

Joint-Employer Status: New NLRB Standards Reset the Stage and Redefine the Players

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By Allen B. Roberts and Steven M. Swirsky

For those liberals and conservatives who do not think of themselves as “joint employers” of their doctors, lawyers, pet groomers, personal trainers, disc jockeys, and baristas, the National Labor Relations Board (“NLRB” or “Board”) has set a new definition that would offer some surprises—were they not spared by the technicality that most individuals do not satisfy National Labor Relations Act (“NLRA” or “Act”) jurisdictional standards of doing business in interstate commerce. However, unlike individuals, most business organizations today pass a very low bar for satisfying NLRB jurisdictional requirements.

In a time when U.S. private sector unionization has shriveled to 6.6 percent (down to approximately one-fifth of its high point in 1954), being drawn into joint-employer status and related obligations to bargain with a union may have seemed farfetched to businesses and other organizations. But under initiatives of a majority of Board members and a General Counsel appointed by President Obama, the NLRB has undertaken a stunning assertion of authority to impose joint-employer status, which is especially relevant in the current “gig” economy and millennial society. The NLRB’s position portends that other agencies may emulate it and private practitioners may seize on a newfound opportunity to draw in a broad range of organizations that under long-standing precedents would not be found to be joint employers of their contractors, vendors, staffing and leasing agencies, or franchisees.

Why Joint Employment Matters

In ordinary circumstances, it would seem rational for an organization to set its own course and determine activities to which it will devote executive, management, and cash resources, contracting to others the responsibility for services or components that are not a business or strategic priority. By its recently issued three-to-two majority decision in [*Browning-Ferris Industries*](#), 362 NLRB No. 186 (August 27, 2015), the NLRB announced how differently it sees things, and it showed how deeply it is committed to disrupting established delineations of employer-employee relations.

Underlying the NLRB’s decision is “the steady increase in procurement of employees through staffing and subcontracting arrangements, or contingent employment.”

Depending upon the industry, businesses will be affected in such varied mainstream or support activities as temporary and contingent staffing, information technology, communications, help desk, mail room, facility and equipment maintenance, dining and catering services, security, janitorial, cleaning, and third-party administrators of benefit plans—in other words, virtually anything that conceivably could be done within the business, if it were not outsourced.

How the NLRB Describes Its New Joint-Employer Standard

The NLRB's starting point is a deceptively modest introduction of its objective:

Our aim today is to put the Board's joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the Act, to best serve the Federal policy of "encouraging the practice and procedure of collective bargaining."

But the NLRB's standard accelerates with a set of basic inquiries that it will examine to determine joint-employment status:

- Do two or more statutory employers share or codetermine matters governing the essential terms and conditions of employment?
- Does the putative joint employer possess sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining?
- How is control manifested in a particular employment relationship?
- Is there direct, indirect, or potential control over working conditions?
- Is the authority to control terms and conditions of employment reserved?

The Board's inquiries are likely to result in a determination of joint-employer status so long as a party is found to possess at least an indirect ability to control employment terms and conditions, even if that authority has not been exercised.

Criteria the NLRB Will Not Consider

Possibly more revealing of what *Browning-Ferris* portends are criteria that the NLRB now explicitly rejects and will not consider relevant to a joint-employer inquiry.

The NLRB will no longer require that a party alleged to be a joint employer possessing the authority to control employees' terms and conditions of employment actually exercise that authority. Now, reserved authority to control terms and conditions of employment will be an essential consideration—even if the authority is not exercised.

Also, the NLRB has abandoned any requirement that an employer's control must be exercised "directly and immediately." Rather, now it will suffice that control is exercised through an "intermediary."

The NLRB also stated the following:

[W]e reject any suggestion that such status should be found *only* where meaningful collective bargaining over employees' terms and conditions could not occur *without* the participation of the putative joint employer. Where two entities "share or codetermine those matters governing the essential terms and conditions of employment," they are *both* joint employers—regardless of whether collective bargaining with one entity alone might still be regarded as meaningful, notwithstanding that certain terms and conditions controlled only by the *other* entity would be excluded from bargaining.

