer relationship because the purported employer did not determine compensation or employee schedules, did not provide tools for work, and did not have the authority to terminate employment.[38]

- In *Arif v. Bashir*, the court made a key distinction between general shared control between two enterprises and shared control "with respect to employment." It held that the "fact that Defendants engaged in an enterprise does not automatically transform them into joint employers of the Plaintiff."[39]

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[33] *Scalia*, 490 F. Supp. 3d at 761–62.

[34] Joint Employer Status Under the Fair Labor Standards Act, 85 FR 2820-01.

[35] *See generally*, *Scalia*, 490 F. Supp. 3d 748.

[36] Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 FR 40939-01.

[37] *See e.g.*, *Castillo v. Spencer's Air Conditioning & Appliance Inc.*, No. CV-22-00798-PHX-DWL, 2024 WL 706939, at *4 (D. Ariz. Feb. 21, 2024) (applying an expansive 12-factor test to deny summary judgment to a purported joint employer).

[38] 640 F. Supp. 3d 159, 168 (D.D.C. 2022) (analyzing the economic realities test in the Title VII context), *dismissed*, No. 22-5309, 2023 WL 2799312 (D.C. Cir. Mar. 31, 2023).

[39] No. 4:20-CV-2704, 2021 WL 1147582, at *5 (S.D. Tex. Mar. 10, 2021), *report and recommendation adopted*, No. 4:20-CV-2704, 2021 WL 1143776 (S.D. Tex. Mar. 25, 2021).

- In *Galvez v. InvestCloud*, the court applied a logic similar to that in *Arif* to dismiss allegations of joint employer status. There, the court held that allegations that one enterprise was responsible for the daily operations of the other, and that employees, partners, and principals of one enterprise directed human resource policies of the other, were insufficient to demonstrate control over the plaintiff worker. This was because there were no specific allegations that the defendant enterprise *itself* had "the power to control" the plaintiff worker.[40]

The above indicates that to the extent franchisors can create lines of delineation between themselves and franchisees with respect to control over employees, it increases their prospects of success against a joint employment claim.

D. Looking Forward

On April 22, 2026, the DOL announced a new proposed rule to address joint employer status under the FLSA. Under the proposed rule, a familiar four factors would be considered in determining whether a franchisor is a joint employer with its franchisee, including whether the franchisor: (1) hires or fires the franchisee's employee, (2) supervises or controls the franchisee's work schedule or conditions of employment to a substantial degree, (3) determines the franchisee's employee's rate and method of payment, and (4) maintains the employee's records.[41] No single factor is determinative of joint employer status.[42]

The proposed rule shares significant similarities to the 2020 rule from the first Trump Administration, but there are some distinct differences. Most importantly, the 2026 rule would establish that while reserved and indirect control are factors that may be considered in determining joint employer status, but that the actual exercise of control is more relevant than the ability, power or right to control.[43] Further, while the 2020 rule limited the analysis to the four factors exclusively, the new rule explains that additional factors may be relevant in assessing vertical joint employment, but that a unanimous finding on the four factors in either direction would establish a "substantial likelihood" regarding whether an individual or entity is a joint employer with another.[44]

The announcement of the proposed rule has been met with praise from the franchising community. The IFA itself praised the action, referring to it as "a clear and commonsense approach for America's 832,000 franchised businesses to operate and grow."[45] This comes as welcome relief to franchisors who had been waiting with anticipation following the DOL's September 2025 regulatory agenda in which the Department announced it was considering a rule to "guide [the

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[40] No. 23 CIV. 11301 (KPF), 2026 WL 165737, at *5 (S.D.N.Y. Jan. 21, 2026).

[41] *Notice of Proposed Rule: Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, RIN 1235-AA48*, United States Department of Labor Wage and Hour Division (April 22, 2026).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *IFA Praises Trump Administration Joint Employer Rule*, International Franchise Association (April 22, 2026).

