Beyond the NLRB's Browning-Ferris joint employer decision: what does it mean for franchising?

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The new, expanded concept of "joint employer" is inexorably taking hold. Proponents of this new outlook are striving to apply it to franchising − part of a broader initiative to overcome the so-called "fissured employment" landscape in the US.

In an August 27, 2015 National Labor Relations Board decision that should not have surprised anyone, the Board – in a contentious 3-2 decision following political party lines – decided to discard 30 years of NLRB precedent and adopt a broader and looser standard for determining joint employer status. This decision in *Browning-Ferris Industries of California, Inc.* substantially adopts the joint employment standard advocated by the NLRB General Counsel Richard Griffin's amicus brief Under the Board's new joint employer standard, a putative joint employer is no longer required to exercise "direct and immediate" control over workers' terms and conditions of employment. **"Indirect" or even "reserved" control is now potentially sufficient to establish a joint employment relationship.**

The NLRB's decision to adopt a new standard has potentially far-reaching implications for a large number of industries, including franchising.

At issue before the NLRB was whether Browning-Ferris Industries of California, Inc. (BFI) was a joint employer of workers provided by a staffing agency, Leadpoint Business Services, under a temporary labor services agreement. The NLRB, noting the explosive growth of "contingent workers" in recent decades, used this is as an opportunity to revisit the NLRB's joint employment standard.

The NLRB re-affirmed the "core" of its joint employer analysis – that an entity will be deemed a joint employer where it "shares or codetermines those matters governing the essential terms and conditions of employment." However, the Board abandoned the historic requirement that a putative joint employer exercise "direct and immediate" control over workers' terms of employment. The NLRB will now also consider "indirect" control exercised through an intermediary employer (such as a staffing agency), as well as a party's reserved contractual rights that may affect workers' terms and conditions of employment, **even if that control is not actually exercised.** In addition, the NLRB clarified that it will not limit its inquiry to control over hiring, firing, discipline, and supervision. The NLRB will also consider a putative joint employer's control over other matters that may impact employment practices, such as the number of workers to be supplied, scheduling, seniority, overtime approval, and the assignment of work.

Applying this new test, the NLRB concluded that BFI was a joint employer of the Leadpoint employees. Among other factors, BFI specified minimum hiring qualifications; retained the right to reject any Leadpoint worker; exercised control "over the processes that shape the day-to-day work" of the workers; set productivity standards; communicated work directives through Leadpoint; set a maximum wage "ceiling" by specifying that Leadpoint could not pay its employees more than BFI employees performing similar work; and required that Leadpoint employees comply with BFI's safety policies.

Although the NLRB's conclusion on the specific facts of this case might be understandable, its decision to adopt a new standard has potentially far-reaching implications for a large number of industries. Most directly, businesses that contract with staffing agencies for workers, common in many industries (including healthcare), will face the prospect that even indirect or reserved control can be grounds for establishing a joint employment relationship.

Moreover, the NLRB's decision also has implications for other legal relationships, including franchising. As noted in the forceful and lengthy dissenting opinion of Board members Philip A. Miscimarra and Harry I. Johnson III:

> "The majority's new test represents a major unexplained departure from precedent. This test promises to affect a sea change in labor relations and business relationships. Our colleagues presumably do not intend that every business relationship necessarily entails the joint employment of every entity's employees, but there is no limiting principle in their open-ended multifactor standard. It is an analytical grab bag from which any scrap of evidence regarding indirect control or incidental collaboration as to any aspect of work may suffice to prove that multiple entities – whether they number two or two dozen – 'share or codetermine essential terms and conditions of employment.'"

Furthermore, according to the dissent: "[t]his change will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts and picketing."

