BATTLE OVER JOINT EMPLOYER TEST CONTINUES

The end of 2018 and the beginning of 2019 have seen continued efforts to alter the joint employer test, which is applied by courts and the National Labor Relations Board ("NLRB") to determine whether two business entities are considered joint employers and therefore responsible for each other's labor practices under the National Labor Relations Act ("NLRA"). The U.S. Court of Appeals for the D.C. Circuit entered a somewhat confusing, split decision in *Browning-Ferris Industries*, which could cause greater uncertainty over what the proper joint employer test is. Meanwhile, the NLRB has moved forward with its efforts to implement a rule that would change the joint employer test, despite widespread criticism of its rulemaking efforts.

D.C. Circuit Court Largely Affirms NLRB's Browning-Ferris Decision

The Obama Labor Board originally decided *Browning-Ferris* in August 2015. The Board's decision in that case made it easier for employees to prove that two companies are both acting jointly as an individual's employer, by returning to the common law standard for joint employers. Under the *Browning-Ferris* standard, joint employer status can be shown based on the actual or *potential* authority to exercise control, directly or indirectly, over another company's employees, regardless of whether the putative joint employer ever actually exercised that authority. Thus, a company which reserved the right to hire, fire, discipline, or otherwise control another company's employees in a contract – such as a franchise agreement or a staffing contract – could be liable for unfair labor practices by the other company and could be required to participate, to some extent, in collective bargaining with the employees' union. *Browning-Ferris* was an important step toward holding employers responsible for their labor policies and practices in a modern economy that involves franchise agreements and other relationships through which one company indirectly controls another company's workers.

The Trump Board reversed *Browning-Ferris* on December 14, 2017, through its decision in *Hy-Brand Industrial Contractors*, and returned to a more demanding joint employer test. However, the *Hy-Brand* decision was vacated in February 2018 due to a finding that Board Member William J. Emanuel, a Trump appointee, had violated ethics rules by participating in *Hy-Brand*. Member Emanuel participated in that case despite conflict-of-interest concerns based on his previous law firm Littler Mendelson's representation of one of the employers in *Browning-Ferris*, which *Hy-Brand* overruled. After *Hy-Brand* was vacated, the *Browning-Ferris* standard was reinstated.

The employers appealed the NLRB's *Browning-Ferris* decision, and after *Hy-Brand* was vacated, the D.C. Circuit Court finally issued its decision in *Browning-Ferris* on December 28, 2018. In its opinion, the appellate court appears to accept the NLRB's joint employer test articulated in *Browning-Ferris*, stating that the Board's standard has "deep roots in the common law" and approving of the consideration of both an employer's reserved right to control and its indirect control over another company's employees. However, the court also concluded that the NLRB failed to limit its consideration of this indirect control factor to the workers' essential terms and conditions of employment, as required by the common law, so the court refused to enforce the Board's order and instead sent the case back to the NLRB to reconsider the case in light of the court's decision. The court noted that because the definition of joint employer under

the NLRA is based on common law principles, it is up to the courts, not the NLRB, to decide how to define an "employer" under the Act. Judge A. Raymond Randolph dissented, in large part because the NLRB is currently involved in the administrative rulemaking process in an attempt to change the joint employer test, as discussed below.

The split nature of the D.C. Circuit Court's decision led to disagreement about its effect, with some news publications announcing that the court affirmed the NLRB's joint employer test, and others announcing that the court invalidated that test. While the full effect of this decision is not yet clear, the court did accept and affirm the most important aspect of the current joint employer test: that the Board can and should consider *indirect* control over employees, as well as power that is *reserved* but not used. The court did not reach the question of whether the reserved right of control standing alone, without any evidence of the actual use of that authority, could establish a joint employer relationship. Since the court ruled the Board must follow the common law standards, which are developed by courts, the NLRB should not be able to immediately revert back to its more demanding test when it reconsiders *Browning-Ferris* (although it may reach a different conclusion on the specific facts of that case).

NLRB Pushes Forward With Proposed Joint Employer Rule

After the NLRB's decision in *Hy-Brand* was vacated in early 2018, the Trump Board took a different tack and proposed to change its joint employer test through the administrative rulemaking process. The NLRB's new proposed rule, which was published on September 14, 2018, would once again undo *Browning-Ferris* and return to a more business-friendly standard. As the Board explained in its press release, under the proposed rule "an employer may be found to be a joint-employer of another employer's employees only 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 would no longer be sufficient to establish a joint-employer relationship." The proposed rule goes on to note that the NLRB is "presently inclined to find, consistent with prior Board cases, that even a putative joint employer's 'direct and immediate' control over employment terms may not give rise to a joint-employer relationship where that control is too limited in scope."

This proposed rule has been sharply criticized by labor advocates. The AFL-CIO submitted a filing to the NLRB calling attention to the extent to which the Board secretly relied on input from industry groups like the U.S. Chamber of Commerce in drafting the new rule. Additionally, a group of law professors submitted comments to the Board stating that the Board failed to conduct any economic analysis before concluding that the *Browning-Ferris* rule would have negative economic consequences for businesses, and that the Board ignored available evidence on the costs that this proposed rule would have on workers.

The NLRB may have new hurdles for its proposed rule in light of the D.C. Circuit Court's *Browning-Ferris* decision. In that decision, the court acknowledged the ongoing rulemaking process and stated: "The policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, must color within the common-law

lines identified by the judiciary." Since the current proposed rule would exclude entirely any consideration of indirect control or reserved authority, it appears to be drafted outside the "common-law lines" defined by the D.C. Court. Based on the appellate court's opinion, House Democrats sent a letter to NLRB Chairman John Ring on January 8, 2019, urging the Board to withdraw its proposed rule and to comply with the joint employer test stated in *Browning-Ferris*.

The NLRB's proposed rule is still available to review online at the following website: https://www.federalregister.gov/documents/2018/09/14/2018-19930/the-standard-for-determining-joint-employer-status. The Board deadline to receive public comments on the proposed rule, which was originally set for November 13, 2018, was once again extended by the Board on January 11, 2019, in light of the D.C. Court's decision. The new deadline for public comments is January 28, 2019. Public comments may be submitted through the Federal Register's website, listed above. Labor organizations and workers who believe that employers should be held accountable for their labor practices and policies are strongly encouraged to submit comments opposing the proposed rule, supporting the current joint employer standard, and urging the Board to apply the common law standard, as required by the D.C. Court of Appeals.

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This release informs you of items of interest in the field of labor relations. It is not intended to be used as legal advice or opinion.

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