Wage and Hour Division]'s enforcement of FLSA joint employer liability and help promote greater uniformity among court decisions nationwide."[46]

It appears the Administration is now taking affirmative steps to prioritize a more business-friendly regulatory environment, with the NLRB also recently reinstating its own employer-friendly 2020 joint employer rule and the DOL simultaneously proposing a new independent contractor test.[47] In fact, DOL officials have suggested that they also intend to de-prioritize pursuing legal enforcement in unionized workplaces, according to an internal memo.[48] Additionally, the DOL recently reintroduced an Opinion Letter Program, which allows employers to seek clarity on ambiguous standards as applied to their unique circumstances. The Department intends to offer fact-specific guidance and can support a purported employer's "good faith" defense to FLSA claims.[49]

V. AMERICAN FRANCHISE ACT AND CURRENT STATE JOINT EMPLOYER REGULATORY LANDSCAPE

A. American Franchise Act ("AFA")

One potential solution that Congress and the second Trump Administration may consider to narrow the definition of a joint employer is the American Franchise Act.[50] The bill establishes that a franchisor is only a joint employer if it has real, direct, and ongoing control over important parts of a franchisee's employees' jobs, such as:

- Deciding how much employees are paid;
- Choosing employees' benefits;
- Setting work hours or schedules;
- Making hiring or firing decisions;
- Disciplining or supervising employees directly; or
- Telling employees exactly how to do their work on a regular basis

If the franchisor only sets general brand standards, shares training materials, or provides advice, that does not make it a joint employer. Occasional or minor involvement by the franchisor likewise does not establish a joint employment relationship. These rules would apply to both labor relations (i.e., the NLRA) and wage/hour laws (i.e., FLSA).

In sum, the AFA aims to protect the franchise business model, by clearly clarifying when a franchisor is considered the employer of the people who work for individual franchise owners. The concept has a clear purpose: franchisees must follow brand standards while running their own businesses and managing their own employees day to day. The AFA recognizes that franchising is a major part of the U.S. economy, employing millions and generating hundreds of billions of dollars. As such, it's worthy of legal protection.

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[46] Max Kutner, *DOL Details Independent Contractor, Joint Employer Plans*, Law360 (September 4, 2025).

[47] W. Eric Baisden, Hannah J. Kraus, & Adam Primm, *NLRB and DOL Publish Significant Rules Governing Joint Employment and Independent Contractor Classification*, Benesch Law (February 27, 2026).

[48] Parker Purifoy, *Top DOL Lawyer Urges Relaxed Enforcement in Unionized Workplaces*, Bloomberg Law (Feb. 27, 2026).

[49] Rachel Zheliabovskii, *Staying Compliant amid a Wave of Proposed DOL Deregulation*, SHRM (August 8, 2025).

[50] H.R. 5267; S.3525.

B. Current State Joint Employer Regulatory Landscape

The current state-level regulatory landscape generally favors franchisors by reducing the risk of joint employer liability, but the continued evolution of state statutes—particularly in response to future federal policy changes—means stakeholders must remain vigilant.

Some states have adopted laws clarifying that franchisors are not considered employers (or co-employers) of franchisees or franchisee employees unless the franchisor explicitly assumes that role in writing or exercises atypical control over employment practices. Many of these state laws were enacted with strong bipartisan support, reflecting a consensus on the need for clarity and legal certainty in the franchise business model. However, the shift toward state regulation has resulted in a patchwork of legal standards—while the majority of states with franchise-focused laws have harmonized standards, a minority have unique exceptions or requirements, underscoring the importance of monitoring developments in each jurisdiction.

Most state laws use the federal definitions of "franchisor" and "franchisee" as set out in 16 CFR 436.1, to ensure consistency and predictability for businesses operating across state lines. Several states, including Utah, explicitly state that administrative rulings by federal agencies on joint employment do not have the force of law in their state unless adopted by statute or a court. This insulates state law from shifting federal regulatory interpretations.

The “control” exception—where a franchisor can be found to be a joint employer only if it exerts a type or degree of control not customarily exercised to protect trademarks and brand—is a common feature in state statutes, including those in Wisconsin, Texas, and Utah. Other states, such as Michigan and Oklahoma, omit the “control” exception and focus on the terms of the franchise agreement, making the franchisee the sole employer unless otherwise specified.

