

CLIENT ALERT

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LABOR & EMPLOYMENT

NEW OHIO LAW ON JOINT EMPLOYER STATUS LIMITS FRANCHISORS FROM STATE EMPLOYMENT LAWS

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Relevant Background Regarding Joint Employer Status

Joint employer status continues to be a major issue at all levels of the debate, including with the National Labor Relations Board (NLRB) and federal and state courts. This is highlighted by the recent conflict that arose in December 2018 with the D.C. Circuit's decision in [Browning-Ferris Industries of California Inc. v. National Labor Relations Board \(D.C. Cir. Dec. 28, 2018\)](#) and the NLRB's [proposed rules](#) on the subject, which were issued just months before on September 13, 2018.

The issue started with the NLRB's 2015 decision in *Browning-Ferris Industries of California Inc.*, 362 NLRB No. 186, which overturned 30 years of precedent and established that employers could be held responsible as joint employers by doing as little as reserving control or exerting indirect control over the same workers. This overturned three decades of precedent that required employers actually exercise control over workers (rather than merely retain the right to do so) in order to be considered a joint employer and created a significant issue for franchisors.

Ohio's Limited Solution

To avoid the uncertainty at the administrative and federal levels, Ohio passed [H.B. 494](#) (the Law), which takes on the franchisor/joint employer issue by amending the definition of "employer" in a number of Ohio employment statutes to provide that franchisors are not the employers of their franchisees or the employees of their franchisees unless one of the following is met:

- The franchisor agreed to assume that role in writing, or
- a court of competent jurisdiction determines the franchisor exercises a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademark, brand or both.

What the Ohio Law Means, Its Application and Its Limitations

The Law takes effect on March 20, 2019 and amends the Ohio Minimum Fair Wage Standards Act, the Bimonthly Pay statute, the Ohio Workers' Compensation Act and the Ohio Unemployment Compensation Act.

This highlights the Laws' limitations as it does not overturn the NLRB or federal law on the joint employer issue. It will, however, stop state agencies and regulators from applying or extending *Browning-Ferris'* joint-employer standard to Ohio state laws to the bimonthly payment of wages, workers' compensation, and unemployment.

Notably, it does not apply to federal laws, including OSHA, WARN, ERISA, or to discrimination, harassment, retaliation or other claims under the Ohio Fair Employment Practices Act, codified at Ohio Revised Code Chapter 4112, and while it would have impact with respect to minimum wage/overtimes claims under state law, it does not have application under the Fair Labor Standards Act, which could complicate hybrid collective/class action overtime claims.

Employer Takeaways

For franchisors with employees in Ohio, the impact of the Law is that they will likely not be deemed a joint employer of their franchisee's employees unless they: (1) exercise direct control over them or (2) they expressly agree to have joint employer status under the terms of the franchise agreement or some other contract with the franchisee.

Franchisors should review their franchise agreements and ensure they expressly do not assume a joint employer role with their franchisees and refuse to exercise direct control of franchisee employees.

The value for franchisors with the Law will be in defending state-specific claims that fall under its purview so franchisor employers should be cognizant of the soon-to-be effective distinctions between state, federal, and agency law in regards to issues covered by the Law, *i.e.*, bi-monthly payment of wages, overtime/minimum wage, workers' compensation, and unemployment.

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