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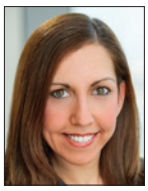
Labor Relations

Expert Analysis

Joint Employer Update: Changing Interpretations



By **John P. Furfaro**

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This article addresses recent developments relating to the National Labor Relations Board's expansive view of joint employer relationships and important implications for employers.

Expanded Definition

In August 2015, the board upended years of precedent by vastly expanding the definition of a "joint employer" under the National Labor Relations Act (NLRA) in its landmark decision, *Browning-Ferris Indus. of California*, 362 NLRB No. 186 (2015). A showing of joint employment previously had required an actual exercise of direct and immediate control over workers. Following *Browning-Ferris*, joint employment may exist where an entity has indirect control over the workers, or even where the entity has the right to control the workers but does not exercise that right.

Browning-Ferris makes it significantly more likely that businesses engaging contractors or staffing agencies to supply workers may be considered joint employers under the NLRA and therefore potentially responsible for unfair labor practices and collective bargaining obligations regarding employees of a separate employer. The case currently is on appeal before the U.S. Court of Appeals for the D.C. Circuit, in which Browning-Ferris Industries is urging the court to return to the direct control analysis.

Multi-Employer Bargaining

In addition to being subject to increased labor and employment litigation risks, joint employers face implications with respect to union elections. Following *Browning-Ferris*, the board in *Miller & Anderson*, 364 NLRB No. 39 (2016), recently held employer consent no longer is required where a union seeks to represent both jointly employed and solely employed employees of a single user employer (i.e., an employer that directly employs its own employees and also engages employees through a third party, such as a staffing agency) in a single bargaining unit.

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In *Miller & Anderson*, the union filed a petition seeking to represent a bargaining unit of sheet metal workers directly employed by Miller & Anderson, Inc. (Miller), a mechanical and electric contractor, as well as a group of sheet metal workers provided by a staffing company whom the union argued were jointly employed by Miller and the staffing company. Applying the ruling in *Oakwood Care Center*, 343 NLRB 659 (2004), which required employer consent under these circumstances (i.e., what the board had categorized as a multi-employer unit), the board's Regional Director dismissed the petition because the two alleged joint employers had not consented to the bargaining unit.

In holding employer consent was not required for the union to represent a unit of all sheet metal workers employed directly by Miller and through the staffing agency, the board overturned *Oakwood Care Center* and returned to its earlier precedent in *M.B. Sturgis*, 331 NLRB 1298 (2000), which had allowed such bargaining units without employer consent, provided the employees shared a "community of interest." The majority cited *Browning-Ferris* and the changes in the American economy over the last several decades as support for its decision. The board also reasoned that a supplier employer (e.g., a staffing agency) has no obligation to bargain over the terms and conditions of employment for employees solely employed by the user employer.

The case was remanded to the Regional Director for further action consistent with the decision, including a determination whether solely and jointly employed workers of Miller share a community of interest under *Sturgis*. In determining whether there is a community of interest, the board has traditionally looked at factors such as bargaining history, functional integration of operations, similarity of employees' skills and functions, common supervision, interchange

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of employees and the extent of interchange and contact between groups of employees, common work locations, common general working conditions, similar benefits and similar hours and shifts. See, e.g., *Peter Kiewit Sons' Co.*, 231 NLRB 76, 77 (1977).

Notably, the dissent in *Miller & Anderson* argued the majority further expanded the joint-employer platform created by *Browning-Ferris* by requiring multi-employer/non-employer bargaining in a single unit when the multiple business entities do not even jointly employ all unit employees.

Staffing Agencies

In August 2016, in *Retro Environmental/Green JobWorks*, 364 NLRB No. 70 (2016), the NLRB held a construction company, Retro Environmental, Inc. (Retro) and a temporary staffing agency, Green JobWorks, LLC (Green JobWorks), were joint employers for purposes of a union petition in which the union was seeking to represent laborers allegedly jointly employed by Retro and Green JobWorks.

In finding Green JobWorks and Retro to be joint employers, the board reasoned that Green JobWorks was primarily responsible for hiring, firing, and assignments whereas Retro was primarily responsible for day-to-day supervision, but that each was able to influence the other's decisions and together they codetermined the employees' essential terms and conditions of employment. Notably, the board found the agreement between the parties imposed conditions on Green JobWorks' hires, including prescreening, physical examination and drug-testing requirements, as well as various job qualifications and certifications. In addition, like the relationship in *Browning-Ferris*, Retro had the right to request that Green JobWorks remove and replace any worker it found to be unsatisfactory.

The case was remanded to the Regional Director, who approved the petitioned-for bargaining unit and ordered a mail ballot election.

Franchise Industry

Browning-Ferris and its progeny may have far-reaching implications for franchisors, which are now particularly vulnerable to labor violations perpetrated by franchisees at a local level. After all, the very basis of franchising is required adherence to franchisor standards.

In *McDonald's USA LLC*, Case No. 02-CA-093893, currently pending before a board administrative law judge, the franchisor for the McDonald's franchise system is battling the board about whether it is a joint employer of its franchisees' employees. The board has asserted the franchisor should be considered a joint employer because its business practices, including employee operating and training manuals for franchisees and business consultants who monitor franchisees' staffing and business practices, allow the company to control the terms and conditions of franchise workers' employment. The trial began in March 2016, and the decision is hotly anticipated.

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Other Agencies

The board's expanded concept of a joint employer may be adopted by other government agencies. The Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act and the Age Discrimination in Employment Act all have been interpreted to impose joint employer liability. Those statutes, however, have required the exercise of direct control over employees' day-to-day activities for joint employer liability to attach. The board's Browning-Ferris standard already has influenced the agencies charged with their enforcement, particularly the Equal Employment Opportunity Commission (EEOC) and the Department of Labor's Wage and Hour Division (WHD).

Indeed, in September 2016, the EEOC filed an amicus curiae brief in the Browning-Ferris appeal before the U.S. Court of Appeals for the D.C. Circuit in support of the board's expansion of the standard for joint employment, which it described as a "flexible, fact-specific evaluation." In supporting affirmation of the board's new joint employer test, the EEOC noted that "Title VII derives from the NLRA, and the two statutes are often interpreted in tandem."

In addition, in January 2016, the WHD issued an administrator's interpretation establishing new standards for determining joint employment under the federal FLSA and the Migrant and Seasonal Agricultural Worker Protection Act, emphasizing that "the concept of joint employment, like employment generally, should be defined expansively." In its guidance, the WHD distinguishes between "horizontal" joint employment and "vertical" joint employment. The WHD stated "horizontal" joint employment may exist when two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee. The WHD indicated "vertical" joint employment may exist when an employee of an intermediary employer (e.g., a staffing agency) is also economically dependent on another employer. It emphasized that application of the broader economic realities analysis, not a common law control analysis, is required in determining vertical joint employment.

Conclusion

Recent labor developments advance the concept of joint employment with various goals in mind. Often, workers today have multiple employers or take direction from multiple employer sources. In an effort to hold employers responsible for the conduct of one another, joint employment is a useful tool. Employers concerned about the risk of this liability should review their agency, staffing, contractor and similar agreements and their work practices to determine how much control, if any, they actually need or want.