Therefore, it does not matter to the NLRB whether the actual and direct employer could fulfill all responsibilities to bargaining unit employees and a union representing them without participation by a contracting employer, or another third party, drawn in as a joint employer.

No Immediate Administrative or Judicial Review of *Browning-Ferris*

Because *Browning-Ferris* was decided in the context of a representation case proceeding, where a union petitioned for an election in a unit of leased or temporary workers, there is no further administrative or judicial review immediately available to the company, the union, or the NLRB in the pending case. Challenges to the Board's new standards and opposition to findings of joint-employer status will have to be tested administratively in unfair labor practice cases alleging a putative joint employer's unlawful refusal to bargain or other alleged unfair labor practice activity (something underway for [McDonald's and certain of its franchisees](#)), prosecuted by the NLRB's General Counsel, litigated before an NLRB administrative law judge, and considered on review by the NLRB or its designated three-member panel.

But no NLRB decision is self-enforcing. As typical of matters in which the NLRB has taken bold steps to refashion established legal principles or expand its interpretive reach, review by a U.S. circuit court of appeals is predictable—if justified by the principle and value of the matter and within the resources of an organization subject to an adverse ruling.

Next Considerations for Business Decisions

Taking account of the mutually advantageous prevalence of business reliance on others to perform certain services, the *Browning-Ferris* majority purported to ground its holding in "the current economic landscape" of "contingent employment relationships." The holding seems to presume that the landscape is not a result of legitimate business decisions, consciously elected to define the activities that an organization will undertake to perform on its own, while identifying other activities for contracting or some other means of delegation or assignment to third parties. By way of example, a science,

technology, or media business may be formed for the purpose of creating content or ideas, but the enterprise may not want to be encumbered with details of either production or distribution of its “product,” outsourcing those activities to others—and their workforces.

To be sure, the NLRB suggests a possible roadmap for avoiding joint-employer status, but the essential question for every organization potentially affected by *Browning-Ferris* and the NLRB decisions likely to follow in its wake is whether it is prudent and in the best interests of the business to relinquish the actual and potential control that could be determinative of joint-employer status. The answer for each organization and situation will vary, possibly with different results that depend on various factors, among them:

- criticality of activity,
- relation of activity to core business,
- comparative expertise,
- quality,
- efficiency,
- resources,
- manpower,
- confidentiality,
- time sensitivity,
- cost, and
- upside or downside risks.

Adding to the factors militating in favor of, or against, outsourcing, *Browning-Ferris* presents a new challenge to organizations that want to focus their business, executive, management, and economic resources on the aspects of the business that they know best and where they see the best opportunity. Now, some organizations may consider exposure of job classifications to unionization as a factor in determining which activities will be outsourced, as well as the manner in which outsourcing will occur.

Practical and Legal Consequences of *Browning-Ferris*

With respect to activities that may be performed remotely and offsite, *Browning-Ferris* may boomerang with a consequence neither intended nor foreseen by the NLRB majority: it could drive jobs offshore, where contractors and their employees are outside the jurisdiction of the NLRB—and its new joint-employer standards. In essence, the

NLRB implicitly may encourage outsourcing to countries outside the United States, where it has no jurisdiction over employers or employees.

Additionally, the NLRB may need to reconsider other precedents that do not fit neatly within the reach of *Browning-Ferris*. Already, the NLRB has indicated that it considers a pending case, [Miller & Anderson, Inc.](#), 05-RC-079249, to be a vehicle for deciding whether to “disallow[] inclusion of solely employed employees and jointly employed employees in the same unit absent consent of the employers, and if not, whether the Board should return to the holding of [M.B. Sturgis, Inc.](#), 331 NLRB 1298 (2000), which permits the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers.”

