

Joint Employer Standard Expanded: NLRB Overturns 30 Years of Precedent

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In a dramatic departure from over 30 years of precedent, the National Labor Relations Board has modified the standard by which it determines whether two entities are “joint employers” under the National Labor Relations Act (NLRA). The 3-2 ruling in *Browning-Ferris Industries of California*, published on August 27, 2015, has serious implications for companies that utilize staffing agencies and temporary employees, and for the staffing agencies themselves. The ruling greatly increases the ability of workers to bargain with both their employer and the company that hires their employer and to hold both companies responsible for various wrongs.

The Case

Browning-Ferris involved a company that contracted with a staffing agency to obtain workers to help staff BFI’s recycling center. The union sought to represent approximately 240 temporary workers as a bargaining unit and desired to bargain with both the staffing agency and with BFI. The regional director of the NLRB determined that the staffing agency was the sole employer of the temporary workers, which precluded the union from bargaining with BFI. The union petitioned for review, alleging that the Regional Director misapplied the standard, or, in the alternative, that the Board should reconsider the standard altogether.

The Ruling

The Board took the Union up on its offer and decided to “revisit and revise” the joint-employer standard in order “to better effectuate the purposes of the [NLRA], in the current economic landscape.” To understand the impact of the ruling, one must remember the standard that has been in place since 1984: the Board would find a joint-employment relationship when the two companies actually shared or co-determined workers’ terms and conditions of employment. Generally, an entity must have had direct and immediate control over such matters as hiring; firing; discipline; supervision and direction; and wages and compensation.

Under the new standard, the rules have changed. Entities are now joint employers if they are employers within the meaning of the “common law” and if they “share or codetermine” essential terms and conditions of employment. The Board will now evaluate whether an employer *possesses* control, and not only whether the employer actually *uses* it. In other words, indirect control (such as through an intermediary) and reserved authority are now sufficient for joint-employer status. The overarching principle now is whether bargaining over certain terms and conditions will be meaningful without both employers.

Back to *Browning-Ferris*

Ultimately in *Browning-Ferris*, the Board determined that the companies were joint employers because they possessed both direct and indirect control over essential terms and conditions of employment for the temporary employees. For instance, both categories of workers worked at the company’s facility on the same tasks. The company determined when the facility was operational, supervised and controlled the work and productivity of both types of workers (including controlling the speed of the recycling center’s conveyor belt), and determined when shifts occurred and when workers could take breaks, while the staffing agency employed several layers of on-site supervisors and was responsible for recruiting, hiring, and scheduling its employees for the company-determined shifts.

In addition to controlling the day-to-day operations of its facility, the company maintained some control over the staffing agency’s temporary worker assignments: the company retained an ability to reject certain temporary workers from being assigned to its facility, and capped temporary workers’ maximum rate of pay to ensure that rate did not exceed the pay of its regular employees.

The Board determined that meaningful bargaining could not occur unless the company and the staffing agency were at the bargaining table, because bargaining solely with the staffing agency precluded bargaining regarding the many terms and conditions of employment controlled by the company.

Impact

The *Browning-Ferris* decision clearly undermines predictability that has been in the law for 30 years. The Board indicates that the “nuanced” approach required under agency law makes clear prospective guidance impossible. The ruling also does not detail which factors will be used to determine joint-employer status in the future, or even which factors will preclude joint-employer status. The closest the decision comes to clear guidance is its use of an independent contractor definition to outline when joint-employer status is non-existent: “service under an agreement to accomplish results or to use care and skill in accomplishing results is not evidence of an employment, or joint-employment, relationship.” In the end, as we wait to see how this decision plays out in the future, determining joint-employment status may require parsing through common law and pre-1984 NLRB decisions. Further adding to the confusion, the Board indicates it will apply the new rule retroactively.

This decision did not occur in a vacuum — it shows a trend of narrowing exceptions and expanding the scope of responsibility for employers. For instance, there are recent concerns from trade groups that other agencies, such as OSHA and the EEOC, may also be adopting a joint-employer standard similar to the one now being implemented by the NLRB. Other recent developments affect exemptions from minimum wage and overtime compensation: guidance limiting when workers may be classified as “independent contractors” and regulations that narrow an exemption for home health care workers.

In light of the NLRB’s decision in *Browning-Ferris*, any entity that utilizes staffing agencies, temporary employees, contractors, or franchising should review its agreements to determine what level of responsibility it has. It is unknown so far whether this case will be appealed, so, as always, we will keep you informed of any changes as they develop in this area.

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Topics

National Labor Relations Board (NLRB), Joint Employers