NLRB Overturns Obama Administration's Definition of 'Joint Employer'

Indirect control test had five major problems, board states

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The National Labor Relations Board (NLRB) jettisoned the Obama administration's much-criticized broad definition of "joint employer" on Dec. 14, a move that's been widely expected since President Trump appointed two additional Republicans to the board earlier this year. As a result, indirect control by one organization of another is no longer enough to be considered a joint employer. There must instead be direct control, making it tougher for contractors and workers at franchised businesses to form unions.

"This is a tremendously significant decision by the NLRB that benefits not merely employers, but our economy generally," said Mark Kisicki, an attorney with Ogletree Deakins in Phoenix. "It returns the board's interpretation of the act that provides meaningful standards that are reasonable and clear due to decades of board jurisprudence. This is a crucial step by the board in helping companies to be able to assess risks when structuring their business relationships."

The overturned definition of joint employer was developed in the board's *Browning-Ferris Industries* ruling in 2015, which had made it easier for companies to be held liable for violations committed by their contractors or franchisees. Now companies have a little more protection.

In its *Hy-Brand Industrial Contractors and Brandt Construction Co.* decision, the board stated that the indirect control test outlined in *Browning-Ferris Industries* "is a distortion of common law as interpreted by the board and the courts." Moreover, it said that "it is ill-advised as a matter of policy, and its application would prevent the board from discharging one of its primary responsibilities under the act, which is to foster stability in labor-management relations. Accordingly, we overrule *Browning-Ferris* and return to the principles governing joint-employer status that existed prior to that decision."

Applying the direct control test, which existed prior to *Browning-Ferris*, instead of the indirect control test, the board found that Hy-Brand Industrial Contractors and Brandt Construction Co. were joint employers.

In *Hy-Brand*, the board found that substantial evidence supported a finding that the two entities exercised joint control over essential employment terms involving Brandt and Hy-Brand employees; that the control was direct and immediate; and that it was not limited and routine. For example, Terence Brandt served as the corporate secretary for both companies, was directly involved in the decisions at both companies to discharge workers and identified himself as an official of Brandt when he signed letters informing two Hy-Brand strikers that they had been fired. The companies also had common employment policies.

Real-World Problems with Indirect Control Test

The vague indirect control standard of *Browning-Ferris* "created a lot of uncertainty about things like franchisor-franchisee relationships and contractor relationships," said Phillip Wilson, president and general counsel with the Labor Relations Institute in Broken Arrow, Okla.

The Obama administration was looking for ways to unravel "gig economy" relationships and the so-called fractured employment relationship, he said. "But they took a sledgehammer to an issue that requires much more finesse," he stated.

There's no doubt that contractor relationships and the freelance economy have dramatically altered the workplace, he added. "But concentrating on things like benefits portability—and health care and savings more generally—is much more productive than trying to just make everyone an employee of the biggest entity you can find."

In *Browning-Ferris*, the board expressly overruled prior decisions that required that control be exercised "directly, immediately and not in a limited and routine manner," noted Molly Kaban, an attorney with Hanson Bridgett in San Francisco. Under the *Browning-Ferris* definition, both direct and indirect control as well as the right to control essential terms and conditions, even if not exercised, could lead to a finding of joint-employer status.

"The joint-employer test has broad significance," Kaban said. Many new entities in a variety of industries could have been subjected to union-organizing campaigns and potential labor disputes where they previously were not, particularly businesses that relied heavily on staffing agencies or otherwise contracted or leased labor from third parties, she noted.

Unions also could have used *Browning-Ferris* to circumvent the National Labor Relations Act's (NLRA's) prohibition on secondary boycotts and to pressure users of contracted labor through strikes and picketing, even when their chief dispute was with the labor supplier, she added.

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Kisicki said the Obama board compounded that problem by failing to provide guidance on how it would interpret the "nebulous standard." As a result, businesses were forced to either exercise extreme caution in their business arrangements or take uncertain risks—"both of which significantly impaired economic growth," he said.

The *Browning-Ferris* case is before the U.S. Court of Appeals for the D.C. Circuit. That court might now send the case back to the board, noted Michael Lotito, an attorney with Littler in San Francisco and co-chair of its government affairs branch, the Workplace Policy Institute. Lotito said *Browning-Ferris* made it difficult for staffing agencies and client companies to establish clear relationships and for companies that outsource landscaping, security, housekeeping, janitorial and food services to know exactly what kind of joint liability might exist.

Five Legal Faults

In addition to these practical faults with the indirect test, the NLRB outlined in this decision, *Hy-Brand*, five legal ones:

- The *Browning-Ferris* test exceeds the board's statutory authority.
- The *Browning-Ferris* majority's rationale for overhauling the NLRA's definition of "employer"—to protect bargaining from limitations resulting from the absence from the table of third parties that indirectly affect employment-related issues—relied in substantial part on the inaccurate notion that present conditions are unique to our modern economy.
- The change made in *Browning-Ferris* was solely within the province of Congress, not the board. The House of Representatives passed legislation in November to reverse *Browning-Ferris* (/ResourcesAndTools/legal-and-compliance/employment-law/Pages/House-passes-joint-employer-bill.aspx) but that legislation has stalled in the Senate.
- The *Browning-Ferris* test deprived employees, unions and employers of certainty and predictability regarding the identity of the "employer."
- To the extent that *Browning-Ferris* sought to correct a perceived inequality of bargaining leverage resulting from complex business relationships involving entities that do not participate in collective bargaining, the inequality addressed was the wrong target and expanding collective bargaining to an employer's business partners was the wrong remedy.

Employers still may be found to be joint employers under the direct control test, as the board found in this case that Hy-Brand Industrial Contractors and Brandt Construction Co. were.

Dissenting Board Members Object to Rush to Reverse

Dissenting board members Mark Gaston Pearce and Lauren McFerran said that the board reversed *Browning-Ferris* even though:

- *Hy-Brand* should easily be decided without reaching the joint-employer issue by finding that the companies are a single employer rather than joint employers.
- The adoption of a new joint-employer standard makes no difference as to whether the companies in *Hy-Brand* are joint employers.
- No party in this case asked the board to reconsider *Browning-Ferris*.
- The board failed to give notice that it was considering a change in the law and failed to provide interested persons with an opportunity to file briefs.
- The D.C. Circuit is currently reviewing *Browning-Ferris*.

"To say that the majority is reaching out—and rushing—to reverse [*Browning-Ferris*] is an understatement," they stated.