The majority spends much time in the opinion defending itself from the dissent's criticism and, *of particular interest to franchisors, states that it was not addressing the "particularized features" of the franchisor-franchisee relationship* in its decision. This noteworthy denial leaves open the possibility that the NLRB will follow General Counsel Richard F. Griffin's view in its amicus brief that a franchisor's indirect control over employee working conditions that is limited to protecting the quality of its product and brand is insufficient to establish a joint employer relationships. In that brief, the General Counsel advised: "[The NLRB] should continue to exempt franchisors from joint employer status to the extent that their indirect control over employee working conditions is related to the legitimate interest in protecting the quality of their product or brand." This view is perhaps supported by the *Freshii* advice memorandum issued by the General Counsel's office, in which, without analysis, a franchisor was deemed not to be a joint employer of its franchisees' employees, even under the new joint employer test. On the other hand, the franchise industry is justifiably alarmed that the NLRB is proceeding

aggressively against McDonald's without signaling at all how McDonald's operational controls over its franchisees will be assessed under the new joint employer analysis. Thus, it is far too early to predict how the NLRB will address the types of controls typically found in the franchise business model.

So now that the NLRB has rendered its *Browning-Ferris* decision, what does it mean and where does this go? How does the appeal process work?

BFI does not have a right to appeal this decision at this time. It is compelled to bargain with the union, and only in the context of failing to do so will BFI have the ability to appeal this joint employer determination in the context of an unfair labor practice (ULP) allegation. Any such ULP claim would move through the proper procedures back to the Board, whose decision then can be appealed to a federal court of appeals. In the meantime, even in the absence of an appellate court affirming the new joint employer standard, the new test will be the NLRB policy (which, of course, has ramifications within the NLRB and how it will proceed) unless and until it is told otherwise judicially.

If BFI wishes to appeal the decision, the process of challenging an unfair labor practice claim in the appellate court could take years, with a court decision not likely until well after the 2016 US Presidential elections. Given the political nature of the NLRB (the majority of the board is appointed by the incumbent US President), there is good reason to believe that the NLRB policy could be reversed if there is a change of parties in the Oval Office. Barring such a change, if a BFI ULP claim based on the NLRB's new expanded joint employer standard finds itself before an appellate court, the court will give deference to the NLRB's policy judgments and expertise in the area of labor relations – thus presenting a higher hurdle to overturn the decision. However, in light of the vociferous dissent at the NLRB level, one can expect a hard-fought battle.

In the meantime – as we anticipated – the expansive joint employer standard is starting to gain a foothold in other employment law arenas, including OSHA and Title VII (anti-discrimination statute), and even has the potential of spilling over into the vicarious liability arena.

What does this mean for franchise companies?

Franchisors will continue to face great uncertainty as the NLRB's views on the new test of joint employer, and how it applies to franchising, unfold. This uncertainty will linger until there is (a) a definitive court ruling overturning the NLRB's decision, (b) change in the political composition of the NLRB, or (c) legislative intervention – which certainly is unlikely before the next federal election.

As noted above, the NLRB's opinion explicitly stated it was not addressing the franchise industry, and there are mixed signals as to how this might unfold for the franchise industry. Nevertheless, we continue to counsel franchisors as we have, even before the advent of the new joint employer standard, to avoid or remove any semblance of control over franchisees' employment practices from franchise agreements and operations manuals and to instruct field personnel to act accordingly; also to avoid or remove all other controls that are not necessary for protection of the brand and the system.

Realizing that the legal risks of an unrestrained application of the new joint employer standard can only be unequivocally avoided by taking steps that would eviscerate brand standards and the franchise model of doing business, one is left practically with the option of just seeking to minimize the risks. As part of this, franchisors should:

- redouble their efforts to engage in best practices in their own employment relations and to encourage franchisees to do likewise
- educate franchisees that a joint employer finding is as disastrous for them as for franchisors and
- continue to demonstrate publicly how franchising is an unparalleled path to the American dream of entrepreneurship.

NLRB General Counsel Griffin and David Weil, Administrator of the Wage and Hour Division of the US Department of Labor and prolific author on the fissured employment justification for expanded joint employer analysis, are scheduled to address the franchise industry at the ABA Forum on Franchising on October 15-16, 2015 in New Orleans. We look forward to their comments and anticipate providing a further FranCast report shortly thereafter.

Find out more about this rapidly evolving situation and its impact on your business by contacting the authors.

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