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NLRA

NLRB Joint Employer Theory Faces Test, As D.C. Circuit Considers Legal Arguments

The National Labor Relations Board March 9 defended its theory that companies can be classified as joint employers if they ''share or codetermine'' the employment terms of a group of workers (*Browning-Ferris Indus. of Calif., Inc. v. NLRB*, D.C. Cir., No. 16-1028, *oral argument* 3/9/17).

Browning-Ferris urged the U.S. Court of Appeals for the District of Columbia Circuit to reject the new NLRB standard, which critics have called a threat to franchising and other business models.

The NLRB adopted the standard in a 2015 ruling that Browning-Ferris Industries of California Inc. was a joint employer with Leadpoint, a staffing firm that provided workers to the recycling company. The board overruled 30-year-old precedents that companies should share legal responsibility for employees only if they exercise ''direct and immediate control'' over the workers.

The NLRB argued it arrived at a reasonable interpretation of federal law that accommodates the increasing use over the past three decades of subcontractors, temporary agencies and contingent workers.

Joseph A. Kroeger, a partner at Snell & Wilmer in Tucson, Ariz., predicted the court will strike down the board's new joint employer standard.

The NLRB is sometimes ''tone deaf about the business community and how it works,'' and the D.C. Circuit ''has not been a hospitable place for the NLRB of late,'' Kroeger told Bloomberg BNA. Kroeger represents employers.

Franchise businesses—such as McDonald's—and other stakeholders are still unsure about how much the board's 2015 decision, if upheld, could expose employers to additional liability under the National Labor Relations Act. Opponents have said it could upend the franchise industry by requiring franchisers to take a much larger role in their franchisees' day-to-day operations.

Judges Question All Sides. The oral argument was scheduled to last 30 minutes, but the judges fired off questions for more than an hour.

The panel was composed of Judges Patricia A. Millett and Robert L. Wilkins, who were appointed by President Barack Obama, and Judge A. Raymond Randolph, a senior judge who was appointed by President George H.W. Bush. The trio probed each party's arguments but didn't give any signals on how they will decide the case.

Joshua Ditelberg of Seyfarth Shaw in Chicago argued for Browning-Ferris. He repeatedly told the court that the essence, or ''center of gravity,'' in determining whether companies are joint employers is the active control they exercise over employees and labor relations.

The board erred in adopting a new standard that would allow joint employer status to be found based on unexercised, or potential, authority, Ditelberg said.

Millett responded, ''Can't they *consider* unexercised authority?''

The management attorney stressed that actual control over employment matters is the ''touchstone'' in determining who is an employer.

But Millett said board members may be entitled to update their views about employment relationships in a transformed economy. Members can decide, ''I'm going to emphasize these particular factors'' as industries and workplaces change over the years, she said.

Indirect Control or Mere 'Influence.' NLRB attorney Joel A. Heller faced several questions about where the board would draw the line between ''indirect control'' showing a joint employer relationship and mere ''influence'' by one company over a contractor or supplier.

Randolph asked about a hypothetical hotel instructing a contract landscaper to ''tell that guy'' (a landscaper employee) to stop mowing the grass too low. Would the board consider that evidence of a joint employer relationship? the judge asked.

Such an incident wouldn't be determinative in an NLRB case, but ''it's on the table and the board is going to look at it,'' Heller said.

Millett said the board has added new factors to its joint employer analysis—a company's indirect control over employees and its potential, unexercised authority over employment. But the agency hasn't provided guidance on what's necessary to show joint employer status and what's insufficient to make the showing.

Heller responded that until 1984, the board did consider the two factors in joint employer cases. The NLRB will continue fielding practical questions about joint employer issues in future cases, he said.

But for Millett, the board's decision not to rely on evidence of indirect control and unexercised authority for more than 30 years has left the courts at a disadvantage in trying to understand how the NLRB would apply those factors now that it has brought them back into its analysis.

It's not clear how the board expects companies to function in a joint employer relationship, Millett told the NLRB lawyer. ''We're not even sure after reading the [NLRB] decision'' what each company would be responsible for in bargaining with a union.

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Union Argues for Meaningful Bargaining Rights. Following the board's decision in 2015, employees of Leadpoint and Browning-Ferris voted as a combined unit on union representation by International Brotherhood of Teamsters Local 350.

Local 350 won the election, and the NLRB ordered the two companies to negotiate with the union. Browning-Ferris, however, refused to bargain and petitioned for review in the D.C. Circuit. The company contends the election certification was improper and the bargaining order was invalid.

Craig Becker represented Local 350 before the D.C. Circuit. He told the appeals court that whatever the significance of indirect control and unexercised authority, the NLRB has a strong case that Browning-Ferris exercised constant oversight and active control over Leadpoint's employees, giving them detailed instructions about their work on a conveyor line that Browning-Ferris controlled.

Becker, who served as an NLRB board member from 2010 to 2012, asserted that the speed of the line was one of the most important elements of work in the recycling plant, and Local 350 needs Browning-Ferris at a bargaining table with Leadpoint to negotiate about employees' working conditions.

Several union attorneys did not respond immediately to Bloomberg BNA's requests for comment.

Standard to Be 'Toast' In Two Years? Attorneys following the Browning-Ferris case told Bloomberg BNA they have different views and expectations about the outcome.

Tamara I. Devitt, a management lawyer and partner at Haynes Boone in California, told Bloomberg BNA that the case has been a ''hot button'' issue. But she said she wouldn't be surprised to see the appeals court defer to the NLRB and enforce the board's order against Browning-Ferris.

The board's new test leaves businesses guessing about how much evidence is required to show joint employer status, she said. Employers may have to wait for President Donald Trump to appoint board members to vacant seats and for a reconstituted NLRB to hear another case raising the issue.

That may be just what happens, Gerald T. Hathaway, a partner who represents management at Drinker Biddle LLP in New York, told Bloomberg BNA.

Hathaway is optimistic that the board's *Browning-Ferris* test of joint employer status will be ''toast'' within two years.

Hathaway told Bloomberg BNA that he hopes the D.C. Circuit will reverse the board for the reasons expressed by now Acting Chairman Philip A. Miscimarra, who dissented from the Browning-Ferris ruling when he was a member of the board.

If the D.C. Circuit fails to reverse the NLRB, Hathaway said he expects a new Republican majority on the board will step in and return the board to its earlier standard.

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