Legal Backgrounder

Vol. 30 No. 24 October 23, 2015

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

After *Browning-Ferris*: The Ballooning Definition of "Employer" and Implications for NLRB, EEOC, and OSHA

by Nathaniel M. Glasser, Stuart M. Gerson and Daniel J. Green

The National Labor Relations Board (NLRB or Board) recently revised the so-called joint-employer standard significantly to expand the scope of determining co-employment under the National Labor Relations Act (NLRA).[1] Upending over 30 years of Board precedent, the NLRB, in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), held that a company can be considered a joint employer if it possesses the right to control various terms and conditions of employment, regardless of whether that company *actually* exercises any such control. The Board action significantly escalates administrative agencies' ongoing effort to expand the definition of "employment" in order to enhance worker benefits.

This change in the legal landscape was prompted, at least in part, by the Board's assertions that "the diversity of workplace arrangements in today's economy has significantly expanded" and that the current standard does not reflect the "industrial realities" of an increasingly contingent workforce.[2] In unionized environments, the Board's decision in *Browning-Ferris* will have immediate implications regarding which entities bear responsibility for collective bargaining obligations.[3] But beyond the NLRA implications and notwithstanding the lack of evidence in support of a nationwide shift toward a "sharing economy,"[4] the Board's pronouncement of a new joint-employer standard likely will have far-reaching effects in all areas of employment law.

As the Obama Administration enters its final year, businesses should expect the agencies charged with enforcing employment statutes—including the NLRB, the Equal Employment Opportunity Commission (EEOC), and the Occupational Safety and Health Administration (OSHA)—to take an expanded view of what it means to be employed by an entity. Whether or not the concept of a sharing economy continues to gain steam, these changes to the historical notions of employment will have a broad impact, particularly on contingent worker arrangements, franchising, and outsourcing.

---

[1] *Browning-Ferris Industries*, 362 NLRB No. 186 (Aug. 27, 2015).

[2] *Id.*, slip op. at 11.

[3] For a more detailed discussion of the bargaining implications, *see* Epstein Becker & Green PC *Act Now Advisory*, "Joint-Employer Status: New NLRB Standards Reset the Stage and Redefine the Players," *available at* http://www.ebglaw.com/content/uploads/2015/09/Act-Now-Advisory_Joint-Employer-Status_New-NLRB-Standards.pdf.

[4] *See* Josh Zumbrun & Anna Louie Sussman, *Proof of a 'Gig Economy' Revolution is Hard to Find*, Wall St. J. (July 26, 2015), *available at* http://www.wsj.com/articles/proof-of-a-gig-economy-revolution-is-hard-to-find-1437932539.

Nathaniel M. Glasser and **Stuart M. Gerson** are Members of Epstein Becker & Green PC and **Daniel J. Green** is an Associate with the firm. Mr. Gerson is former Acting Attorney General of the United States and Assistant Attorney General of the Justice Department's Civil Division. He serves on WLF's Legal Policy Advisory Board.

The Board's Decision in *Browning-Ferris*

In *Browning-Ferris*, the NLRB considered whether a recycling plant was the joint employer of the sorters, screen cleaners, and housekeepers supplied by a contractor. The NLRB held that the company was a joint employer, despite not directly exercising control over these contingent workers, because it "*reserved* authority to control terms and conditions of employment."[5]

At common law, the hallmark of determining whether two entities were joint employers was the concept of control over labor relations and, specifically, whether the two entities "share[d] or codetermine[d] those matters governing the essential terms and conditions of employment."[6] For more than three decades the Board interpreted this framework to require that an entity actually exercise direct and immediate control over the workforce to be considered a joint employer.[7]

Under this new formulation, the NLRB has abandoned the traditional requirements that the putative joint employer both (1) exercise the authority over the terms and conditions of employment and (2) do so "directly and immediately."[8] Rather, it is sufficient that the party exercise control indirectly through an intermediary. Thus, in practice, "[w]here the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user's guidance, makes specific personnel decisions and administers job performance on a day-to-day basis," both firms are likely to be deemed joint employers.[9]

Potential for Expanded Application of *Browning-Ferris*

Although the *Browning-Ferris* decision directly addresses joint-employer liability in the contingent-worker context, it also has important implications for franchisors. The NLRB's General Counsel has asserted that a franchisor may be liable for a co-employer's unfair labor practices where, "through its franchise relationship and its use of tools, resources and technology, [it] engages in sufficient control over its franchisees' operations, beyond protection of the brand."[10] Under *Browning-Ferris*, the mere *right* to control franchisee operations, even if never actually exercised, may be sufficient to trigger liability.

