



Browning-Ferris and joint-employer issues before the NLRB

An examination of the National Labor Relations Board's new standard – which may apply to 40 percent of the U.S. workforce

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It should come as no surprise that alternative employment relationships are becoming increasingly prevalent in today's modern economy. According to a 2015 report from the U.S. Government Accountability Office, about 40 percent of the U.S. workforce is now made up of contingent workers, defined as including workers at temporary staffing agencies, on-call workers, contract company workers, independent contractors, and self-employed workers.¹

In these situations, there may be multiple employers at play who control the terms and conditions of employment. Some government agencies have been re-assessing their standards for joint employer status in light of the changing landscape of modern employment relationships.

In August 2015, in the 3-2 decision of *Browning-Ferris Industries of California, Inc.*, the National Labor Relations Board ("NLRB" or the "Board") revised its current standard for assessing joint employer status for purposes of collective bargaining under the National Labor Relations Act ("NLRA").² Under the newly clarified standard, two or more employers can be found as joint employers of the same employees if those employers "share or code-terminate those matters governing the essential terms and conditions of employment." The decision shifted from prior Board opinions in stating that a putative employer's *right to control* the essential

terms and conditions of employment is probative of an employment relationship, whether or not that control is actually exercised. Also, under the new standard, such control does *not* need to be exercised directly and immediately to be relevant to joint-employer status.

By allowing a finding of joint employer status when a company exercises *indirect control*, companies who want to maintain some control over the employment relationship cannot simply claim to have no *direct control* over the workers. This is a significant change as companies will need to seriously reevaluate the degree of control they exercise or face the risk of increased litigation and exposure.

The Board's decision in *Browning-Ferris* was appealed in January 2016 to a federal appeals court in Washington, D.C., and is currently pending review.

This article will examine the new standard articulated in the *Browning-Ferris* decision, review the NLRB's historical development on the joint employer analysis, discuss the joint employer doctrine in the context of other statutes and agencies, and end with some practical tips on litigating cases with possible joint employer issues.

The new joint-employer standard under *Browning-Ferris*

The factual issue in the *Browning-Ferris* case was whether BFI Newby Island Recyclery ("BFI") and Leadpoint Business Services ("Leadpoint") were joint employers of various workers whom the Union had petitioned to represent. BFI owned and operated a recycling facility which

sorted waste materials into separate commodities that were sold to other businesses at the end of the recycling process. BFI contracted with Leadpoint. Leadpoint provided the workers to manually sort the materials on the conveyor belt streams (sorters), to clean the screens on the sorting equipment and clear jams (screen cleaners), and to clean the overall facility (housekeepers). The Union sought to represent about 240 full-time, part-time, and on-call sorters, screen cleaners, and housekeepers who worked at the BFI facility. The relationship between BFI and Leadpoint was governed by a temporary labor services agreement, which stated that Leadpoint was the sole employer of the workers it provided to BFI.

The question was whether BFI was also a joint employer of these individuals. In its decision, the NLRB re-examined its standard for joint-employer status to determine whether it should be revised to better effectuate the purposes of the NLRA and encourage the practice of collective bargaining. The Board noted the expansion of different kinds of workplace arrangements in today's economy, such as staffing and subcontracting agreements. The Board also noted that as of August 2014, the number of temporary agency workers had risen to a new high of 2.87 million, and that the number of jobs in the employment services industry was expected to increase to almost 4 million by 2022. According to the Board, this growth alone was a reason to revisit its joint-employer standard.

In deciding whether a company is a joint employer, the initial inquiry, as the



JUNE 2016

Board reiterated, is “whether there is a common law employment relationship with the employees in question.”³⁷ In making that determination, the Board follows the common law agency test. If such an employment relationship exists, “the inquiry then turns to whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.”³⁴

In *Browning-Ferris*, the Board reviewed the historical development of its standard for assessing joint-employer status. The Board cited the Third Circuit’s decision in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*⁵, which had endorsed the Board’s long-standing standard for determining joint-employer status. Under that standard, a joint employer was one who shares or codetermines the essential terms and conditions of employment. This was the standard in effect prior to 1984.