The trend toward state-level legislation is a direct response to fluctuating federal rules and interpretations, particularly from the National Labor Relations Board and Department of Labor, which have created uncertainty for franchisors and franchisees. States like Wisconsin have taken a broad approach, applying franchisor exclusion provisions across multiple labor and employment statutes, including workers’ compensation, unemployment insurance, wage law, and employment discrimination.[51]

VI. A PATH FORWARD TO STRIKE THE RIGHT BALANCE

The franchise relationship is a complex, dynamic, and ever-evolving business relationship. This is particularly true over the last few years, due in part to joint employer uncertainty. The liability risk does not stop there; the future of franchise liability extends far beyond joint employer liability.

Franchisors who have responded to the joint employer uncertainty by withdrawing their operational support for franchisees may be reducing legal risk by avoiding being deemed a joint employer or their franchisees’ employees, but those franchisors risk creating uncertainty in their relationship with their franchisees, which can have many unintended consequences. Franchisees who see their franchisor providing less support or less collaborative leadership due to joint

[51] Several states are considering legislation as of the date of publication. *See e.g.*, Nebraska LB941 (seeking to define joint employment by establishing that franchisors are not employers of franchisees’ workers unless they exercise direct control over employment terms); Missouri SB94 and related bills (seeking to establish that a franchisor is not a joint employer unless they exercise direct, immediate control over employment actions like hiring or firing).

employer concerns may themselves pull back on investment decisions regarding their existing franchised businesses or new franchise unit expansion.

Despite this joint employer uncertainty, franchisors still must find a path forward that balances the potential joint employer liability risks with the realities that, in order for a franchise system to be successful and sustainable in the long run, franchisors and franchisees are far better off finding collaborative solutions to challenging issues, especially those directly related to unit-level profitability. Those issues are all highlighted by (i) discerning consumers having more choice than ever before and demanding higher quality products or levels of service from all brands, and (ii) technology (including generative AI) dramatically changing the landscape of all aspects of business.

Franchisees understand the need to implement change and evolve the franchise system. Their fear, though, is that franchisors will mandate change without properly testing or piloting the change, without taking into account the franchisees' return on investment in implementing and executing the change, or without any meaningful input from the franchisees on what the change should look like in the actual outlets.[52] A related dynamic that frustrates franchisees is the franchisor's requirement that the then-current franchise agreement be signed as a condition to any transfer or renewal. From the franchisee's perspective, the then-current franchise agreement requirement can have an impact on the bottom line of the business and therefore a chilling effect on their ability to sell their business and monetize their equity.

Several of these franchisee concerns are legitimate, as they seek a more balanced franchise agreement, but in the past, franchisees were rarely comforted by how a franchisor addressed those concerns in the franchise agreement. Each franchisor should ask themselves the following: Do the existing franchisees have a voice in system-wide change, either through a franchisee advisory council, franchisee association, or other means? Does the franchisor lead through a spirit of collaboration rather than dictating change? These dynamics are important even though they may not be specifically addressed in the franchise agreement. In instances where franchise agreements do recognize rights of an independent franchisee association or advisory council and what impact or role they might play in system change or changes to the franchise agreement, that recognition is typically the result of prior litigation in the system and a negotiated settlement. Is now the time to take a fresh look at the franchise agreement to assess not only joint employer risks but also overall risk management and the franchisor's and its franchisees' ability to compete in the marketplace in a way that benefits all brand stakeholders.

A. <u>Reinforce the Fundamentals of Franchising</u>

In a healthy franchise system and franchise relationship, the primary roles and responsibilities of the franchisor and franchisee have not changed over the years. The franchisor's roles and responsibilities are to build, grow, protect, and evolve the franchise system. The franchisee's roles and responsibilities are to build, invest in, and grow its franchised business in the local market by delivering on the brand promise to local customers and being the employer of choice in those local markets.

