

Revisiting the Great Joint Employment Debate



From ‘Browning-Ferris’ to ‘Hy-Brand’ and beyond

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The National Labor Relations Board has been making headlines of late with a high-profile internal debate over the scope of the joint employment doctrine under the National Labor Relations Act. The doctrine itself carries broad implications for franchisors and corporate “families” of affiliated companies, as well as any employer that relies on “temp agency” workers or subcontractors to supplement its own workforce. So it is critical for such companies, and their counsel, to have an understanding of both the doctrine and the current debate over it.

In essence, the joint employment doctrine posits that an individual employee, working in a single role, can be simultaneously—or “jointly”—employed by more than one employer. Take, for example, a cashier working at one location of a nationwide chain of fast-food restaurants. Under the joint employment doctrine, that individual may be considered the employee of both the

franchisee company operating that local restaurant, and of the larger franchisor. Or take a retail store that hires one security supervisor to oversee and direct the work of subordinate officers who are supplied by a subcontractor. Under the joint employment doctrine, those officers may be considered employees of both the subcontractor and of the store.

Now, suppose a union seeks to organize the cashier and his coworkers. Will it be limited to campaigning at the single restaurant where the cashier works? Or can it argue, under the joint employment doctrine, that the franchisor should recognize the union as the representative of all cashiers at all of its branded restaurants nationwide? Suppose the cashier claims he and his coworkers were denied overtime pay required by the Fair Labor Standards Act and decides to bring a collective action. Will he be limited to suing the franchisee restaurant on behalf of the relatively modest number of workers there, or can he bring a nationwide claim against the franchisor as well? Suppose one of the subcontracted security officers claims she was sexually harassed by a coworker. Can she bring a Title VII claim against the store? Or suppose she becomes pregnant and requires an accommodation. Does the store, as her joint employer, have a legal obligation to engage in the interactive process and afford her reasonable accommodations?

Answering these questions involves fact-sensitive analyses concerning whether the franchisor and store exercise sufficient control over the cashier and security officer to be considered their employer. But just how much control is sufficient to create a joint employment relationship? That is the question at the center of the current debate.

For more than three decades prior to 2015, the Board had required that the putative joint employer (in our hypotheticals, the franchisor and the store) both possess and actually exercise control that was “direct and immediate.” Then, in August 2015, the Board issued its landmark decision in *Browning-Ferris Industries*, 362 NLRB No. 186.

In *Browning-Ferris*, the Board abandoned its traditional “direct and immediate control” test for joint employment in favor of a more lenient standard that examines “all of the incidents of the relationship.” No longer was it necessary that the putative joint employer both possess the

authority to control the essential terms and conditions of employment and also exercise that authority. The Board declared that “reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry.”

It would be difficult to overstate the significance of the Board’s *Browning-Ferris* decision. It immediately touched off a debate among labor, management and practitioners on both sides, which has not quieted yet. If anything, it has intensified. Browning-Ferris Industries appealed the Board’s decision to the D.C. Circuit Court of Appeals in January 2016, arguing that the Board had adopted an unworkably vague rule without articulating an adequate reason for doing so. A host of business associations echoed these arguments in amicus briefs.

Others, including various labor advocacy groups, came to the Board’s defense and urged the Circuit Court to uphold *Browning-Ferris*. Among them was the U.S. Equal Employment Opportunity Commission, which submitted an amicus brief in support of the Board’s new test. The EEOC argued that “a broad, fact-specific inquiry” was not only workable, but consistent with its own “intentionally flexible” approach to joint employment issues.

The EEOC’s multi-factor approach stems from the U.S. Supreme Court’s 1992 decision in *Nationwide Mutual Insurance Company v. Darden*, which adopted the common law test in defining an “employee” for purposes of ERISA. The list of factors includes, among others, whether the employer has the right to control the “means and manner” of the work; whether the employer furnishes the equipment used to perform the work and the worksite itself; whether the work performed is an integral part of the employer’s business; and the parties’ respective rights and obligations should either wish to terminate their relationship. Importantly, the list of factors is not exhaustive, and no one factor—or even a majority of factors—is determinative. The EEOC, arguing that “courts are well equipped to address the nuances of a fact-specific joint employer determination,” urged the Court of Appeals to embrace a similar approach in affirming *Browning-Ferris*.

Before the D.C. Circuit rendered its decision, however, the Board reversed course. On Dec. 14, 2017—in the last days of the chairmanship of Philip Miscimarra, who two years earlier had dissented in *Browning-Ferris*—a majority of the Board issued a surprise decision in *Hy-Brand Industrial Contractors*, 365 NLRB No. 156. Joined by Trump appointees William Emanuel and Marvin Kaplan, Chairman Miscimarra lambasted the standard adopted in *Browning-Ferris*, stating that:

[I]t is a distortion of common law as interpreted by the Board and the courts, it is contrary to the [National Labor Relations] Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations.

The *Hy-Brand* majority therefore overruled *Browning-Ferris*, and declared that the Board would once more require “proof that the alleged joint-employer entities have actually *exercised* joint control over essential employment terms” and that the control “must be ‘direct and immediate.’” Control that is “limited and routine” would not suffice to establish a joint employment relationship.

In light of *Hy-Brand*, the Court of Appeals granted the Board’s request to remand the appeal from its *Browning-Ferris* decision. That was not, however, to be the end of *Browning-Ferris*.

On Feb. 9, the Board’s inspector general issued a report concluding that, under an executive order known as the “President’s ethics pledge,” Member Emanuel should have been recused from the deliberations in *Hy-Brand* because of his ties to the attorneys for one of the parties in *Browning-Ferris*. Based upon the inspector general’s report, the Board—without Member Emanuel’s participation—issued an order vacating *Hy-Brand* on Feb. 26, thereby reinstating the *Browning-Ferris* standard.

So what lies in store for the joint employer doctrine? On March 1, the Board asked the D.C. Circuit to reaccept and “continue processing” the appeal from *Browning-Ferris*. The Board argued that in light of the order vacating *Hy-Brand*, there were no longer valid grounds to

remand the *Browning-Ferris* decision. Browning-Ferris Industries has opposed the Board's motion, arguing in supplemental briefing that taking the case back would be "premature." Positing that *Hy-Brand* "evidences a desire by a Board majority at that time to overrule the *Browning-Ferris* joint employer standard in an appropriate case," the company argued that "judicial economy calls for ordering retention of the instant case by the Board, and its reconsideration based upon agency policy developments." As of the date this article was submitted for publication, the Circuit Court had yet to rule on the Board's application.

Separately, on Nov. 7, 2017, the U.S. House of Representatives passed the Save Local Business Act. The bill would amend both the National Labor Relations Act and the Fair Labor Standards Act to provide that "a person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment." There has been no movement, however, since the House passed the bill. A heavily lobbied-for rider that would have overturned *Browning-Ferris* was left out of the omnibus spending bill passed in March. That leaves the Save Local Business Act's chances of eventual enactment unclear at best.

If anything is certain, it is that the debate over the joint employer standard is unlikely to end anytime soon. At least for the time being, the looser "indirect control" standard of *Browning-Ferris* is Board law. And whatever the fate of *Browning-Ferris* itself, it may have limited influence on the approach to joint employer issues taken by courts and other government agencies, in particular the EEOC and its myriad state and local counterparts. Employers, and their counsel, would thus be wise to keep a close eye on this continuing debate.

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