NLRB's New Joint Employer Standard Poses Big Challenges For Businesses

Mitchell Boyarsky and James J. La Rocca
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The National Labor Relations Board ("NLRB" or "Board") recently issued a decision that dramatically altered the standard to assess "joint employer liability" under the National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA"), creating a potential legal morass for employers and their investors, franchisers, affiliate companies and contract relationships. In *Browning-Ferris Indus. of Cal.*, 362 NLRB No. 106 (Aug. 27, 2015), the Board changed a decades-old standard for deciding when multiple businesses are joint employers under the NLRA. The new standard makes it easier for labor unions to hold a non-union company responsible for the collective bargaining obligations and the labor law violations of a unionized employer or one undergoing union organizing.

The decision may have far-reaching legal implications for the business community and warrants attention not only by companies that enter into staffing arrangements with third parties, as in *Browning-Ferris*, but all companies that have contingent employment relationships, conglomerate business models, private equity investment, subcontract arrangements, and franchise agreements.

New Standard

For decades, the NLRB found a company to be a joint employer only if it actually exercised direct and immediate control over essential employment conditions and terms over the unit of workers at issue. *TLI, Inc.*, 271 NLRB 768 (1984); *Laerco Transp.*, 269 NLRB 324 (1984). Under the new standard articulated in *Browning-Ferris*, however, two different businesses can be found a joint employer merely because one possesses – even if it does not actually exercise – sufficient control over the workers' essential employment conditions and terms. The Board justified the change by claiming that the new standard both is consistent with the standard established years ago in *Greyhound Corp.*, 153 NLRB 1488 (1965) and *Browning-Ferris Indus. of Pa., Inc.*, 259 NLRB 148 (1981), and yet resulted from a need to keep pace with the increase in contingent employment relationships prevalent in the labor market.

Factual Background

The facts of *Browning-Ferris* involved a union seeking to represent temporary workers; Browning-Ferris Industries of California ("BFI"), a waste management company; and the staffing agency that provided BFI with those workers pursuant to a labor services contract. The union claimed that BFI and the staffing agency jointly employed the temporary workers. BFI, as the owner and operator of a recycling facility where the employees worked, controlled the overall operations. The vast majority of the employees at the plant worked for the staffing agency, whose managers were responsible for hiring, orienting, training, compensating and disciplining the workers it supplied.

The NLRB analyzed the following:

- *Operations:* The majority of the workers at issue maintained the equipment in the plant. BFI decided which equipment to operate, the times for shifts and breaks, the staffing

levels per shift, overtime needs and productivity standards. The staffing agency supplied BFI with labor to operate the plant.

- *Management:* Supervisors from BFI and the staffing agency worked on-site and met with the employees before the start of their shifts to assign work. However, the staffing agency's supervisors managed the employees. The two companies maintained separate human resources departments, and the staffing agency even had an on-site human resources manager.

- *Hiring:* The staffing agency generally was responsible for hiring the employees (for a period up to six months). Although the staffing agency had authority to hire applicants who met BFI's qualifications, BFI reserved the right to reject their hires.

- *Orientation and Training:* The staffing agency provided the workers with orientation and training, although, on occasion, BFI supervisors might perform on-the-job training.

- *Wages and Benefits:* The staffing agency paid and provided benefits to the workers. Yet BFI supervisors were required to approve (1) the hours worked and (2) wages paid above a certain rate.

- *Discipline:* In general, the staffing agency was responsible for disciplining workers, and, in one instance, a BFI supervisor requested the staffing agency to fire three individuals.

The NLRB found both BFI's control over the manner and method of operations and the language in the provisions of the parties' services agreement to create joint employer liability. The NLRB concluded that BFI was a joint employer with the staffing agency because it codetermined or shared control over the workers' essential employment conditions and terms, and even exercised that control, directly and indirectly. For that reason, the Board explained that BFI, along with the staffing agency, would have a statutory duty to bargain collectively with those employees were the employees to unionize.

