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Appeals Court Upholds Obama-era Joint Employer Standard as NLRB Rulemaking Continues

Volume 42

Issue 5

January 15, 2019

Authors
Nancy Vary, JD
Abe Dubin, JD

In its 2015 *Browning-Ferris Industries of California* decision, a sharply divided NLRB held that entities having indirect or potential control over another company's employees may be deemed joint employers for collective bargaining, unfair labor practices and other purposes, even if they never exercised control. Shortly after the NLRB proposed joint employer regulations grounded on direct and immediate control over another entity's workers, the U.S. Court of Appeals for the D.C. Circuit upheld the indirect control standard but not its application in *Browning-Ferris* and sent the case back to the NLRB for further proceedings consistent with its opinion. It remains to be seen what, if any, impact the court's ruling will have on the board's rulemaking, as uncertainty over the joint-employer standard continues.

Background

From 1984 until 2015, the NLRB required a business to exercise direct and significant control over another entity's workers in order to be deemed a joint employer for purposes of the National Labor Relations Act (NLRA). In 2015, the Obama board issued its controversial *Browning-Ferris Industries of California, Inc.* decision, adopting a new, expansive standard for determining joint employer status under the NLRA. Under this standard, employers that have only indirect control (or the ability to exercise such control) over the essential terms and conditions of another entity's employees are joint employers for liability and collective bargaining purposes. (See our September 25, 2015 *For Your Information*.) Browning-Ferris appealed the decision to the U.S. Court of Appeals for the D.C. Circuit.

On December 14, 2017, the board overruled *Browning-Ferris* in *Hy-Brand Industrial Contractors*. At the board's request, the D.C. Circuit then remanded the *Browning-Ferris* case to the agency "for further consideration in light of *Hy-Brand.*" After the NLRB inspector general concluded that Member Emanuel should not have participated in the *Hy-Brand* deliberations, the board reversed itself. Because vacating the *Hy-Brand* decision reinstated the *Browning-Ferris* decision, the board then asked the D.C. Circuit to reinstate the *Browning-Ferris* appeal. Citing "extraordinary circumstances,"

a split panel of the appeals court agreed to restore the appeal to its docket on April 6. (See our May 10, 2018 *For Your Information*.)

The following month, the NLRB announced that it was considering rulemaking to address the standard for determining joint-employer status under the NLRA. On September 14, 2018, the board published a proposed rule that would restore the pre-*Browning-Ferris* standard. Under that standard, joint employment would be found "only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." To be deemed a joint employer, an employer would have to "possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine." (See our September 14, 2018 *FYI Alert*.)

DOL to Pursue Joint Employer Rulemaking

The Department of Labor's Agency Rule List on its **Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions** includes "Joint Employment Under the Fair Labor Standards Act" (FLSA). The DOL **said** it is considering changes to the regulations that it interprets and enforces concerning the joint employment relationship under the FLSA. Like the NLRB, it has indicated that it will pursue rulemaking to provide clarity and more uniform standards nationwide.

The NLRB initially set a 60-day comment period on the proposed joint employer rule, but later issued two 30-day extensions. On January 11, the NLRB announced a third extension of the deadlines to submit comments and to reply to comments to January 28 and February 11, 2019, respectively, in order to address the D.C. Circuit's December 28, 2018 decision in *Browning-Ferris Industries of California v. NLRB* (discussed below).

> **Buck comment.** Both the NLRB and the DOL were among the federal agencies that were fully funded through October 1, 2019 in a "minibus" funding bill (H.R. 6157) the president signed last September. Because the agencies are fully operational during the current government shutdown, we expect their rulemaking efforts to continue.

D.C. Circuit weighs in

On December 28, a 2-1 ruling by a panel of the D.C. Circuit in *Browning-Ferris Industries of California v. NLRB* held that the common law of agency controls who is a joint employer, noting that the NLRA does not define "employer" or "joint employer." Upholding the board's *Browning-Ferris* standard, the panel concluded that both reserved authority to control another company's employees and indirect control over employees' terms and conditions of employment may be relevant in determining joint employer status — and that the NLRB may decide how much weight to give those factors in making that determination.

Nonetheless, the majority opinion found that the board applied the indirect control factor too broadly in this case. It said that the Board failed to distinguish between indirect control over essential

employment terms — which is relevant to joint employer status — and indirect control recognized under common law as intrinsic to ordinary third-party contracting arrangements (such as cost-plus billing, cost containment, task descriptions, performance basics, and contractor "objectives" and "expectations") — which is not relevant to joint employer status. The panel held that, to find joint employment under the NLRA, the board must find both a common-law employment relationship and sufficient control over employees' essential terms and conditions of employment to permit "meaningful" collective bargaining. Here, it found that the board failed to define "meaningful" collective bargaining and to make clear what employment terms Browning-Ferris jointly controlled to make such bargaining possible. Notably, the panel did not decide whether an unexercised right to control by itself could establish joint employment.

The panel remanded the case to the board to reformulate the *Browning-Ferris* test, at least as it applies to Browning-Ferris, and to "erect some legal scaffolding that keeps the inquiry within traditional common law bounds." In dissent, Judge A. Raymond Randolph wrote that the majority decision did not correctly construe the concept of "control" under common law and that the court should not have issued its opinion in light of the NLRB's joint employer rulemaking. Whether the board or Browning-Ferris will seek review of the panel decision by the full appellate court is unclear.

In closing

After the NLRB proposed joint employer regulations grounded on direct and immediate control over another entity's workers, the court largely endorsed an indirect control standard and sent the case back to the board to reformulate the *Browning-Ferris* test. While it remains to be seen what, if any, impact the court's ruling will have on the board's reformulation or rulemaking, uncertainty over the joint-employer standard is likely to remain for some time.

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