

Joint Employment under NLRA: Interpreting D.C. Circuit Court's *Browning-Ferris* Decision

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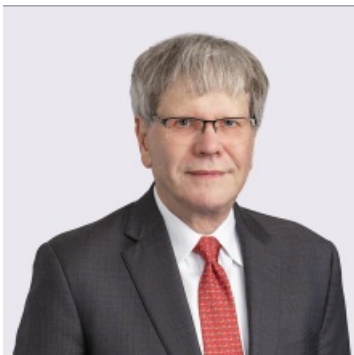
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In a highly anticipated decision on the National Labor Relations Board's controversial 2015 joint-employer standard under the National Labor Relations Act, the federal appeals court in the District of Columbia has partially upheld the standard. *Browning-Ferris Industries of Cal., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018).

The Court affirmed, as consistent with common law, "the Board's articulation of the joint-employer test, which includes consideration of a putative joint employer's reserved right to control and its indirect control over the employees' terms and conditions of employment." However, the Court reversed the Board's application of the indirect-control element to the extent it did not distinguish between indirect control the common law of agency considers inherent in ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment. The Court remanded that aspect to the Board for it to explain and apply its test in a manner consistent with the common law of agency.

History of the Joint-Employer Standard

For more than 30 years, the Board consistently maintained that a joint-employer relationship existed only where "two separate entities share or codetermine those matters governing the essential terms and conditions of employment." To support a joint-employer finding, the Board required evidence that a putative joint employer "meaningfully affect[ed]" matters relating to the employment relationship and that its control over such matters was "direct and immediate."

In 2015, the Board expressly overruled this extensive precedent, articulating a new, two-factor test for determining joint-employer status. *Browning-Ferris*, 362 NLRB No. 186. The Board's new *Browning-Ferris* standard would evaluate:

1. Whether a common-law employment relationship exists; and
2. Whether the putative joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining."

In applying both prongs of the test, the Board announced it would no longer require "direct and immediate" control over workers to establish a joint-employer relationship. Instead, it would consider both reserved and indirect control, such as through an intermediary or through contractual provisions that reserve the right to control, as potentially sufficient evidence to establish a joint-employer relationship, regardless of whether the right to control is ever exercised.

Employers and pro-employer groups widely criticized the *Browning-Ferris* decision as impermissibly vague and impractical. The new standard lacked adequate guidance on potential bargaining obligations and the types of reserved or indirect control that may result in a joint-employment finding, among other things. It also failed to serve the purpose

of the National Labor Relations Act by potentially imposing obligations and joint-and-several liability on a business that did not play an active role in making decisions regarding the terms and conditions of employment.

In December 2017, in *Hy-Brand*, the Board overruled *Browning-Ferris* and reinstated the previous joint-employer standard, which included the “direct and immediate” control requirement. 365 NLRB No. 156. Unfortunately, *Hy-Brand* was quickly vacated. The Board’s Inspector General had determined that Board Member William Emanuel should not have participated in the decision because of a conflict-of-interest based on his prior law firm’s representation of one of the parties in that case. Thus, the *Browning-Ferris* joint-employer standard was revived and remains Board precedent for joint-employment determinations.

In September 2018, the Board shifted course. Instead of following its traditional approach of addressing such issues through its decisions on a case-by-case basis, it formally proposed a rule that would reinstate the pre-*Browning-Ferris* standard. Public comments to the proposal must be submitted by January 14, 2019. Some anticipated a final rule may be issued in mid-2019, although a letter from General Counsel Peter Robb to the Board in December 2018 that criticized the proposal may cause a delay. Robb argued in his letter that the Board’s proposal leaves open such important questions as: (1) which employment terms are “essential,” (2) which of those “essential” terms are critical in determining whether an entity is a joint employer, (3) how many (and to what extent) terms must actually be subject to the putative joint employer’s direct and immediate control in order to establish joint-employer status, and (4) what is the meaning of “substantial,” “limited,” and “routine” in the proposed rule.

Meanwhile, and at the Board’s request, the D.C. Circuit issued its *Browning-Ferris* decision, which has been pending for several years. The Court’s opinion likely will affect the Board’s formulation of the final rule, but the extent of its impact remains to be seen.

