Joint Employer Standard May Have Nine Lives

By Kate Swearengen

A recent decision by the U.S. Court of Appeals for the District of Columbia Circuit may have thrown a wrench into the National Labor Relations Board's proposed rulemaking on the joint employer standard.

In *Browning-Ferris Industries of California, Inc. v. NLRB*, *d/b/a BFI Newby Island Recycling*, No. 16-1028 (Dec. 28, 2018), the D.C. Circuit held that the NLRB had acted properly in 2015 when it adopted a more comprehensive test for determining whether companies should be considered joint employers for the purposes of liability and collective bargaining. The underlying NLRB case—decided 3-2 over the dissent of the Board's two Republican appointed members—overruled two Reagan-era Board decisions that had narrowed the joint employer doctrine and made it more difficult for unions to establish joint employer status.

The revised standard announced in the 2015 NLRB decision provided that "two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or co-determine those matters governing the essential terms and conditions of employment." The Board held that it would "no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority[.]" The Board also eliminated the requirement that a putative joint employer's control over employment matters be direct and immediate, ruling that "otherwise sufficient control exercised indirectly—such as through an intermediary—may establish joint-employer status." Finally, the Board eliminated the exception to joint employer status where a company exercises its control in a "limited and routine" manner.

In adopting a test that focuses on the degree of control a company can exert over another company's employees, the NLRB explained that the steady increase over the last three decades in contingent employment and in staffing and subcontracting arrangements necessitated the doctrine's modification. Under the previous standard, the Board had focused on whether the putative joint employer exerted direct (as opposed to indirect) control over the employees in question.

High profile litigation involving McDonald's (as well as the prospect of litigation involving subcontracted Microsoft workers) ensured that *Browning-Ferris* remained in the public eye. In December 2017, the Board overturned the *Browning-Ferris* decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156, and asked the D.C. Circuit to remand *Browning-Ferris* to the agency for further consideration. Two months later, the Board vacated *Hy-Brand* due to questions regarding the participation of Member William Emanuel in the decision, and rescinded its remand request.

In May 2018, the Board announced its intention to undertake rulemaking on the standard for joint employer status. Notwithstanding the pending rulemaking, in June 2018 the Board specifically requested that the D.C. Circuit decide *Browning-Ferris*. On September 14, 2018, the NLRB published a Notice of Proposed Rulemaking regarding the joint employer standard. Under the proposed rule, an employer would 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 does so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority alone would not suffice to establish a joint employer relationship.

In its 2-1 opinion, the D.C. Circuit found that that the *Browning-Ferris* Board had appropriately recognized that "indirect control" and "reserved right to control" are "relevant" factors in determining joint employer status. The Court, however, reversed the Board's application of the indirect control factor, finding that the Board had not adequately distinguished between indirect control that is inherent in third-party contracting relationships, and indirect control over essential terms and conditions of employment. The D.C. Circuit remanded that portion of the case to the Board with instructions that it explain and apply its test in a manner consistent with the common law of agency.

In evaluating the Board's joint employer test under the *de novo* standard of review urged by Browning-Ferris and its amici, the D.C. Circuit's decision may effectively constrain the agency's proposed rulemaking to a standard almost identical to the one currently in place. The Court made plain its view of the limits of the agency's authority in this area, noting that

> "Congress has tasked the courts, and not the Board, with defining the common-law scope of 'employer' . . . . The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary. That presumably is why the Board has thrice asked this court to dispose of the petitions in this case during its rulemaking process. Like the Board, and unlike the dissenting opinion [], we see no point to waiting for the Board to take the first bite of an apple that is outside of its orchard."

Following issuance of the D.C. Circuit's decision, the Board extended public comment on its proposed rulemaking to January 28, 2019. Whether the Board will now move forward with its proposed rule remains to be seen. In the meantime, practitioners tasked with advising unions and employers as to the future of *Browning-Ferris* and the case's implications for union organizing and labor law enforcement have not had that job made easier. ■

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