[52] Aziz Hashim and Brian Schnell, *System Change: The Role of the Franchise Agreement*, Fransocial (hereinafter, "*System Change*"); *see also* Aziz Hashim, Catherine Monson, and Ann Hurwitz, *The Dynamics of the Franchise Relationship in Today's Business & Regulatory Environment*, International Franchise Association (2015) (hereinafter, "*Dynamics*") at *5.

Now is the time to reinforce the franchisor and franchisee roles and responsibilities through reinforcing the following fundamentals of franchising:

- Franchising is primarily about making money (for all stakeholders);
- Business format franchising gives franchisees an opportunity to make money by providing a trademark and business model/system;
- Successful franchising starts with a successful business model that is capable of being replicated by independent businesspersons;
- The key to actual replication is uniformity -- one franchised business is indistinguishable from another;
- Franchisors assure uniformity through system/brand standards:
- Individual franchisee success also turns on their good management – proper management of the elements of the profit and loss statement;
- Franchisors assist good management through the franchisee-selection process, an extensive training process that covers the businesses' operations, and ongoing support that includes helping the franchisee improve its profit and loss statement (its bottom line).
- In the end, successful franchising is all about unit-level economics, an undying devotion to the brand, and understanding the roles and responsibilities of the franchisor, franchisees, and the system overall.

When these fundamentals are made a top priority, and the franchisor and franchisee execute these fundamentals, the likelihood of franchisor and franchisee success is higher, and the likelihood of joint employer liability is lower.

B. The Role of the Franchise Agreement

At its foundation, the franchise agreement is the legal contract between the franchisor and franchisee. It defines each party's rights and obligations regarding important facets of the franchise relationship. Rather than ambiguity, clarity should be the goal when addressing the franchisor's and franchisee's rights and obligations in the franchise agreement. Predictability should be another cornerstone principle of a franchise agreement. No franchisor wants a court to second-guess its decision when the franchisor's intent was to be clear on what rights it was granting to the franchisee and what rights it was reserving for itself.[53]

Every standard franchise agreement includes many of the same types of provisions addressing the grant of rights to the franchisee to use the franchisor's trademarks and know-how (the system), the period of time for which – and the conditions under which – those rights may be exercised; and the circumstances which can lead to a loss of those rights. These typical provisions are designed to accomplish at least two primary purposes: to give the franchisor the control and enforcement powers necessary to protect the principal assets of the brand for its benefit and for the benefit of the franchise system, and to preserve the franchisor's flexibility to grow the brand, facilitate changes to the brand, and capitalize on extensions of the brand. But a franchise agreement that recognizes the legitimate interests of the franchisor and the franchise system need not – and should not – ignore the franchisee's interests.

[53] *Dynamics*, at *2.

Beyond its foundation, the franchise agreement is a "living, breathing" document that must allow the franchise system to change over the life of that agreement. Franchisors often compete with larger companies that operate corporate locations rather than franchised locations. These companies can roll out new product lines or new marketing campaigns with executive decisions and implement them immediately. If a franchisor cannot compete effectively with these competitors, it and its franchisees will not survive. Accordingly, a franchisor must reserve rights in its franchise agreement to implement system-wide changes and otherwise evolve the system.

In order to minimize joint employer liability risks, franchisors address the pressure points that courts consider regarding control over a franchisee's business with franchise agreement provisions that establish the following:

- Any required standards exist to protect the system and trademarks and not for establishing control or duty to take control;
- Operations manuals provide guidelines and recommendations in addition to required standards;
- Franchisee is responsible for compliance with all laws;
- Evaluations and inspections are not to exercise control;
- No employee of the franchisee will be deemed an employee of the franchisor;
- Acknowledgment that the technology, training, support, guidance or tools the franchisor provides are for the purpose of protecting the brand and trademarks and to assist in operations, not to exert control.[54]

Breakdowns often occur during conversations about the franchise agreement in large part because the parties fail to recognize and understand the different perspectives that franchisors and franchisees bring to the franchise relationship and franchise agreement. Franchisors want to protect and grow the brand. On the other hand, franchisees want to protect and grow their investment.

