Federal Court Upholds Unworkable Joint Employer Test

Insights
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With one final jolt to end the year, a federal appeals court ruled today that the impractical joint employer test originally adopted by the Obama-era National Labor Relations Board in 2015 was properly enacted and therefore remains in effect (*Browning-Ferris Industries v. NLRB*). This doesn't change much for employers' day-to-day operations, as the Trump Labor Board's efforts to overturn the controversial standard ran into a roadblock in early 2018 and the standard has effectively been in place for the better part of three years now.

The best hope for employers to have the test returned to a balanced standard might be to await the finalization of rulemaking from the NLRB itself, which could be on the horizon for 2019. For a quick recap of where we've been, a review of what happened today, and a forecast for where we expect to go from here, read on.

Where Have We Been?
The joint employment dilemma has taken many twists and turns in the recent past, and 2018 was an exceptional roller-coaster of a year when it comes to the legal standard. For over 30 years, the National Labor Relations Board (NLRB) held that two companies would only be considered "joint employers"—equally responsible for certain labor and employment matters—if they shared or codetermined those matters governing the essential terms and conditions of employment, and *actually exercised* the right to control.

However, in 2015, the Board renounced this joint-employer test in the controversial *Browning-Ferris* decision, eliminating the requirement that the employer actually exercise control. Instead, the NLRB decided that businesses need only retain the contractual right to control to be considered a joint employer—even if it has never exercised it. Further, the Board held that indirect control (e.g., control through an intermediary) would be sufficient to find joint employment.

The standard briefly reverted to its previous form in December 2017, when the Board effectively overturned *Browning-Ferris* in the *Hy-Brand Industrial Contractors, Ltd.* case. But just a few months later, in February 2018, the Board was forced to vacate that decision due to allegations that one of the Board members involved in the decision had an unacceptable conflict of interest. That means that, as of today, employers are still subject to the *Browning-Ferris* standard.

Unbeknownst to many, the underlying *Browning-Ferris* litigation churned on, despite the legal wrangling at the NLRB. It sat dormant for well over a year, as the case was appealed in 2015 and

argued to the court in March 2017. Today, the D.C. Circuit Court of Appeals issued its ruling upholding the current standard, further pinning employers into a difficult spot.

What Happened Today?

In a 2-1 decision, the D.C. Circuit Court of Appeals (often called the second-most powerful court in the country behind the U.S. Supreme Court) upheld the *Browning-Ferris* standard. The case itself involves Browning-Ferris Industries, an operator of recycling plants, and Leadpoint Business Services, a staffing company providing workers to perform jobs at the company (such as sorting through the recycled material, clearing sorting jams, and keeping the pivotal work areas clean). In 2013, the Teamsters union filed a petition with the Board seeking to represent a new bargaining unit consisting of both Browning-Ferris and Leadpoint workers, claiming they were joint employees of both organizations. In 2015, the Board agreed with the union and concluded that the two companies were joint employers.

To do so, the Board adopted a new test: it eliminated the requirement that an employer actually exercise control over the worker in order to be considered to be a joint employer. Instead, the NLRB ruled that businesses need only *retain* the contractual right to control to be considered a joint employer—even if it never exercises it. Further, the Board held that indirect control (e.g., control through an intermediary) could create a joint employment scenario.

The issue wound its way up to the D.C. Circuit, and after several fits and starts, it finally issued its ruling today. The court held that the "right-to-control" test adopted by the NLRB has "deep roots" in common law, and thus can be justified. It pointed out that indirect control over workers was a justifiable factor to consider when rendering a determination on joint employment status. "Retained but unexercised control has long been a relevant factor in assessing the common law master-servant relationship," the court concluded, ruling that the reservation of a right to control "underpins" the historical employer-employee dynamic.

However, the court did have reservations about the way the Board applied this new standard to the case at hand involving the Browning-Ferris and Leadpoint workers. It concluded that the Board never made a proper showing about which specific factors lead it to conclude that Browning-Ferris was a joint employer, and expressed concern "that some of them veered beyond the orbit of common law." For that reason, it remanded the case back to the Board—now controlled by a majority of Trump-appointees—for a more complete analysis and ruling on the matter.

Where Are We Going?

It is worth keeping an eye on this continuing litigation saga involving Browning-Ferris, as there is a chance that the case could ultimately be resolved in employers' favor. The case could be heard by an *en banc* full panel of judges from the D.C. Circuit, or could even end up at the U.S. Supreme Court. There is even a chance that, upon remand back at the Labor Board, the Trump-appointed majority could toss the unworkable test and revert things back to the balanced standard that had stood in place for over 30 years.

However, employers may instead want to keep an eye on the federal agency rulemaking process in 2019 for the better chance of progress on the matter. In September 2018, the Board announced a proposed rule whereby an employer would only be considered a joint employer if it shared or codetermined the "essential terms and conditions" of employment over the workers of another business, and there must exist evidence of direct and immediate control before a joint employer relationship can be found. This includes pivotal human resource activities such as day-to-day supervision, hiring, discipline, and firing. The employer would need to not only possess but actually *exercise* "substantial direct and immediate control" over the essential terms and conditions of employment in a way that is not considered "limited and routine."

As the Board explained, if the proposed rule is adopted, it will be insufficient to establish joint employer status "where the degree of a putative joint employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer)." By including such requirements, the proposal would almost certainly mean that fewer businesses would be found to be a joint employer by a court or agency.

Once the Notice of Proposed Rulemaking was officially published, the Board began a formal process that includes receiving and considering comments from interested parties and members of the public before any new rule can be officially established. The due date for comments was recently extended to January 14. (Meanwhile, the U.S. Department of Labor has also announced plans to issue a revised joint employment rule, although that agency is well behind the NLRB when it comes to movement on this issue).

After the comment period closes, it could take months for the rule to be finalized, as the Board will need to hold public hearings and will need to sufficiently address the substantive comments received (many of which will no doubt come from unions and other worker advocates). Moreover, critics of the rule could seek to block or delay it through the court system, especially if the notice-and-comment period is seen as lacking in substance. The incoming Democratic House of Representatives has already indicated that it has problems with the proposed rule, and we could see sparks fly on Capitol Hill when it comes to the battle over which standard will ultimately win out.

Conclusion

If you have questions about this decision or the joint employer rule proposal and how they might impact your business, contact your Fisher Phillips attorney or any attorney in our Staffing and Contingent Workers or Labor Relations Practice Groups.

This Legal Alert provides an overview of a specific federal decision and proposed rulemaking. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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