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Legal Sidebar

Joint Employment and the Save Local Business Act

Jon O. Shimabukuro
Legislative Attorney

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Note: H.R. 3441, the Save Local Business Act, was passed by the House of Representatives on November 7, 2017 by a vote of 242-181.

Since it was decided in 2015, the National Labor Relations Board's (NLRB's) joint employer decision, *Browning-Ferris Industries of California*, has been opposed by many in the business community. In *Browning-Ferris*, a majority of the NLRB's five members concluded that two or more entities would be considered to be joint employers of a single work force if they are employers under common law and if they share or codetermine matters governing the employees' essential terms and conditions of employment. Notably, the NLRB indicated that joint employer status could be established even if an entity does not exercise direct control over employment matters, and its control is indirect or reserved by contract.

Shortly after *Browning-Ferris* was issued, the U.S. Chamber of Commerce criticized the decision for "expanding the universe of potential employers who can be targeted by the NLRB, unions, and [the] plaintiffs' bar." Others praised the decision, however, for recognizing the increased use of staffing companies and contingent workers, maintaining that the decision would provide employees with opportunities to negotiate improved wages and working conditions. An effort to codify the joint employer standard that was used by the NLRB prior to *Browning-Ferris* has now been introduced in Congress. H.R. 3441, the Save Local Business Act, would amend the National Labor Relations Act (NLRA), as well as the Fair Labor Standards Act, to recognize an entity as a joint employer only if it "directly, actually, and immediately . . . exercises significant control over the essential terms and conditions of employment[.]" Sponsors of the bill contend that H.R. 3441 restores a "commonsense definition of what it means to be an employer."

The dispute in *Browning-Ferris* arose after a union petitioned to represent a group of workers, who were placed in the company's recycling facility by Leadpoint Business Services, a staffing company, pursuant

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to a labor services agreement. Applying a joint-employer standard that had been in place since 1984, a regional director with the NLRB concluded that Leadpoint and Browning-Ferris were not joint employers of these workers. Under the old standard, the NLRB considered not only whether the alleged joint employers shared the ability to control or codetermine essential terms and conditions of employment, but also whether the companies actually exercised direct and immediate control over such employment matters. The regional director found that Browning-Ferris did not control the daily work performed by the employees provided by Leadpoint, and that the staffing company was solely responsible for paying the workers and providing their benefits. Ultimately, the regional director maintained that Browning-Ferris's control over the workers' terms and conditions of employment was neither direct nor immediate.

On appeal, the NLRB majority described both the policies of the NLRA and the diversity of current workplace arrangements before "restating" a reconsidered joint-employer standard. Acknowledging the increased use of staffing arrangements and contingent workers, the majority observed: "This development is reason enough to revisit the Board's current joint-employer standard . . . If the current joint-employer standard is narrower than statutorily necessary, and if joint-employer arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's 'responsibility to adapt the Act to the changing patterns of industrial life.'"

By eliminating the requirement that two or more employers must exercise direct and immediate control over workers' terms and conditions of employment to be deemed joint employers, the majority maintained that it was returning to the traditional test used by the NLRB. The majority explained that the emphasis on exercising direct and immediate control over employment matters actually evolved from earlier NLRB decisions that recognized indirect and reserved control as indications of joint employer status. Applying the "restated" joint-employer standard to the case at issue, the majority concluded that Browning-Ferris and Leadpoint were joint employers of the relevant workers. While it acknowledged that Browning-Ferris did not participate in Leadpoint's day-to-day hiring practices, the majority noted that the company retained the right to reject any worker under the labor services agreement. In addition, the majority described other control over employment matters reserved for Browning-Ferris under the agreement, such as the identification of processes that shaped day-to-day work.

The NLRB's dissenting members criticized the majority opinion, contending that the standard "will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity . . ." The dissenters also indicated that the standard could be particularly significant with regard to franchise arrangements. Under *Browning-Ferris*, it seems possible that a franchisor could be deemed a joint employer of the workers employed by its franchisee even if it is located far from the franchisee and maintains only limited contact with franchisee employees.

In fact, unfair labor practice cases that allege McDonald's USA LLC is a joint employer of franchisee employees are currently pending before the NLRB. If enacted, however, the Save Local Business Act might forestall further consideration of the relationship between McDonald's USA LLC and franchisee employees. In the past, McDonald's USA LLC has indicated that it does not have the authority to "direct or co-determine the hiring, firing, wage rates, hours, or any other terms of employment of our franchisees' employees[.]" Under the standard prescribed by the Save Local Business Act, it appears likely that McDonald's USA LLC – presuming its assertion is accurate – would not be considered a joint employer of franchisee employees.

As Congress considers whether to act on the Save Local Business Act, another effort to reverse the joint employer standard articulated in Browning-Ferris is occurring before the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit). In March 2017, the D.C. Circuit heard oral argument in a challenge to the NLRB's 2015 decision, and a ruling in that case is forthcoming. If the D.C. Circuit reverses the NLRB's decision and the agency's former joint employer standard is reinstated, the change proposed by the Save Local Business Act, at least with regard to the NLRA, may not be needed. Nevertheless, the codification

of a joint employer standard that requires the direct, actual, and immediate exercise of significant control over essential terms and conditions of employment would likely minimize the possibility of a future NLRB adopting the kind of standard prescribed by Browning-Ferris.