Outside of traditional labor law, the EEOC can be expected to pursue the Board's new relaxed standard for determining joint-employer liability aggressively in the context of anti-discrimination laws such as Title VII of the Civil Rights Act of 1964 (Title VII), the Americans With Disabilities Act, and the Age Discrimination in Employment Act. The EEOC has taken the position that "two separate entities are considered to be joint employers if they share or co-determine essential terms and conditions of employment."[11] Although the statutes do not expressly provide for joint-employer liability, many courts have adopted the concept. Indeed, the EEOC has pursued this theory in litigation and recently persuaded the Sixth Circuit to adopt joint-employer liability in Title VII claims.[12]

---

[5] *Browning-Ferris Industries*, 362 NLRB No. 186, slip op. at 2 (emphasis added).
[6] *Id.*, slip op. at 2, *quoting NLRB v. Browning-Ferris Indus. of Penn., Inc.*, 692 F.2d 1117, 1123 (3d Cir. 1982).
[7] *Id.*, slip op. at 10, *citing*, *e.g.*, *Airborne Express*, 338 NLRB 597, 597 n.1 (2002).
[8] *See id.*, slip op. at 14.
[9] *Ibid.*
[10] https://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet.
[11] http://www.eeoc.gov/eeoc/newsroom/release/1-29-15.cfm.
[12] *EEOC v. Skanska USA Bldg., Inc.*, 550 Fed. App'x 253 (6th Cir. 2013); *see also EEOC v. Valero Refining-Texas L.P.*, 3:10-CV-398, 2013 U.S. Dist. LEXIS 42776 (S.D. Tex. 2013).

In the past, courts have looked to labor law and the NLRB's joint-employer standard.[13] Importantly, the courts typically require the exercise of control by a company before imposing liability. Even the EEOC's Compliance Manual states that "each [entity must] exercise sufficient control of an individual to qualify as his/her employer."[14]

Yet the *Browning-Ferris* decision likely will empower the EEOC, consistent with the administration's current strategic priorities,[15] to pursue and develop this expanded theory of liability. Some courts, which in the past have struggled to determine what test to apply to determine whether a company is an employer of a contingent worker, may adopt the Board's changes to the joint-employer standard. Thus, where courts may have previously held that the business did not have sufficient control over a workplace to be an employer, courts may now find that the employer's theoretical ability to exercise control is sufficient to impose joint-employer liability.

The NLRB's *Browning-Ferris* decision also is likely to influence another administrative agency, OSHA, in its approach to inspections and citations involving temporary or contract employees. One of OSHA's enforcement priorities—the temporary employee initiative—is aimed at expanding liability for workplace-safety violations to cover multiple entities.[16] Typically, when OSHA inspections of worksites hosting employees of a staffing agency result in citations, only the host employer is cited because it is perceived as having a greater ability to control or prevent the temporary employee's exposure to a hazard. Under the new initiative, OSHA likely will seek to investigate whether the staffing agency exercised sufficient care to ensure that the worksite was safe prior to entering into business with the host employer and whether it was diligent in verifying that working conditions continued to be free of hazards.[17] If OSHA, as might be expected, adopts the rationale of *Browning-Ferris*, this initiative will significantly increase staffing agencies' exposure to OSHA citations even when the staffing agency had no control over the workplace or prior awareness of the hazard.