In a digression from the traditional Board analysis, the NLRB in *Browning-Ferris* relied on the common law and Restatement of Agency to conclude that control over an employment relationship may exist simply due to the "right to control" – and not solely based on actual control. The NLRB dismissed prior Board precedent, which it found to impermissibly ignore this concept. The Board went on to decide that two or more businesses are joint employers of a single workforce "if both are employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." In light of *Browning-Ferris*, a company that exercises control through an intermediary without any direct interaction with the workers at issue but reserves the ability to influence the employees' terms and conditions of employment sufficiently qualifies as a joint employer with another. In contrast, under the pre-*Browning-Ferris* standard, joint employer liability would not have been imputed to BFI because it did not exercise direct and active control over the agency workers.

One may now discern that the Board intends to apply a loose analysis of the ways putative joint employers share such control. The Board will still focus on historically persuasive factors, such as one's involvement in decisions about hiring, firing, discipline, supervision and direction, and yet input on decisions regarding headcount, scheduling, seniority, overtime, work assignments, and the method and manner of work could be equally significant.

Potential Inconsistency at NLRB

The *Browning-Ferris* decision not only creates ambiguity through its murky standard, but the Board's new standard varies from its own General Counsel's recent interpretation of the law. The NLRB General Counsel acts both as the prosecutor to enforce the NLRA and to issue policy interpretations – often concerning pending NLRB cases – called Advice Memoranda through the General Counsel's Division of Advice. In Advice Memorandum 177-1650-0100 dated April 28, 2015, the Division of Advice applied the traditional standard for joint employer liability articulated in *Laerco Transportation*, 269 NLRB 324 (discussed *supra*). The Advice Memorandum analyzed whether a joint employer relationship existed between a franchisor of a fast food restaurant chain and a franchisee of a single store.

In deciding that a joint employer relationship did not exist between the franchisor and the franchisee, the Division of Advice found that the franchisor did not meaningfully affect matters involving the employment relationship between the franchisor and franchisee. Only time will determine whether the Advice Memorandum is simply at odds with *Browning-Ferris* in applying the relevant standard and, therefore, creates additional confusion, or whether *Browning-Ferris* effectively overrules the Advice Memorandum.

Broader Implications?

It is now a guess as to which joint employer standard might apply in a franchise relationship. However, the answer may be forthcoming. For the past three years, fast food workers throughout the country have sought to unionize, including workers at McDonald's. In conjunction with this union organizing effort, the NLRB's General Counsel has issued more than a dozen complaints against McDonald's USA, LLC and its franchisees. The General Counsel has alleged that McDonald's USA, LLC is a joint employer because it "possesses" control over the franchisees' employment policies, an argument that echoes the joint employer standard set forth in *Browning-Ferris*.

Moreover, while the Board's decision in *Browning-Ferris* clearly covers companies that subcontract with staffing agencies to provide temporary labor or to supplement their workforces, it may have much broader implications for other models, such as private equity investors and conglomerate companies.

Challenging the Standard

Shortly after the Board issued its decision in *Browning-Ferris*, Congress introduced legislation, called the Protecting Local Business Opportunity Act, S. 2015/H.R. 3459, to attempt to reverse the new *Browning-Ferris* standard. Specifically, this Bill would amend the definition of an "employer" under the NLRA by adding "two or more employers may be considered joint employers for purposes of this Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate." The odds are slim that the proposed legislation will become law any time soon, as the President likely would veto the bill were it to reach his desk, just as he recently handled legislation challenging the NLRB's new "quickie" election rule.

The more likely way for the Board to revert to its prior joint employer standard is through an appeal of *Browning-Ferris* at the federal appellate court level. The stage for an appeal of the *Browning-Ferris* decision currently is being set as the union, after winning a representation election in that case, filed an unfair labor practice charge against BFI for refusing to bargain with

the union. Once the NLRB issues a final bargaining order against BFI, BFI will be able to appeal the Board's joint employer finding.

Outlook

For now, businesses, including franchisors and large conglomerates with multiple operating companies, are left with an unclear standard to navigate when entering into subcontracts or investor relationships involving active participation. In those relationships, the governing legal document may be instrumental to establish a joint employer relationship. Also, operational control – or reserving operational control – by one company over another may suffice to create joint employer liability for labor matters.

Mitchell Boyarsky is a Director in the Gibbons P.C. Employment & Labor Law Department in New York City. James J. La Rocca is an employment and labor associate, who works out of the firm's headquarters in Newark, New Jersey.