SEYFARTH SHAW

Management Alert

NLRB Overturns Browning-Ferris Joint Employer Standard

By Joshua Ditelberg

***Seyfarth Synopsis**:* In Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (December 14, 2017), by a 3-2 vote, the National Labor Relations Board (NLRB or Board) overturned its 2015 decision in* Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (Browning-Ferris), *362 NLRB No. 186 (2015), p*etition for review docketed Browning-Ferris Indus. of Cal. v. NLRB, *No. 16-1028 (D.C. Cir. filed Jan. 20, 2016) and restored its 30-year test for determining whether separate businesses are "joint employers" under the National Labor Relations Act (NLRA).*

Joint employer status potentially can exist under the NLRA -- and other employment laws -- in a variety of circumstances including labor user-supplier, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer relationships.

The Board's joint employer doctrine is significant because a unionized joint employer has or shares an obligation to collectively bargain over those employment terms it controls or jointly controls. Similarly, a union or non-union joint employer may be found to have committed unfair labor practices within the scope of its control over the workplace. Additionally, under the NLRA, a union can engage in certain forms of picketing, secondary boycotts, or other economic protest activity against an entity determined to be a joint employer instead of a neutral third party.

In *Browning-Ferris,* the Board majority (3-2) held that even when two entities never have exercised joint control over essential employment terms, and even when any joint control is not "direct and immediate," they still will be joint employers based on the existence of "reserved" joint control or "indirect" control or control that is "limited and routine."

As the *Hy-Brand* Board majority underscored, the breadth and vagueness of such a joint employer test threatened to ensnare a vast range of economic relationships, including:

- insurance companies that require employers to take certain actions with their employees in order to comply with policy requirements for safety, security, health, etc.
- franchisors
- banks or other lenders whose financing terms may require certain performance measurements
- any company that negotiates specific quality or product requirements
- any company that grants access to its facilities for a contractor to perform services there, and then regulates the contractor's access to the property for the duration of the contract
- any company that is concerned about the quality of contracted services
- consumers or small businesses who dictate times, manner, and some methods of performance of contractors

Among the criticisms of the *Browning-Ferris* test were the NLRB's inability to clearly articulate what "indirect" and "reserved" control meant, and how to distinguish such factors from realities which the common law long recognized were part of a contractor relationship, such as establishing the standards of a worker's performance, the mere fact that the customer owns the premises where services will be provided, the customer's bargaining power in relation to (but not actual control over) the service provider, cost control initiatives which influence but do not dictate the provider's employees' compensation, and potential/reserved but unexercised terms of service contracts intended to protect against unacceptable performance.

Prior to *Browning-Ferris*, since at least 1984, joint employer status turned on whether two entities exercised joint control over essential employment terms, and evidence that an entity had "reserved" the right to exercise such control would not result in a joint employer finding. Moreover, the putative joint employer's control over employment matters had to be "direct and immediate."

Additionally, prior to *Browning-Ferris,* the Board found that a customer's "limited and routine" supervision of a service provider's employees was insufficient to create a joint employer relationship. This meant that a "supervisor's instructions consist[ing] primarily of telling employees what work to perform, or where and when to perform it, but not how to perform it" -- without an ability to hire, fire, discipline, or directly determine compensation --would not give rise to joint employer status.

Hy-Brand returned to those requirements and boundaries of a joint employer relationship. That does not mean that forms of indirect or contractually-reserved control are irrelevant, just that they are not determinative. The *Hy-Brand* Board majority noted that its "fundamental disagreement with the *Browning-Ferris* test is not that it treats indicia of indirect, and even potential, control to be probative of join employer status, but that it makes such indicia potentially dispositive without any evidence of direct control in even a single area. Under the common law, in our view, evidence of indirect control or contractually-reserved authority is probative only to the extent that it supplements and reinforces evidence of direct control." As a result, employers seeking to reduce their risk of a joint employer finding should continue to minimize arguable forms of control over another entity's employees to the extent possible consistent with business objectives.

Applying the pre *Browning-Ferris* test to the facts in *Hy-Brand,* the Board found that the two companies were joint employers because they exercised significant direct and immediate control over each other's employees, and shared common benefit plans, policies, and other employment terms.

The two dissenting Board members in *Hy-Brand* (Pearce and McFerran) raised various objections to the majority decision, including that the majority allegedly did not follow the Administrative Procedures Act's requirement of "reasoned decisionmaking" in reversing precedent.

The strongly diverging views of pro-labor and pro-management Board members in this area likely means that the NLRB's joint employer doctrine will continue to change as Board composition changes in successive administrations. The House of Representatives recently passed the Save Local Business Act, which would amend the NLRA to reflect the pre-*Browning-Ferris* test, but the chances of the bill overcoming a likely Senate filibuster are considered uncertain.

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