The expansion of joint-employer status in these contexts would mirror the state of the law under the Fair Labor Standards Act ("FLSA"), where employer identity is determined using a broad multifactor test that includes a review of the economic realities of the arrangement.[18] Then, over the past summer, the Department of Labor published guidance urging an increased focus on "economic dependence," while downplaying the importance of whether the putative employer exerts control over a worker.[19]

Workforce Impact

By expanding the definition of employer and more aggressively seeking to impose joint-employer liability, the government is necessarily causing businesses to give greater scrutiny to the employment practices of subcontractors, staffing agencies, and franchisees. Although protecting workers from unlawful

---

[13] *See, e.g.*, *Whitaker v. Milwaukee County*, 772 F.3d 802 (7th Cir. 2014); *Knitter v. Corvias Military Living, LLC*, 758 F. 3d 1214 (10th Cir. 2014); *EEOC v. Skanska USA Bldg., Inc.*, 550 Fed. App'x 253 (6th Cir. 2013); *EEOC v. Pacific Maritime Assn.*, 351 F. 3d 1270 (9th Cir. 2003); *Graves v. Lowery*, 117 F. 3d 723 (3d Cir. 1997); *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F. 3d 1350 (11th Cir. 1994); *Rivas v. Federacion de Asociaciones Pecuarias*, 929 F. 2d 814 (1st Cir. 1991).

[14] EEOC Compliance Manual, No. 915.003, "Section 2: Threshold Issues," § 2-III.B.a.iii.b (May 12, 2000), *available at* http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1.

[15] U.S. EEOC, Strategic Enforcement Plan, FY 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

[16] https://www.osha.gov/temp_workers/.

[17] "Policy Background on the Temporary Worker Initiative," *available at* https://www.osha.gov/temp_workers/Policy_Background_on_the_Temporary_Worker_Initiative.html.

[18] 29 C.F.R. §§ 791.1 & 791.2.

[19] Administrator's Interpretation No. 2015-1: "The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors."

ISBN 1056 3059

harassment and unhealthy working conditions are worthy goals, expanding the definition of what constitutes an employer is not an efficient method to achieve them.

Much of the value of contingent-worker or franchise arrangements is derived from the fact that businesses can contract out ancillary functions to other businesses that specialize in performing those functions efficiently. Expanding joint-employer liability forces businesses to expend resources monitoring these other firms' compliance with employment laws, reducing or eliminating these efficiencies and increasing the costs of benefits and administration. The primary virtue of the common-law control test is that it seeks to impose liability on the party with the greatest ability to ensure legal compliance while reducing the need for businesses to expend resources auditing each other's employment practices.

Given the new legal landscape, employers now must scrutinize existing relationships with providers of temporary or contract workers and audit the contracts with those providers to determine whether there is a vulnerability to findings of joint-employer status. Employers should anticipate more frequent assertions of joint-employer status by plaintiffs, labor unions and the administrative agencies charged with enforcing employment-related statutes. Nevertheless, businesses should be cognizant that, even where a joint-employer finding is made, courts have held that, at least in the discrimination context, actual *participation* in alleged discriminatory conduct is required in order to hold a joint employer liable for the actions of another company.[20] Thus, even if joint-employer status becomes unavoidable, businesses are advised to continue compliance with relevant employment laws and to take corrective action where appropriate.

Related Washington Legal Foundation Publications

California Supreme Court Should Reject Use of Unfair Competition Law to Regulate Workplace Safety
By **Jeffrey M. Tanenbaum**, a Partner, and **Traci Bernard-Marks**, an Associate, in the San Francisco office of Nixon Peabody LLP.
WLF Legal Opinion Letter, October 23, 2015

Judicial Review of Informal Agency Pronouncements: Any Clearer After *Young v. UPS* and *Perez v. MBA*?
By **Gregory F. Jacob**, a Partner in the Washington, D.C. office of O'Melveny & Myers LLP, who served in the George W. Bush Administration as Solicitor of Labor, and **Lynsey Ramos**, an Associate in the firm's New York City office.
WLF Legal Backgrounder, July 31, 2015

Oil and Gas Employers Face New Scrutiny Under OSHA's Severe Violator Program
By **Jeffrey Tanenbaum**, a Partner, and **Rachel Fischetti**, an Associate, in the San Francisco office of Nixon Peabody LLP.
WLF Counsel's Advisory, May 22, 2015

Redefining "Employer": How the NLRB Plans to Treat Separate Companies as One
By **Michael J. Lotito**, a Shareholder and Co-Chair of the Workplace Policy Institute in the San Francisco, CA and Washington DC offices of Littler Mendelson P.C., and **Missy Parry**, Special Counsel in the Walnut Creek, CA office of the firm.
WLF Legal Backgrounder, September 26, 2014

All WLF publications available at www.wlf.org

[20] *Whitaker*, 772 F.3d at 812.

ISBN 1056 3059