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NEWSALERT

April 2026

Human Resources

NLRB Reinstates 2020 Rule on Joint-Employer Liability

THE NATIONAL Labor Relations Board has formally reinstated its 2020 rule governing when a company is deemed a joint employer under labor law, loosening standards put in place during the Biden administration.

This pro-business shift will make it harder for workers to hold parent companies, franchisors or hiring entities liable for labor violations by contractors, subcontractors or franchisees. The rule took effect Feb. 27.

A finding of joint employment can have significant consequences for companies under the National Labor Relations Act. Under established case law, each company found to be a joint employer by the NLRA may be held liable for the unfair labor practices of its co-employers.

Under the reinstated standard, merely holding a contractual right to control another entity's workers or exercising indirect control such as setting safety standards is not enough to create a joint-employer relationship.

Types of cases affected

Franchise disputes: Cases where employees of a franchisee (e.g., a fast-food restaurant) seek to hold the franchisor responsible for unfair labor practices, wage disputes or bargaining.
Staffing agency arrangements: Situations where workers hired through a staffing agency claim that the company they are assigned to is also their employer, particularly in disputes regarding discrimination or union organizing.
Subcontractor relationships: Cases involving construction or logistics firms where a general contractor or larger client is accused of interfering with the labor rights of a sub's employees.
Unfair labor practices: Cases where unions charge a parent company or hiring entity with violating rights will now be harder to prove unless the parent company or hiring entity directly controls hiring, firing or wages.
Collective bargaining: Cases determining whether a large corporation must sit at the bargaining table with workers employed by a vendor or contractor.

Reinstated rule explained

Under the reinstated rule, a business must possess and exercise "substantial direct and immediate control" over at least one essential term and condition of employment of another employer's staff to be a joint employer.

The rule defines substantial direct control as actions that have "a regular or continuous consequential effect" on several core aspects of a worker's job This includes the employer's ability to:

1. Hire or fire a worker,
2. Supervise and control an employee's work schedule or conditions of employment to a significant degree,
3. Determine a worker's rate and method of payment, and
4. Maintain the employee's employment records.

An employer does not have to meet all four factors to be considered a joint employer. Also, even when an employer exercises direct control over another employer's workers, it will not be considered a joint employer if the control is exercised on a sporadic, isolated or de minimis basis.

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Risk Management

Employers Contributing to Distracted Driving

A NEW study has found that many people who interact with their mobile phones while behind the wheel do so because of pressure from their bosses to answer calls, e-mails and text messages even if they are not on the clock.

Employers that pressure their staff to respond quickly to work-related messages and calls can be held partially liable for any accidents their employees cause due to distracted driving.

While the employee's personal auto coverage would cover the cost of accidents they cause, if an incident results in serious injury or property damage, the injured third party may go for deeper pockets, like your business.

According to the report by The Travelers Companies, almost nine in 10 business managers expect their employees to at least occasionally respond to work-related phone calls and texts outside traditional office hours. A third of them expect employees to take or participate in work phone calls while they're driving.

Forty-two percent of drivers take work calls and read work texts and e-mails while driving, according to the report.

Of those who do:

- 42% say it's because there may be an emergency at work.
- 39% believe they must always be available for their employers.
- 19% believe their bosses will become upset if they don't answer.

Another study found that 86% of people who drive for their jobs had used a mobile device for work purposes while driving during the prior three months. An astounding 29% participated in video calls while driving.

These behaviors put the health and lives of the drivers at risk, along with those of their passengers and the motorists with whom they share the road.

In addition to unnecessary pain and suffering, resulting accidents can incur thousands or even millions of dollars in legal liabilities for the drivers and their employers.

What to do

Also, employees should find safe places to stop their vehicles if they feel it necessary to check messages or respond to calls or texts from work. Your staff should feel secure enough in their positions that they can also refuse to respond until they are safely parked.

Distracted driving causes avoidable, tragic accidents. These are bad enough when people make voluntary irresponsible decisions. They are worse when drivers feel they have no choice.

Employers can take action

- Include in your employee handbook policies discouraging use of mobile devices while driving on company business;
- Make safe driving part of the company's culture so that employees will have an expectation that they must drive safely;
- Explicitly state that no phone call, e-mail or text message is so important that it cann't wait until the driver has stopped driving;
- Explicitly state in your workplace policies that no employee will be expected to participate in video calls while driving; and
- Discourage managers from calling, texting or e-mailing employees when they know employees are driving.

If employers and employees change their attitudes, they can make the highways safer for all.

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New Rule Provides Clarity for Employers, Subcontractors

The takeaway

This new rule will provide employers with clarity and certainty in instances where they may be considered joint employers, either when working with contractors or as franchisees.

However, employers still face some risk and should ensure that managers stay within the confines of the rules when establishing project goals and directing the work of third-party providers such as subcontractors and staffing agencies through direct supervision or task assignment. When dealing with these workers, managers should focus on what needs to be done rather than how the vendor's employees perform it.

For franchisees, it will now be more difficult to pull franchisors into labor disputes and collective bargaining, which may prompt unions to focus on site-specific organizing.

Why Safety in Design Should Lead Every Project

TOO OFTEN, safety on construction sites is treated as a field problem managed after work begins. By then, many of the most significant risks are already built into the job. Safety in design flips that approach by identifying and eliminating hazards before ground is ever broken.

Safety in design is a proactive process that integrates safety into the earliest stages of planning, engineering and layout. The goal is simple: to remove or reduce risks at their source rather than relying on protective equipment, procedures or workarounds later. For construction executives, design safety can mean fewer injuries, lower costs and smoother project delivery.