The Board then noted that subsequent to that decision in 1984 and after, the Board adopted additional requirements, without explanation, for finding joint-employer status. First, subsequent Board decisions required that a putative joint employer *actually exercised* the authority to control workers’ terms and conditions of employment. Second, the Board required that a putative joint employer must exercise *direct and immediate control* of the terms and conditions of employment. Such requirements were articulated in Board decisions such as *TLI, Inc.*⁶, *AM Property Holding Corp.*⁷, and *Airborne Express*.⁸

Old standards are out of sync

In *Browning-Ferris*, the Board reaffirmed the Third Circuit’s “share or codetermine” standard for assessing joint-employer status. The Board also did away with the additional requirements for the joint-employer analysis, finding that such requirements did not have any basis in common law and created barriers to finding joint-employment

relationships that were out of sync with the rapid growth of contingent employment.

Thus, under the newly clarified standard, the Board will not require a company to actually exercise control over the terms and conditions of employment to be found as a joint employer. A company’s *possession or reservation* of the authority to control the terms and conditions of employment, even if not actually exercised, is relevant to the joint-employer analysis. The Board now also does not require that an employer’s control be exercised directly and immediately. Control that is exercised *indirectly* – for example, through an intermediary subcontractor – can still establish joint-employer status. The Board thus overruled prior decisions that had added these requirements.

The majority opinion in *Browning-Ferris* recognized that the Board has “typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status” without requiring “that this right be exercised, or that it be exercised in any particular manner.”⁹ The critical issue was whether a putative employer exercised ultimate control over the essential terms and conditions of employment. In that sense, *Browning-Ferris* represents more of a reversion to the Board’s joint employer standard prior to 1984, as opposed to an entirely new standard.

Applying the clarified standard to the case facts at issue, the NLRB found that BFI was a joint employer of the Leadpoint-supplied employees in question. For example, the Board found that BFI codetermined the outcome of Leadpoint’s hiring process by imposing specific conditions on hiring decisions, including drug tests and productivity benchmarks. BFI exercised control over the employees’ daily work processes, including unilateral control of the speed of material streams on the facility’s conveyor belts and the productivity standards for sorting waste materials. BFI managers assigned specific tasks for completion,

exercised oversight of the employees’ work performance, dictated the number of workers and the timing of work shifts, and determined when overtime was necessary. Also, BFI prevented Leadpoint from paying the workers more than BFI employees performing comparable work, creating a *de facto* wage ceiling for Leadpoint workers. Given these and other facts, the Board found that the facts demonstrated that BFI shared or codetermined the essential terms and conditions of employment for the Leadpoint employees, and was thus a joint employer.

Joint employer determinations under other statutes

It remains to be seen whether the Board’s decision will be upheld upon appellate review. It also remains to be seen whether and to what extent *Browning-Ferris* will influence other agencies’ jurisprudence on joint employer status. The general trend, however, has been an expansion of the joint-employer doctrine.

The Equal Employment Opportunity Commission (“EEOC”) has also endorsed a fairly broad joint employer standard. In *EEOC v. Skanska USA Building, Inc.* (6th Cir. 2013) 550 Fed. Appx. 253, the Sixth Circuit agreed with the EEOC that a general contractor could be liable for racial harassment and retaliation under Title VII against the subcontractor’s workers, even though the general contractor did not directly employ the workers. Just like the NLRB, the Sixth Circuit held that entities are joint employers if they share or codetermine the essential terms and conditions of employment.¹⁰ The Court found that the general contractor directed the workers’ daily assignments and hours, collected timesheets, provided training, and could remove them from the job site. These facts were sufficient to determine that the general contractor was a joint employer subject to possible liability for race harassment and retaliation under Title VII.



JUNE 2016

In California, in determining whether an entity is a joint employer under the Fair Employment and Housing Act (“FEHA”), courts will “consider the ‘totality of circumstances’ that reflect upon the nature of the work relationship of the parties, with emphasis upon the extent to which the [entity] controls the [workers’] performance of employment duties.”¹¹ There is an argument that the recent *Browning-Ferris* decision could be persuasive for determining joint employer status under FEHA.