The franchise agreement is the document that balances the interests of the franchisor, the franchisees, and the system as a whole. Franchisor and franchisee interests are sometimes aligned, and at other times they differ. Even though their roles in the system are different, that does not or should not mean they are at odds. Those conversations should begin during the franchise development process and continue throughout the franchise relationship. The franchisor and franchisees can then more easily focus on customer-centric activities with the mutual objective of finding and keeping highly satisfied and loyal customers.[55]

A franchisor's interest in protecting the brand means that they can make changes to the system in response to customers' demands, and they can also get rid of free-riding franchisees that refuse to play by the rules. Using an economic analogy, it is the franchisee free-rider who refuses to play by the rules who potentially creates great risk to all the other stakeholders in the system. The franchisee who refuses to contribute to a marketing fund, who uses unapproved vendors or products, or who violates the noncompete covenants is the franchisee who hurts not only the franchisor, but also the franchisees that play by the rules, and the system and brand as

[54] *Id.* at *28.

[55] *See A New Era in Franchising Continues to Emerge: Should a More Balanced Franchise Agreement Play a Role?; FranTogether*, IFA Franchising World*;* Brian Schnell, *Effective Franchisor-Franchisee Collaboration: It's All About Attitude and Leadership*, IFA Franchising World (hereinafter, "*Effective Franchisor-Franchisee Collaboration*").

a whole. All stakeholders in the brand should want a franchise agreement that allows the franchisor to effectively deal with free-riding franchisees.

While most franchisees recognize the franchisor's interest in protecting the brand, franchisors must understand the franchisees' interest in protecting their investments. The franchisees' concerns often stem from their view that (i) they have little control over strategic decisions that the franchisor makes, even though the franchisees' investments in their businesses can exceed the investments of franchisor executives making those key brand decisions, and (ii) they have little recourse if those franchisor decisions turn out to be bad ones. A related franchisee concern is the possibility that the franchisor will sell the company to new ownership, which has a different outlook on how to grow the business.

In the normal course of business, when each party is performs its proper role and there are no material external challenges to the business, the relationship-driven model works well, as evidenced by the exponential growth of franchising as a business model over the last half-century. In that scenario, the franchise agreement is subordinate to the business dynamics that drive and support the relationship.

The model also works well even in the face of routine challenges when the franchise agreement may assume a primary role – for example, when a franchisor takes action to protect the brand by issuing a default notice to, terminating, or taking other legal action against a franchisee who fails to contribute to a marketing fund, uses unapproved vendors or products, violates the non-compete covenant or otherwise refuses to play by the rules (a "free rider").

Using an economic analogy, it is the franchisee free-rider who potentially creates great risk to all the other stakeholders in the system by hurting not only the franchisor, but also all the franchisees that do play by the rules, and the system and brand as a whole. All stakeholders in the brand should support a franchise agreement that allows the franchisor to effectively deal with free riding franchisees. In that circumstance, the franchise agreement appropriately balances the interests of the franchisor, the franchisee, and the system as a whole.

Highly successful franchisors talk about the critical role that franchisees play in the success of the franchise system and brand. These franchisors often emphasize the collaborative approach they take with their franchisees. What we are suggesting is that franchisors should take a look at how their franchise agreements reflect that collaborative approach. This collaboration does not mean that a franchisor should have a franchise agreement that does not allow it to protect the brand. The bottom line is that a strong franchise agreement is critical to the franchisor's ability to (i) enhance the likelihood that the franchise system will meet the needs of the franchise brand's customers, including making necessary innovations and changes as those customers' demands and needs evolve, and (ii) protect the interests of the various stakeholders who have an interest in the brand, including the franchisor and its owners, the franchisees and the brand customers.