This approach requires project teams to think through how a structure will be built, used, maintained and eventually demolished — and address hazards at each stage. That means involving safety professionals, engineers and operations personnel so risks can be engineered out rather than managed in the field.

How design decisions reduce risk

Many of the most effective safety improvements are straightforward design choices made early in a project. Each of these decisions removes a hazard before it reaches the job site, reducing reliance on administrative controls or worker behavior to stay safe:

- Add roof parapets or guardrails to reduce fall risks and limit the need for active fall protection systems.
- Relocate rooftop equipment to ground level to eliminate work at height during maintenance.
- Design site layouts to separate pedestrian and vehicle traffic and improve equipment flow.
- Ensure adequate space for safety equipment like eyewash stations and spill kits.
- Plan access for safe removal and replacement of heavy equipment like generators.

A gap between design and construction

Despite its benefits, safety in design has historically been underutilized in the U.S. Designers often distance themselves from construction-phase safety due to limited training in safety practices and concerns about increased liability.

That disconnect creates risk. Designers ultimately dictate how a project is built, including the materials and assembly methods used, yet they are often not directly involved in construction safety planning.

Design-build firms tend to perform better in this area. Designers and builders work within the same organization, so they can collaborate more effectively.

Construction teams flag safety concerns during design, and those lessons carry forward into future projects.

Companies working with outside design firms should insist on similar collaboration.

Owners and contractors should consider bringing designers together with construction managers and safety teams to review risks and identify safer alternatives.

Why early involvement pays off

- **Lower total project costs:** Addressing hazards early avoids costly redesigns, delays and injury-related expenses.
- **Fewer incidents and disruptions:** Eliminating risks upfront reduces the likelihood of accidents that halt work and injure workers or third parties.
- **Improved productivity:** Safer, better-designed work sites are more efficient and easier to navigate.
- **Reduced insurance and liability exposure:** Fewer claims and stronger safety records can improve underwriting outcomes.
- **Stronger competitive position:** Many project owners now expect documented safety plans as part of bids.

A shift that is gaining momentum

Safety expert Georgi Popov notes that historically, most safety efforts have focused on the operational phase of projects. In an interview with *Construction Dive*, he said that is changing as more organizations recognize the value of early intervention.

"Our goal is to manage risk throughout the life cycle of a system or building, starting with the design concept," Popov said, adding that earlier involvement helps eliminate embedded risks before they reach the field.

In short, projects are safer when they are designed that way from the start.

Workplace Issues

AI Deepfakes Fuel New Wave of Harassment

THE RISE of generative artificial intelligence is creating a troubling new category of workplace risk: employees using AI-generated "deepfakes" to harass, humiliate or retaliate against co-workers.

While harassment claims are nothing new, employers should be aware that this emerging form of misconduct is already appearing in lawsuits and is expected to grow as AI tools become cheaper, easier to use and more realistic. These incidents can involve sexually explicit fake videos, manipulated recordings depicting an employee violating company policy or altered audio suggesting someone made offensive or abusive remarks.

It's important that employers understand this emerging form of workplace harassment.

Recent cases

In one recent case, a law enforcement officer alleged colleagues created and circulated an AI-generated video depicting him in a sexualized scenario meant to mock his sexual orientation.

In another, a television meteorologist sued her employer after deepfake sexual images using her likeness were circulated and, she claimed, the issue was inadequately addressed by her employer.

Appellate courts have also upheld significant verdicts where employers failed to act after deepfake content spread within organizations.

Meanwhile, the volume of deepfake content is exploding. Reports have found millions of deepfake files circulating online, with sexually explicit content making up the majority. As these tools become more accessible, misuse in the workplace is likely to increase.

Existing laws still apply

Harassment involving deepfakes is generally evaluated under the same standards as traditional workplace harassment claims. If the content targets an employee based on protected characteristics such as gender, race or sexual orientation — and contributes to a hostile work environment — employers may face liability under federal and state anti-discrimination laws if complaints are not handled appropriately.

Employers may also be exposed to claims involving:

- Defamation
- Invasion of privacy
- Intentional infliction of emotional distress
- Violations of emerging state laws targeting nonconsensual deepfake content

Why it's an issue

Most employee handbooks and anti-harassment policies were drafted before generative AI became widely available, so they do not explicitly address synthetic media or AI misuse.

As a result, employees may not clearly understand that this conduct is prohibited, and employers may have a harder time defending their policies if litigation arises.

What employers can do

- **Update anti-harassment policies.** Explicitly prohibit creating, sharing or possessing AI-generated content that is sexually explicit, defamatory or targets protected characteristics in your policies.
- **Address off-duty conduct.** Make it clear that behavior outside of work that affects the workplace can be subject to disciplinary action.
- **Enhance investigation protocols.** Treat digital content as potentially manipulated evidence. Verify its authenticity and document findings carefully.
- **Train managers and employees.** They should know how to recognize deepfake harassment and respond appropriately.
- **Act promptly and consistently.** When issues arise, apply discipline regardless of the employee's role or tenure.
- **Monitor legal developments.** States continue to pass laws targeting deepfake misuse and Congress is considering broader regulation.
- **Review insurance coverage.** Call us to see if your employment practices liability or cyber policies address claims involving synthetic media. An employment practices liability insurance can cover litigation costs, including legal fees, discovery, settlements and judgments in harassment cases.

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