Insight *In-Depth Discussion*

NLRB Imposes New "Indirect Control" Joint Employer Standard in Browning-Ferris

BY MICHAEL LOTITO, MAURY BASKIN AND MISSY PARRY ON AUGUST 28, 2015

On August 27, 2015, the last day of Harry Johnson, III's term as a Board member, the National Labor Relations Board issued its long-awaited decision in *Browning-Ferris Industries of California, Inc.*[1] The Board voted 3-2 to change its joint employer standard with Chairman Pearce, Member Hirozawa and Member McFerran representing the majority and Member Miscimarra and Member Johnson dissenting. The question before the Board was whether Browning-Ferris Industries (BFI) was a joint employer with Leadpoint, a staffing services company, in a union representation election covering Leadpoint's employees.[2] The Board concluded that BFI and Leadpoint were joint employers under the representation petition filed by Teamsters Local 350. In finding that BFI was a joint employer with Leadpoint, the Board relied on BFI's indirect control and reserved contractual authority over essential terms and conditions of employment of the Leadpoint-supplied employees.

The decision will have a significant impact on businesses because for the first time in decades, the Board considered "indirect control" to be the main factor in determining whether a joint employer relationship existed under the National Labor Relations Act (NLRA or "the Act"). The Board overruled longstanding precedent to achieve this result.

The Board's decision had been widely anticipated since April 30, 2014, when the NLRB invited amicus briefs on whether it should adopt a new joint employer standard in *Browning-Ferris*. In its brief, the General Counsel for the NLRB, Richard Griffin, advocated adopting a new standard under which an entity would be a joint employer "if it exercised direct or indirect control over working conditions, had the unexercised potential to control working conditions, or where 'industrial realities' otherwise made it essential to meaningful bargaining." Although the majority denied that it was adopting the "industrial realities" test proposed by the General Counsel, the Board's decision appears to have gone even further than the General Counsel's proposed standard. The result is an extreme departure from established precedent.

The majority asserted that it was required to revisit the joint employer standard because the primary function and responsibility of the Board is to apply "the general provisions of the Act to the complexities of industrial life." The Board majority found the Board's current joint employer standard "narrower than statutorily necessary."[3] According to the Board, the definition of employer should encompass as many employment relationships as possible to foster collective bargaining.[4]

The majority asserted it was returning to the "traditional" joint employer standard.[5] It imposed a two-part test. The Board will now find that two or more entities are joint employers of a single workforce if they share or codetermine those matters governing the essential terms and conditions of employment. To determine whether a putative joint employer meets this standard, the Board's initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.

The Board specifically overruled its decisions in *TLI, AM Property, Lareco* and Airborne Express.[6] Prior to the Board's decision in *Browning-Ferris*, under decades-old legal precedent, two employers were found to be "joint employers" only when the two entities exerted such direct and significant control over the same employees that they shared or co-determined matters governing the essential terms and conditions of employment.[7] Relevant factors in making this assessment included the right to hire, terminate, discipline, supervise and direct the employees. In applying this test, administrative agencies and courts generally found that the control exercised by the putative joint employer must be actual, direct and substantial—not simply theoretical, possible, limited or routine.[8]

In *Browning-Ferris*, the Board majority rejected the requirement that the joint employer's control be direct and immediate. The Board found that the direct control requirement was not compelled by common law, so the Board was not compelled to adhere to the current standard. [9] The Board will now evaluate the evidence to determine whether an employer that uses a staffing company's employees affects the means or manner of those employees' work and terms of employment, either directly or indirectly. Under the new test, essential terms and conditions of employment include those matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction. However, the Board expanded essential terms and conditions of employment to include, "dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance."[10] The Board recognized that its new test would require a factual inquiry in every case.

The dissent, written by Members Miscimarra and Johnson, asserts that the Board made sweeping changes to the definition of employer and injected uncertainty into business relationships. The dissenters contend that the majority's new test does not return to pre-1984 standards. Instead, the majority has imposed a never-before-seen test that extends far beyond the congressional intent of the NLRA. The majority's test will find joint employment if there is any evidence of indirect control, even when no evidence of direct control exists. The dissent also asserts that the Board replaces a long-standing and predictable test with an ambiguous test that imposes far-reaching consequences and liability.

The dissent further contends that the Board's change in the rules for employers will have a substantial impact on the economy. The majority's test will foster bargaining instability by introducing too many conflicting interests on the employer's side. The dissent concludes that the new joint employer test will fundamentally alter the law for user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor and contractor-consumer business relationships.[11]

The dissent predicts that the majority's changes will make entities subject to new joint bargaining obligations, expand liability for unfair labor practices and breaches of collective bargaining agreements, and subject employers to economic protest activity that would have previously been unlawful secondary activity. In addition, the jurisdictional standards will combine the commercial data from both joint entities, which will extend jurisdiction to some small businesses.

The change in the well-established joint employer standard is significant. The new standard in *Browning-Ferris* requires the Board, on a case-by-case basis across multiple industries, to inject itself into complex business relationships, the structures of which are completely unrelated to labor relations. Employers will need to revisit and revise their current business practices to eliminate the risk of being found a joint employer under the NLRA, though the Board has given little guidance on how to guarantee non-joint status under the new standard. The new test may lead to the end of long-standing business relationships or a greater degree of influence by one employer over the terms and conditions of employment of another business to reduce risk and liability.

The Board's decision will not be the last word on the joint employment test. Initially, the decision is likely to be appealed. Further, more litigation will be required to resolve the myriad issues left unanswered by the Board in *Browning-Ferris*. If this new joint employer standard survives judicial review, NLRB Regional Directors, the Board and the courts will struggle for years to come to determine whether companies are joint employers, at the expense of employers nationwide.

See Footnotes ⌄

Authors

Michael J. Lotito (/people/michael-j-lotito)
Co-Chair, Workplace Policy Institute
San Francisco, CA
mlotito@littler.com (mailto:mlotito@littler.com)
(415) 677-3135

Maury Baskin (/people/maury-baskin)
Chair, Construction Industry Group
Washington, District Of Columbia
mbaskin@littler.com (mailto:mbaskin@littler.com)
(202) 772-2526

Elizabeth Parry (/people/elizabeth-parry)

Special Counsel
Walnut Creek, CA
mparry@littler.com (mailto:mparry@littler.com)
(925) 927-4542

Focus Areas

Workplace Policy Institute® (/products-and-services/workplace-policy-institute%C2%AE)

Labor Management Relations (/labor-management-relations)

Staffing and Contingent Workers (/staffing-and-contingent-workers)

Legislative and Regulatory Practice (/practice-areas/legislative-and-regulatory-practice)

Related Publications

The NLRB Refuses to Require its General Counsel to Explain the Joint Employer Case Against McDonald's (/publication-press/publication/nlrb-refuses-require-its-general-counsel-explain-joint-employer-case)

NLRB Chairman Pearce and GC Griffin Face Grilling by Senate Appropriations Committee (/publication-press/publication/nlrb-chairman-pearce-and-gc-griffin-face-grilling-senate)

NLRB's General Counsel Issues More Complaints Against Franchisor as Joint Employer (/publication-press/publication/nlrbs-general-counsel-issues-more-complaints-against-franchisor-joint)

Senate Hearing Focuses on Definition of Joint Employment (/publication-press/publication/senate-hearing-focuses-definition-joint-employment)