Legal Backgrounder

Vol. 32 No. 12 May 19, 2017

Washington Legal Foundation
Advocate for Freedom and Justice®
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Washington, DC 20036
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Predictable, Uniform Standard Needed for Who Is a Joint Employer

by Michael J. Lotito and Missy Parry

The Obama Administration engaged in an unprecedented regulatory overreach when it changed the definition of who constitutes an employer under numerous statutes. In 2015, the National Labor Relations Board (NLRB) expanded joint-employer liability with its decision in *Browning-Ferris Industries of California, Inc.*[1] This change in the employer definition then spread to other federal agencies and the statutes under their regulatory jurisdiction, which in turn created greater disharmony in an arena already rife with differing standards for joint-employer liability. The new administration has moved quickly to curb overregulation, but it has yet to address the uncertainty many businesses face from the differing joint-employer standards and expansion of joint liability.

NLRB's decision in *Browning-Ferris* overruled more than 30 years of bipartisan precedent and is inconsistent with both the Taft-Hartley amendments to the National Labor Relations Act (NLRA) and the common-law definition of joint employment.[2] NLRB replaced the predictable "direct and immediate control" standard for determining joint-employer status with a vague test based on indirect control, unexercised potential control, and limited and routine supervision.[3]

The *Browning-Ferris* decision exposes a broad range of businesses, including franchisors and franchisees, contractors and subcontractors, and staffing companies and their clients, to workplace liability for another employer's actions and over workers not in their employ. The standard could impose bargaining obligations on joint employers and make entities liable for each other's unfair labor practices, including unlawful discipline or discharge of employees. The new joint-employer standard also increases the likelihood of union "corporate campaigns" against national businesses that will pressure smaller businesses, franchisees, suppliers, or subcontractors to organize. Unions engaged in corporate campaigns often use NLRB's complaint process against employers. As has been seen in NLRB's case against a large national franchisor, small businesses, which may not be able to handle the costs, may become enmeshed in a long, expensive legal battle along with the national business.[4]

Browning-Ferris was appealed to the US Court of Appeals for the DC Circuit.[5] On March 9, 2017, a three-member panel of judges heard oral arguments. The panel questioned how the new indirect-control test would provide a clearly delineated standard for joint employment. Although employers found this line of questioning encouraging, a decision is not expected for several months and could be appealed to the US Supreme Court.

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NLRB's expanded definition of joint employer spread from the NLRB to other federal agencies. Last year, the Wage and Hour Division at the US Department of Labor released administrative directives extending joint-employer liability to statutes under its jurisdiction.[6] The Department of Labor also issued a fact sheet on joint employment under the Family and Medical Leave Act applying the same analysis.[7] The Equal Employment Opportunity Commission filed a brief in support of NLRB's new standard in *Browning-Ferris* arguing that the definition of employer under Title VII is based on the NLRA and supporting a similar standard under both statutes.[8] A draft memo by the Occupational Safety and Health Administration instructed investigators to determine whether a joint-employment relationship exists between franchisors and franchisees based on indirect or potential control.[9]

At the federal and state levels, joint-employer litigation has mushroomed. Plaintiffs' lawyers have brought numerous joint-employer lawsuits under various federal employment laws. At the state level, plaintiffs' lawyers have filed joint-employment suits under workers' compensation acts, wage-and-hour laws, and human rights laws. Some of the most high-profile joint-employment lawsuits have been against large nationwide companies. For instance, in November 2016, contract delivery drivers filed a Fair Labor Standards Act (FLSA) complaint in a Chicago federal court against their employer and a third-party business that contracted with that employer for services, for overtime pay.[10] The drivers argue that the contractor should be considered their joint employer, although the shipping subcontractor hired and paid them. In May 2016, New York Attorney General Eric Schneiderman filed a wage-and-hour lawsuit against a large pizza franchisor as a joint employer with ten local franchise owners.[11] Both lawsuits remain pending.