D.C. Circuit’s *Browning-Ferris* Decision

On appeal, the D.C. Circuit approved, as consistent with common law, the Board’s *Browning-Ferris* two-factor test. The Court also determined that the Board properly considered both the putative employer’s reserved right to control and its indirect control as factors for determining whether businesses should be considered joint employers.

The Court noted, however, that indirect control is relevant to the joint-employer analysis only if it relates to essential terms and conditions of employment. Here, the Court said, the Board failed to apply the “indirect control” factor within the relevant boundaries of the common law because it did not differentiate between relevant forms of indirect control (*i.e.*, related to the essential terms and conditions of employment) and those inherent to contractual business relationships (*e.g.*, objectives, basic ground rules, and expectations of a third-party contractor). To that end, the Court stated, “[t]he Board’s analysis of the factual record in this case failed to differentiate between those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third-party contract relationships.”

Consequently, the Court remanded the case to the Board to identify which specific facts supported its joint-employer finding and to further articulate a “legal scaffolding” for application of the indirect control factor that “keeps the inquiry within traditional common-law bounds and recognizes that ‘[s]ome such supervision is inherent in any joint

undertaking, and does not make the contributing contractors employees.”

Additionally, the D.C. Circuit held the Board did not meaningfully apply the second step of the new standard – that is, whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining. The Court said the Board failed to identify what terms and conditions are “essential” to make collective bargaining meaningful or to clarify what “meaningful collective bargaining” might require. The Court suggested that, if the Board once again finds *Browning-Ferris* a joint employer on remand, the Board should “(i) apply the second half of its announced test, (ii) explain which terms and conditions are ‘essential’ to permit ‘meaningful collective bargaining,’ and (iii) clarify what ‘meaningful collective bargaining’ entails and how it works in this setting.”

Significantly, the Court did not address employers’ burning question regarding whether indirect or reserved control alone may be sufficient to support a joint-employer finding.

Implications

As noted above, the impact of the Court’s lengthy opinion on what employers should anticipate from the Board’s proposed joint-employer rulemaking is not readily apparent.

It is reasonable to expect some changes to the final rule – especially in light of the Court’s strong statement on the interpretation of the common-law principles of agency. Further, the Court admonished the Board that “[t]he policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law’s definition of a joint employer. The Board’s rulemaking, in other words, must color within the common-law lines identified by the judiciary.” Thus, it appears that wholly disregarding reserved or indirect control as a relevant common-law factor in the Board’s final rule may violate aspects of the D.C. Circuit’s holding.

The Court’s guidance otherwise should prove useful to the Board in finalizing the joint-employer rule. The Court echoed employers’ criticism that the *Browning-Ferris* standard was vague and failed to provide a blueprint of what types of indirect control could give rise to a joint-employment finding. It also expressed concern that the Board’s failure to articulate what terms and conditions of employment it considers essential to meaningful collective bargaining could lead to bargaining obligations, joint-and-several liability, and other issues that do not align with the purposes of the National Labor Relations Act.

The Court also recognized that “Congress delegated to the Board the authority to make tough calls on matters concerning labor relations” and “to broader policy questions about promoting effective collective bargaining.” Although it did not extend this deference to the Board’s interpretation of common-law principles of agency, the Court implied that this deference would apply to the Board’s interpretation of what terms and conditions of employment are “essential” to “meaningful collective bargaining,” what “meaningful collective bargaining” entails, and how it would work in a joint-employment setting.

The Board may have a valid argument that it is entitled to deference on the issue of what is necessary for meaningful and effective collective bargaining. For example, the Board could embrace the second step of the *Browning-Ferris* standard in its final rule and attempt to demonstrate that imposing joint-employer obligations in the absence of “direct and immediate” control over the essential terms and conditions of employment does not permit meaningful collective bargaining or further the purposes of the Act.

The Court's *Browning-Ferris* opinion is nuanced and several questions remain unanswered. There is no guarantee or assurance that a final rule incorporating a "direct and immediate" control requirement would withstand judicial scrutiny. Consequently, the Court's caution that "the Board's rulemaking ... must color within the lines identified by the judiciary" underscores that the lines may be difficult to discern from the D.C. Circuit's opinion.

Please contact Jackson Lewis with any questions about this case or other workplace developments.

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