C. The Franchise Relationship

The power of franchising lies in collaboration between the franchisor and franchisees to protect, enhance, and evolve the brand. That doesn't mean the franchisor and its franchisees will always agree. But it is franchisors who are dedicated to collaborative leadership who will thrive today and in the future. The energy of the franchise system ought to be focused on beating the competition—not beating one another. Keep in mind that any organization is getting the results that they are designed to get, and in order to get different results, you need to make changes to

the foundation/the relationship. This isn't about spending more money on operations, training, marketing, and the like, but looking at ways to make fundamental change as to how the relationship between a franchisor and its franchisees is designed and executed, and at the same time mitigate joint employer risks.[56]

Here are a few best practice reminders for franchisors to consider in mitigating joint employer risks and, at the same time, provide clarity on the support they provide franchisees:

- Operations Manuals: Controls to protect uniformity and quality of the brand are still essential; the key is not to exercise control beyond what is necessary to protect the brand. With each system standard, distinguish requirements, recommendations, and suggestions on how a franchisee meets the system standard. In doing so, understand the nature and scope of controls and the manner and means of meeting system standards. A prime example is an operations manual section that establishes the system standard that the franchisee must meet, but then, rather than mandating exactly how the franchisee must meet the brand standard, the franchisor identifies recommendations or suggestions on how the standard is met. In other words, as long as the franchisee meets the system standard, how they do so does not need to be franchisor-mandated for every system standard.
- Training: A franchisor should have a robust training program for the franchisee and managers, and then should insist on the franchisee being responsible for training the franchisee's employees. Training a franchisee's employees is not the franchisor's responsibility. Where a line is potentially blurred is with a franchisor's learning management system (LMS). Make sure that franchisee employees have LMS access to only those parts that are directly related to their role. Further, before they are granted LMS access they should acknowledge that they understand (i) they are an employee of the franchisee, an independent owner of the "ABC" franchise, and not an employee of the franchisor, (ii) all employment matters are between the employee and the franchisee and (iii) access to the LMC does not change or modify in any way the employee's employment relationship with the franchisee.
- Continue to stay away from a franchisee's employment matters: This best practice has been in place for decades based on vicarious liability principles. Joint employer risks have reinforced those best practices. One area of increasing concern for franchisors is technology that includes scheduling, labor management practices, employee relations, and human resources information and guidance.
- The nature of franchise field support's guidance and support: Franchisors must educate their field support team on joint employer risks and best practices. In short, the franchise field support team should be coached in how to effectively stay away from responding to a franchisee's employment-related training questions, directly training franchisee employees, or doing the work a franchisee should be doing. The message should be that the support team member won't operate the business for the franchisee, but will provide support, guidance, evaluations, and recommendations to enable the franchisee to make the decisions necessary to grow the franchisee's business. In short, reinforce the fundamentals of franchising.

[56] *See generally*, *Effective Franchisor-Franchisee Collaboration*.

D. **Conclusion and Final Suggestion - Now is the Time to Look at Meaningful Change that Will Make a Difference**.

We close by emphasizing a few principles that a franchisor and its franchisees may consider in balancing joint employer risk, franchisor and franchisee collaboration, and clarity on the roles and responsibilities of franchisors and franchisees.[57]

- Recognize the franchisee's investment in the brand. What is the value of that investment to the brand, and should it be recognized in a manner beyond simply a license to use the franchisor's trademarks and system;
- Allow the franchisee to monetize their equity. Include reasonable transfer provisions and full disclosure that a franchisee may have limited post-termination rights, which may render a portion of that investment useless if the franchisee does not amortize appropriately;
- Commit to franchisee consultation on material issues that have a systemwide impact;
- Be transparent about sources of revenue from supply chains;
- Have franchisee profitability as a pillar of brand decision-making. Policies that only enrich the franchisor through sales increases without regard to the impact on franchisees will not be sustainable in the long run;
- Offer practical territorial protections for the particular business being franchised;
- Do not use the operations manual inappropriately. Some brands use the operations manual to make policy changes because they cannot make the change through the franchise agreement.

In assessing legal and business risks, franchisors and franchisees have the opportunity to re-examine the key drivers that can best contribute to their success in the near and long term. How a franchisor and its franchisees relate with one another is one of the key drivers of a franchise system's ability to survive and thrive in the current business and regulatory environment. With all the external pressures franchising is currently facing, franchisors and franchisees should seize the opportunity to take control of their relationship, their businesses, and their future.

[57] *See also System Change*; Brian Schnell, *Effective Dialogue and Social Capital are Keys to Resolving Disputes without Litigation*, FranSocial.