Navigating NLRB: A New Era For Joint Employment?

By **Peter Kirsanow**
September 18, 2018, 12:05 PM EDT

*From joint employment concerns to questions about email use and employee handbooks, employers today face a host of modern labor law issues amid a continually changing political and legal landscape. In this **Expert Analysis series**, former* National Labor Relations Board *members weigh in on recent issues before and within the board and share practical considerations to address them.*

Peter Kirsanow

Since 2015, the National Labor Relations Board's decision in Browning-Ferris Industries,[1] which governs when a company is considered an employer, has dominated labor news. Beginning in December 2017, an elaborate dance of twists and turns have left employers watching the legal standard vacillate from one extreme to another. Prior to Browning-Ferris, this issue was stable and well-established.

History

The joint employer analysis began 70 years ago when Congress passed the Taft-Hartley Act in 1947. In response to the expanding reach of the NLRB and U.S. Supreme Court, Congress passed Taft-Hartley to amend the definition of "employer" to include only those "acting as an agent of an employer." Grounded in this legislative history, the NLRB in the 1980s established its long-standing test for defining joint employers. In TLI Inc.,[2] and Laerco Transportation,[3] the board adopted a recent Third Circuit opinion in (ironically) NLRB v. Browning-Ferris Industries Inc.,[4] which stated that the "'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment."[5] The NLRB explained what it meant to "share or co-determine" matters: "To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."[6] Essentially, joint employer control over employment matters must be direct and immediate[7] and even actual, but "limited and routine" supervision and direction of another entity's employees was insufficient to establish joint employer status.[8]

This standard held for over 30 years until Browning-Ferris turned labor law on its head in 2015. In that decision, the NLRB, ignoring its precedent from the 1980s and earlier decisions stemming from Taft-Hartley, created a new, unpredictable standard that left employers hostage to the whims of the NLRB's current members. The NLRB found that two or more companies are joint employers of the same employees if they "share or co-determine those matters governing the essential terms and conditions of employment." Historically, a company must have exerted direct and immediate control over hiring, firing, discipline, supervision and direction to be a joint employer. Now, mere indirect control or a reserved, but unexercised, right to control was sufficient. Moreover, the NLRB expanded the

“essential terms” to include scheduling, seniority, overtime, assigning work, and determining the manner and method of work performance.

On Dec. 14, 2017, the NLRB overturned Browning Ferris in Hy-Brand Contractors Ltd.[9] In Hy-Brand, the NLRB — consistent with its desire to “provide[] certainty and predictability” — returned to its previous, long-standing requirements that a company exercise direct and immediate control over employees as a prerequisite to finding joint employer status. Under Hy-Brand, joint employer status again required proof that (1) a putative joint employer exercised control rather than merely having a reserved right to do so; (2) the control is direct and immediate and not indirect; and (3) the joint employer will not result from “limited and routine” control.

However, that stability was short-lived. On Feb. 9, 2018, NLRB Inspector General David Berry sent a report to board members stating the new member William Emanuel should not have participated in the Hy-Brand decision because his former law firm represented Leadpoint (one of the two alleged joint employers) in Browning-Ferris. Although Emanuel and his former firm had no involvement in the Hy-Brand case, Berry stated that Hy-Brand was a “vehicle to continue the deliberations of Browning-Ferris.” Based on Berry’s report, the other four members of the NLRB unanimously vacated Hy-Brand on Feb. 26, reinstating the 2015 Browning-Ferris standard.

Effect

The joint employer issue is important because it affects many employers and practices, including franchisor-franchisee relationships and any company’s utilization of staffing agencies.

For example, under Browning-Ferris, a company may be vicariously liable for violations of the National Labor Relations Act for actions — such as discipline or termination — committed by entities completely outside the putative joint employer’s control. These companies may also be subjected to another entity’s (such as a staffing agency’s) collective bargaining obligations even though the company had no role in the union campaign or collective bargaining negotiations. Franchisors (specifically, but not limited to fast food restaurants) could similarly be exposed to liability created by franchisees for decisions outside the franchisor’s control, such as minimum wage or overtime claims, because the franchisor sets some degree of consistency across the general procedures — but not day-to-day operations or supervision — governing the franchisees.