A further complication inheres in the limitations that will exist by virtue of the NLRB’s recognition that “a joint employer will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful.” Sorting out the particular areas of joint employer, as distinct from direct employer, responsibility in the potpourri of wages, hours, terms, and conditions of employment that are mandatory subjects of collective bargaining could be daunting in each unique relationship.

Potential Extensions of *Browning-Ferris* to Other Laws

Looking beyond the NLRA, organizations must anticipate a host of administrative and compliance actions, piggybacking *Browning-Ferris*, and other fallout from the NLRB’s majority opinion. If a business is deemed a joint employer for NLRA purposes, other federal, state, and local administrative agencies, together with the plaintiffs’ bar, may be at the ready to test whether other statutes have sufficient elasticity to mimic the NLRA and impose similar joint-employer exposure by means of administrative charges and complaints, judicial action, or arbitration proceedings. Topics of potential joint-employer reach could relate to direct or joint responsibility for wage and hour compliance, equal employment opportunity, [occupational safety and health](#), immigration, medical and pension plan participation, payroll withholdings and deductions, workers’ compensation, unemployment insurance, and the misclassification of independent contractors and others.

The Occupational Safety and Health Administration (“OSHA”) presents one immediate area of applicability, and the NLRB’s *Browning-Ferris* decision is likely to influence OSHA’s approach to inspections and citations involving temporary or contract employees. When [OSHA’s temporary employee initiative](#) was announced in 2013, the Assistant Secretary of Labor for Occupational Safety and Health, Dr. David Michaels, declared that “[t]emporary staffing agencies and host employers share control over the employee, and are therefore jointly responsible for temp employee’s safety and health. It is essential that both employers comply with all relevant OSHA requirements.”

Although inspections under the temporary employee initiative sometimes result in citations being issued to both the host employer and the staffing agency, more often than not, only the host employer is cited because it is perceived as having a greater ability to control or prevent the temporary employee’s exposure to a hazard. Should OSHA adopt the reasoning of *Browning-Ferris*, this trend will surely change, significantly

increasing staffing agencies' exposure to OSHA citations even when the staffing agency had no control over the workplace or awareness of the hazard. Additionally, under the agency's [multi-employer worksite citation policy](#), OSHA may cite an employer for hazards that other employers' employees were exposed to when OSHA finds that the employer controlled the hazard, created the hazard, or was responsible for correcting the hazard. Applying the reasoning of *Browning-Ferris* to this policy could considerably expand the number of employers cited, treating multiple contractors as controlling employers, regardless of whether they had any real control over the hazards at the worksite.

What Employers Should Do Now

As learned from reception of the NLRB's zealous assault on mandatory arbitration and waivers of class and collective actions under a line of cases beginning with [D.R. Horton](#) in 2012, reviewing courts are not necessarily hospitable to the NLRB's novel extensions of coverage or intrusions into matters of settled legislation. Nevertheless, by its *Browning-Ferris* decision, the NLRB presents diverse and consequential issues for all businesses having existing relationships with contractors and other service providers or contemplating forming or expanding such relationships.

It is prudent to be mindful that existing facts, showing no actual exercise of control by one organization over employee relations of another, may not be sufficient to avoid a determination of joint-employer status. Instead, an NLRB determination may turn on control that *potentially* could be exercised in an arm's length business relationship that was understood to be quite ordinary—until *Browning-Ferris*.

Organizations should anticipate a role in newly filed proceedings alleging joint-employer status, even as they contemplate reforming or redefining terms by which they engage contractors and other providers of services supportive of their business. While many organizations will escape being targeted by the NLRB or a union seeking representation or pursuing an unfair labor practice charge—or other agency compliance or enforcement actions and private party litigations—it is clear that *Browning-Ferris* must become a factor in auditing existing relationships, contemplating new ones, and conducting due diligence for the acquisition or sale of a business.

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For more information about this Advisory, please contact:

Allen B. Roberts
New York
212/351-3780
aroberts@ebglaw.com

Steven M. Swirsky
New York
212/351-4640
sswirsky@ebglaw.com

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