The Department of Labor also recently issued administrative guidance on determining joint-employer status under the Fair Labor Standards Act (“FLSA”) and the Seasonal Agricultural Worker Protection Act (“MSPA”).¹² The DOL differentiated between “horizontal” and “vertical” joint employment. Horizontal joint employment is when a worker is employed by two or more technically separate but related or overlapping employers. Factors to consider include common ownership of the potential joint employers, overlapping of officers or directors, shared control or intermingling of operations, and whether the potential joint employers treat the pool of workers as available to both employers.

The vertical joint employment inquiry focuses on whether a worker for an intermediary company is also hired or contracted to work for another company – for example, when an employee of a staffing agency is contracted to work for a client company. Abandoning current regulations, the DOL stated that it would now apply the “economic realities” test for the vertical joint employment analysis. Although the analysis differs among jurisdictions, the DOL mentioned factors including the control and supervision of the work being performed, the control of employment conditions, the permanency and duration of the employment relationship, the skill level required for the work, whether the work is integral to the business, whether the work is performed on the potential employer’s premises, and

whether the potential joint employer handles administrative functions such as payroll and workers’ compensation insurance. The ultimate inquiry focuses on the degree of the worker’s economic dependence on the potential joint employer. The DOL’s new guidance may likely be used to hold more potential joint employers liable for alleged violations of the FLSA and MSPA.

Litigating joint employer cases

The question of whether a company is a joint employer will often be a fact-intensive inquiry. Indeed, in the 2015 *Browning-Ferris* decision, the Board noted that it “will evaluate the evidence to determine whether a [putative] employer affect the means or manner of employees’ work and terms of employment, either directly or through an intermediary,” and emphasized that all aspects of the employment relationship must be assessed.¹³ With the ruling in *Browning-Ferris*, evidence that an employer had the contractual authority to control workers, whether or not it is exercised, can result in a finding of joint-employer status. This may expand the scope of discovery in joint-employer cases, a fact that lawyers for both employees and employers should consider in propounding and responding to discovery.

Given the factual nature of determining joint-employer status, you should conduct sufficient discovery on this issue. This can include propounding discovery requests on whether the potential joint employers share assets, have common ownership or management, share a possible pool of workers, have any intermingling of operations, or have any agreements addressing their business relationships. Contractual agreements between the two potential joint employers would be discoverable. Also, any communications between the two potential employers that may show the amount of control over the workers can create a joint-employer status. Conducting person most knowledgeable (“PMK”) depositions or 30(b)(6) depositions may also shed

light on the issues of corporate relationships. In depositions, it is not enough to inquire about how directives are given to workers on a day-to-day basis. Rather, the entire nature of the relationship between the two potential joint employers is at issue. Given this new ruling, it is likely that there will be an increase of potential joint employers being named in complaints and a broader scope of discovery being directed at all aspects of the relationship between the two potential joint employers.

If the *Browning-Ferris* decision by the Board is upheld on appeal, there will likely be an increase in litigation as unions seek to increase the number of workers that they represent. There is also likely to be an increase in litigation to expand the *Browning-Ferris* decision to other statutes and areas of the law. Given that a part of the reasoning in *Browning-Ferris* was the recognition of the realities of alternative employment relationships in the modern economy, those same realities must be addressed by the courts in all areas of employment law.



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Endnotes

¹ U.S. Government Accountability Office, "Contingent Workforce: Size, Characteristics, Earnings, and Benefits," April 20, 2015, available at <http://www.gao.gov/assets/670/669899.pdf>.

² *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery* (hereinafter "*Browning-Ferris*"), 362 NLRB No. 186 (2015).

³ *Browning-Ferris*, at p.2.

⁴ *Id.*

⁵ 691 F.2d 1117 (3d Cir. 1982).

⁶ 271 NLRB 798 (1984).

⁷ 250 NLRB 998 (2007).

⁸ 338 NLRB 597 (2002).

⁹ *Browning-Ferris*, at p. 9.

¹⁰ *E.E.O.C. v. Skanska USA Bldg., Inc.* (6th Cir. 2013) 550 Fed.Appx. 253, 256.

¹¹ *Vernon v. State* (2004) 116 Cal.App.4th 114, 124.

¹² https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf

¹³ *Browning-Ferris*, at p. 16.