The new Browning-Ferris test for joint employers operates to expose companies to an expanding list of potential violations and liability for decisions not controlled or affected by the companies. In fact, the underlying decisions or policies may have been formed before the putative joint employer was even involved, but ongoing implementation would now operate to hook the separate company.

Businesses cannot operate with set expectations when the seemingly basic question of who constitutes their employees can change on a whim, particularly when based on a reserved, unexecuted right. Such shifts could result in liability that could (or should) not be anticipated.

Future

The decision to vacate Hy-Brand is far from the last word on the joint employer analysis.

Even before Hy-Brand, the U.S. House of Representatives passed the Save Local Business Act, which would amend the National Labor Relations Act and the Fair Labor Standards Act to only qualify a person as a joint employer if the person "directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment[,]" which includes hiring, firing, determining pay rates and benefits, day-to-day supervision, assigning work schedules and tasks, and administering discipline. The Senate has not yet debated the bill.

Regardless of the bill's status in the Senate, the NLRB has repeatedly expressed its intention to pursue notice-and-comment rulemaking to reverse the joint employer test in Browning-Ferris. Such rulemaking would be time-consuming, but would also allow both Emanuel and NLRB Chairman John Ring to participate despite their past firms' representation of putative joint employers and the alleged conflicts that may be raised as a result.

On Sept. 13, 2018, the NLRB followed through on its announced intentions and **released a draft rule** to redefine the test for whether an entity constitutes a joint employer. The proposed rule would only find a business qualifies as a joint employer of another business's workers if it "possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority" will no longer establish a joint employer relationship. The rule represents a complete reversal of the Browning-Ferris standard that companies could be joint employers if they possess "indirect" control, whether or not ever exercised. The draft was published in the Federal Register on Sept. 14, which triggered a 60-day public comment period, after which the NLRB will consider any public comments received when promulgating a final rule. Ring was joined by Emanuel and Member Marvin Kaplan in proposing the rule over Member Lauren McFerran's dissent.

In addition to rulemaking, at least two joint employer cases are working their way through the NLRB's administrative system. Both Orchids Paper Products Co.,[10] and Preferred Building Service Inc.,[11] are on appeal to the NLRB, challenging administrative law judge rulings that found companies were joint employers of workers supplied by staffing companies. It is unclear whether the IG report would require Ring or Emanuel to recuse themselves from either case as their firms were not involved, but the cases arguably represent a continuation of Browning-Ferris.

Furthermore, the U.S. Department of Labor is working to update its approach to joint employer liability, with plans to restrict the scenarios in which one business is responsible for the wage-and-hour violations of a contractually related company. The DOL has already withdrawn an Obama-era memo directing the department to apply joint employment "as broad as possible" under the FLSA. On Sept. 12, Secretary of Labor Alexander Acosta stated that the DOL was "giving serious consideration to writing a rule" to "provide a clearer and more permanent approach to joint employer." Acosta stressed the importance of business knowing the "rules of the road."

Finally, the 2015 Browning-Ferris decision that started this whole mess is currently on appeal to the D.C. Circuit. Issues have been briefed and argued and a decision could be forthcoming. If not for the procedural ping-pong that played out at the NLRB from December 2017 through February 2018, a decision already may have been issued.

Thus, while Browning-Ferris is currently the standard upon which joint employer analysis rests, its reign may be short-lived as a number of independent challenges to its vitality loom. Until such time as the standard changes, employers should examine the degree to which their third-party contracts afford control over third-party employees. Employers should use caution in exercising control, whether direct or indirect, over wages, hours, and terms and conditions of another entity's employees.

Peter N. Kirsanow is a partner at Benesch Friedlander Coplan & Aronoff LLP. He served as a member of the NLRB from January 2006 to December 2007.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 362 NLRB No. 186 (2015)

[2] 271 NLRB 798, 798 (1984)

[3] 269 NLRB 324, 325 (1984)

[4] 691 F.2d 1117 (3d Cir. 1982)

[5] Browning-Ferris Industries Inc.at 1123

[6] TLIat 798;Laercoat 325

[7] TLIat 798-799

[8] TLIat 799;Laercoat 326

[9] 365 NLRB No. 156 (2017)

[10] No. 14-CA-184805

[11] No. 20-CA-149353