Fourth Time's the Charm? NLRB Now Set to Change Joint-Employer Standard After Federal Appeals Court Punts Case Back to the Board

Insights
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A federal appeals court in Washington, D.C. recently issued a decision in the latest installment of the *Browning-Ferris* joint-employer dispute that should serve as a reminder to employers across the country that change is soon on the horizon. While the Court's August 1 decision has no immediate consequences for employers, you need to brace your organization for a significantly revised rule that will almost certainly be unforgiving to those employers participating in alternative staffing arrangements. What just happened – and what should you do to prepare?

A Quick Refresher

For historical reference, the Obama-era Board's 2015 *Browning-Ferris* decision held that, for a joint-employment relationship to exist, an employer need only have *the contractual right* to control an employee's working conditions – whether or not such control is ever exercised. In 2018, the United States District Court of Appeals for the District of Columbia upheld this new test but sent the matter back to the Board "for it to explain and apply its test."

Not so fast. By the time it had worked its way back to the NLRB, the political tides had changed in D.C. and the Trump-era Board viewed the matter differently. In 2020, the Trump-era Board reversed course and adopted its own rule on joint employment, overturning *Browning-Ferris* and fundamentally altering the definition of joint employment.

This *Browning-Ferris II* test requires that a would-be joint employer *actually exercise* substantial, direct, and immediate control over those *essential* terms and conditions of employment in order for a joint-employment relationship to exist. The union at issue in the matter asked the Board to reconsider its *Browning-Ferris II* decision, but the Board denied this motion (*Browning-Ferris III*).

***Browning-Ferris IV* on the Horizon**

After the Board denied the union's motion for reconsideration in *Browning-Ferris III*, the Union petitioned the D.C. Circuit seeking for review of the Board's rulings in *Browning-Ferris II* and *Browning-Ferris III* – arguing that the Board had arbitrarily defied the D.C. Circuit's 2018 orders.

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Though clearly agreeing with the union in that regard, the D.C. Circuit stopped short of expressly reaching that conclusion in last week's decision. Rather, it found that the Board had "made multiple overlapping errors" in its analysis and remanded the case back to the Board once again. This now sets the stage for *Browning-Ferris IV* – but once again the political winds have shifted and the NLRB is now controlled by a Democratic majority.

What Happens Next and How Should Employers React?

The D.C. Circuit's decision does not have any immediate consequences for employers. Rather, it simply means that *Browning-Ferris* is once again headed back to the Board for review. But of course, this time it will be before a Biden-appointed Board – which means the consequences will be profound.

The current Board has already indicated on several occasions that it intends to establish a broader joint-employer test. As we discussed late last year, it announced that it would soon issue proposed rulemaking on its joint employer standard. We may now get an official joint employer ruling from the Board in the interim by way of the decision-making (rather than rulemaking) process – although it remains to be seen how that will all play out from a timing standpoint.

Either way, employers need to brace for a significantly revised rule that will be as unforgiving to employers, if not more so, than *Browning-Ferris I*. The Trump Board's narrower *actual control* standard is destined to be set aside in favor of a broader right to control standard. If and when that happens, evidence of even potential, unexercised, and indirect control over *any* working conditions could be deemed sufficient to confer joint employer status.

If you have not yet done so, this may be an appropriate time to begin evaluating service contracts and related documents for language reserving the right of (direct or indirect) control over workers staffed by a third party when it comes to their employment terms and conditions.

Conclusion

We will continue to monitor the situation and provide updates as more information becomes available. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. Any questions may be directed to your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Labor Relations Practice Group or PEO and Staffing Industry Team.

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