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By Adrian Mehdiraz*

Introduction

The joint-employer standard establishes that two or more entities are employers of a group of employees if those entities exert some form of control over the same group of employees.¹ This standard is an essential aspect of labor law because the National Labor Relations Act (“NLRA”) requires employers to collectively bargain with their employees.² The joint-employer standard, a judicial construction created by the National Labor Relations Board (“NLRB”),³ remained largely unchanged from 1984 until 2015. During that period, the Board found a joint-employer relationship if the putative joint-employer exercised “direct and immediate control” over the essential terms and conditions of employment.⁴

Recent Developments

In 2015, the Board decided *Browning-Ferris*, holding that joint-employer status can be established if the employer directly or indirectly controls, or reserves the authority to control, the employment terms and conditions of another employer’s employees.⁵ Then, in 2017, the Board decided *Hy-Brand*, which reversed *Browning-Ferris* and reinstated the “direct and immediate” joint-employer standard.⁶ Later, in February 2018, the Board vacated *Hy-Brand* for ethical reasons and reinstated the joint-employer standard articulated in *Browning-Ferris*.⁷ To add to the confusion, the D.C. Circuit has recently upheld the standard as articulated in *Browning-Ferris*.⁸

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¹ *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186, Slip op. at 2 (2015).

² 29 U.S.C. §§ 151-169.

³ *Greyhound Corp.*, 153 NLRB 1488 (1965).

⁴ *Laerco Transp.*, 269 NLRB 324, 325 (1984); *TLI, Inc.*, 271 NLRB 798, 798-99 (1984).

⁵ 362 NLRB No. 186, Slip op. at 1-2 (2015).

⁶ *Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156, Slip op. (2017).

⁷ *NLRB Vacates Hy-Brand Decision Returning to BFI Joint-Employer Standard . . . For Now*, Ogletree Deakins, (Feb. 18, 2018), <https://ogletree.com/insights/2018-02-28/nlr-b-vacates-hy-brand-decision-returning-to-bfi-joint-employer-standard-for-now/>.

⁸ *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

On September 14, 2018, the NLRB published a Notice of Proposed Rulemaking⁹ seeking to adopt a joint-employer standard where an employer must possess and “actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer’s employees in a manner that is not limited or routine.”¹⁰

The proposed rule reflects the Board’s primary view that the NLRA is best served by regulating only those who “played an active role in establishing essential terms and conditions of employment,” which can be achieved by eliminating the indirect control requirement.¹¹ The Supreme Court and the Board have held that firms retain some influence over the work performed by its supplied workers without destroying those firms’ classification as independent employers.¹² Lastly, the proposed rule will provide certainty in reinstating the joint-employer standard supported by decades of precedent.¹³

Implications of the Proposed Rule

Firstly, the proposed rule will not provide absolute certainty as to the joint-employer standard. The Board, in hastily reversing *Browning-Ferris* with *Hy-Brand*, vacating *Hy-Brand*, and then proposing a new joint-employer standard through the rulemaking process, has brought more confusion. The dissenting opinion in *Hy-Brand* took note of this, as the *Hy-Brand* majority was incapable of citing an opinion that displayed the uncertainty that *Browning-Ferris* had caused.¹⁴ Further, the proposed rule requires

⁹ The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681 (Sept. 14, 2018) (codified at 29 C.F.R. § 103).

¹⁰ *Id.* at 46686.

¹¹ *Id.*

¹² *Id.*; *See Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689-90 (1951) (holding that a contractor’s exercise of supervision over a subcontractor’s work did not eliminate the classification of each as an independent contractor or make the employees of one the employees of another).

¹³ *Id.*

¹⁴ *Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156, Slip op. (2017) (Members Pearce and McFerran, dissenting). This stems from the *Hy-Brand* majority, which argued that

substantial direct and immediate control which is wholly different than direct and immediate control.¹⁵ The Board, though it offers hypotheticals containing certain activities to explain whether joint-employer status has been established,¹⁶ offers no explanation as to whether certain activities constitute substantial direct and immediate control, leaving employers, employees, and unions questioning what constitutes substantial direct and immediate control.

The D.C. Circuit's affirmation of the Browning-Ferris joint-employer standard cuts against the proposed rule. Even more alarming, the D.C. Circuit upheld Browning-Ferris for the reasons that Hy-Brand deemed inapposite.¹⁷ Accordingly, such a finding adds to the uncertainty surrounding the proposed rule, as a reviewing court may hold that the proposed rule is an unreasonable interpretation of the joint-employer standard.

A third consequence of the proposed rule is that it incentivizes employers to fissure the workplace. The fissured workplace is a phenomenon in which large companies utilize staffing agencies to carry out the lesser important activities.¹⁸ These staffing agencies then utilize separate entities to hire employees, causing a large chain of employees separate from the main, large company.¹⁹ The separate entities and their employees that are further removed from the main, large company have the lowest wages and fewest benefits because the incentive to cut costs increases the farther away the company is from the main employer.²⁰ Accordingly, the proposed rule will exacerbate this problem. The proposed rule will incentivize businesses to exert control less than substantial direct and immediate control, thereby relinquishing their classification as an employer and duty to collectively bargain. Therefore, when a business implements these strategic business

the *Browning-Ferris* majority's inclusion of indirect or reserved control in the joint-employer standard will cause confusion amongst employers, employees, and unions.

¹⁵ 83 Fed. Reg. at 46686 (emphasis added).

¹⁶ *Id.* at 46697.

¹⁷ *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1211 (D.C. Cir. 2018).

¹⁸ David Weil, How to Make Employment Fair in an Age of Contracting and Temp Work, *Harv. Bus. Rev.*, <https://hbr.org/2017/03/making-employment-a-fair-deal-in-the-age-of-contracting-subcontracting-and-temp-work> (Mar. 24, 2017).

¹⁹ *Id.*

²⁰ *Id.*

practices, the business can continue to focus on profitability at the expense of the outsourced employees. This affects the employees that are furthest away from the main employer because these employees are incapable of collectively bargaining with the entity that has the resources to concede to its employees during negotiations.

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