Other franchisors face similar issues. Last year, a franchisor agreed to pay $3.75 million to settle franchisee workers' wage-and-hour claims, even though a federal judge found that the evidence did not establish a direct joint-employer relationship. Instead, the judge let the case proceed based on indirect state-law "ostensible agency" claims that the employees reasonably believed that the franchisor was their employer.[12] The franchisor unsuccessfully argued that an ostensible agency relationship is incapable of being determined on a class-wide basis because it involves individualized questions of personal belief and reasonable reliance. However, on January 5, 2017, another judge in the Northern District of California refused to certify similar ostensible agency claims against the same franchisor.[13] The court held that there was no general bar to certifying ostensible agency claims, but the experience of the putative class members in this case was too varied.

Some federal courts have also expanded the standard based on inflated agency interpretations. In a recent subcontractor case, the Fourth Circuit adopted an expansive joint-employment test based on the Department of Labor Administrator's Interpretation.[14] The court specifically rejected a long-standing Ninth Circuit test. In addition to traditional direct-control factors, the court looked at informal and indirect control over the essential terms and conditions of a worker's employment to determine joint employment. In holding both businesses jointly liable for overtime violations, the court reversed a district court's determination that a class of drywall installers was not jointly employed by their subcontractor employer and the construction contractor.

Under these expanded standards, almost any business relationship could be subject to a joint-employer claim. By making larger businesses liable for the employment practices of entities outside their control, the expanded joint-employer standard will reduce opportunities for entrepreneurs and result in fewer jobs. Franchisors may decrease their franchise opportunities. Franchise owners may not

want to stay in business when a franchisor exercises more control over its small business. Subcontractors may have fewer business opportunities as companies limit their exposure to joint-employment liability. These industries are leading creators of jobs and generate opportunity for entrepreneurs to start new businesses.

Since NLRB's new joint-employer test has extended to multiple federal agencies, the standard cannot be addressed solely at NLRB. The new administration and Congress must make fixing the joint-employer standard a top priority. The White House should consider issuing an executive order mandating that federal agencies apply the direct-and-immediate-control standard to statutes under their jurisdiction. Congress could likewise enact legislation that supports businesses and seeks to ensure a uniform standard for determining joint-employment liability under all the relevant federal statutes, including the NLRA, the FLSA, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act, the Migrant and Seasonal Agricultural Worker Protection Act, and the Occupational Safety and Health Act of 1970.

That definition should require a business to directly, actually, and immediately exercise significant control over the essential terms and conditions of employment, including hiring, firing, discipline, supervision and direction of employees, who are employed by the other entity, before joint employment attaches.[15] The statute should make clear that law preempts all substantially similar state, city, and county labor and employment laws regarding the definition of joint employment.[16] Federal preemption of state laws regarding joint employment is necessary to provide the uniformity required to ensure smoothly functioning national markets and protect businesses from liability for employment practices that are not their own.[17]

As part of its commitment to deregulation, the new administration should curtail the creeping expansion of joint-employer liability. As noted in a letter signed by almost 50 lawmakers to the House Appropriations Committee in April 2017, NLRB's joint-employer standard has "fundamentally altered long-standing labor policy in our country and made it harder for workers to advance." Reversing the Obama Administration's indirect-control test, and returning to a bright-line standard requiring direct and immediate control, would restore certainty and predictability, which would ensure the continuation of beneficial business relationships such as franchising, subcontracting, and temporary employment.

ISBN 1056 3059

Endnotes

[1] *Browning-Ferris Industries of California, Inc.,* 362 NLRB No. 186 (2015).
[2] Whether a worker is an "employee" of a putative "joint employer" must be determined on the basis of common-law understandings of "employee" and "employer" and NLRB is not to give new meaning to these definitions. H.R. Rep. No. 245, 80th Cong., 1st Sess., 26. The common-law definition of the employer-employee relationship is based on the understanding that employees work for wages or salaries under direct supervision. *Ibid; see also NLRB v. United Ins. Co.,* 390 U.S. 254, 256 (1968).
[3] Following *Browning-Ferris,* NLRB applied its expanded joint-employer theory in other cases. *See Microsoft Corp.,* NLRB Case No. 19-CA-162985, Order (July 19, 2016) (Rejecting challenge to expansive subpoenas to determine if Microsoft was joint employer with supplier for failure-to-bargain case); *Miller & Anderson, Inc.,* 364 NLRB No. 39 (2016) (Union could organize workers employed by one business, and temporary workers jointly employed by that business and a staffing agency, in one unit); *Retro Environmental, Inc./Green Jobworks, LLC,* 364 NLRB No. 70 (2016) (Expanding standard to contingent-worker industry and finding a construction company and a temporary staffing agency joint employers for a union petition to represent a combined unit of employees, even though the companies had no current projects and no bids for future projects).
[4] *McDonald's USA, LLC*, NLRB Case No. 02-CA-093893 (ALJ Order Oct. 12, 2016).
[5] See *Browning-Ferris Industries of California, Inc.,* 363 NLRB No. 95 (2016) petition for review pending *Browning-Ferris Industries of California, Inc. v. NLRB,* No. 16-1028 (D.C. Cir.). [*Ed. Note*: WLF filed an *amicus* brief in support of the Appellant, *available at* http://www.wlf.org/upload/litigation/briefs/Browning-FerrisvNLRB-WLFBrief-2-.pdf.]
[6] *See* Administrator's Interpretation No. 2015-1, *The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors* and Administrator's Interpretation No. 2016-1, *Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act* available at https://www.dol.gov/whd/opinion/opinion.htm.
[7] Fact Sheet #28N: *Joint Employment and Primary and Secondary Employer Responsibilities under the Family and Medical Leave Act (FMLA)* available at https://www.dol.gov/whd/fmla/fact_sheets.htm.
[8] *Browning-Ferris Indus. of California. v. NLRB*, Case No. 16-0128, Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Support of NLRB (D.C. Cir. filed Sept. 14, 2016).
[9] Available on the U.S. House of Representatives Education and Workforce Committee website: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0ahUKEwi8pMHs38DTAhVGrlQKHUroAGQQFghFMAU&url=http%3A%2F%2Fedworkforce.house.gov%2Fuploadedfiles%2Fosha_memo.pdf&usg=AFQjCNHsDzXDhA9xTTm0pnFoPCKUKeL7yw.
[10] *Bradley v. Silverstar, Ltd.*, Case No.: 1:16-cv-10259 (E.D. Ill., Nov. 1, 2016).
[11] *New York v. Domino's Pizza*, Index No. 450627/16 (Sup. Ct., May 23, 2016).
[12] *Ochoa et al. v. McDonald's Corp.*, 2016 WL 3648550 (N.D. Cal. July 7, 2016).
[13] *Salazar v. McDonald's Corp.*, Case No. 3:14-cv-02096-RS (N.D. Cal. Jan. 5, 2017).
[14] *Salinas v. Commercial Interiors, Inc.,* 848 F.3d 125 (4th Cir. 2017).
[15] For instance, NLRB applied this standard for over 20 years in cases such as *Laerco Transp. & Warehouse*, 269 NLRB 324 (1984); *TLI, Inc.*, 271 NLRB 798 (1984); and *Airborne Express*, 338 NLRB 597 (2002) (control over employment matters must be direct and immediate).
[16] As long as it is exercising its constitutional power to regulate interstate commerce, Congress can decide to impose a regulatory regime that also preempts state regulation by adding a separate provision to the statute specifying the extent to which the federal law preempts state law. Hundreds of federal statutes contain express preemption clauses.
[17] Under the Supremacy Clause, Congress has the power to preempt state law. *See Brown v. Hotel Employees,* 468 U.S. 491, 500–501 (1984). The Supreme Court has recognized that states may not regulate labor activities when they are clearly protected or prohibited by the federal statute. *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 240 (1959). Similarly, Congress intended to subject employers and employees to only one set of regulations regarding occupational health and safety, be it federal or state, which specifically limits states' ability to regulate. *Gade v. National Solid Wastes Mgmt. Assn.,* 505 U.S. 88 (1992).

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