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The joint-employer standard and the National Labor Relations Act

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The National Labor Relations Act (NLRA) provides most private-sector workers the fundamental right to join a union and collectively bargain. This right provides workers a voice on the job and the ability to collectively bargain for wages, benefits, and working conditions. Over the last several decades, employers have increasingly outsourced various workplace functions to contractors and subcontractors. This has resulted in workers having multiple entities dictating their terms of employment, such as pay, schedules, and job duties. Historically, if a worker's terms of employment are set by two or more businesses, then both businesses are considered "joint employers" of that worker. In February 2020, the National Labor Relations Board (NLRB) finalized a rulemaking on the joint-employer standard under the NLRA, which substantially narrows the set of circumstances whereby a firm can be found to be a joint employer. In this report, we discuss the history of the joint-employer standard under the NLRA and the implications of its current status for workers and employers.

What are workers' rights under the NLRA?

The NLRA is the nation's primary labor law. Enacted by Congress in 1935, it gives workers the rights to organize and join unions and bargain collectively with their employers for better pay, benefits, and working conditions. The National Labor Relations Board, an independent federal agency, administers the act. The agency consists of a five-member board, charged with interpreting the law and adapting it to the changing conditions of the workplace, and a general counsel, responsible for the investigation and prosecution of violations of the NLRA.

What is the joint-employer standard?

When two or more businesses co-determine or share control over a worker's terms of employment (such as pay, schedules, and job duties), then both businesses may be considered to be employers of that worker. Consider a common employment arrangement in which a staffing agency hires a worker and assigns her to work at another firm. The staffing agency determines some of the worker's terms of employment (hiring, wage rate), but the other firm directs her daily tasks and sets her schedule and hours. Because both entities co-determine and share control over the terms and conditions of her employment, both businesses may be found to be joint

employers. Joint employers are responsible, both individually and jointly, to employees for compliance with worker protection laws.

The history of the joint-employer standard under the NRLA

The joint-employer standard under the NLRA has been established over time through decisions made by the NLRB in administering the NLRA. Prior to 1984, the NLRB had consistently found joint-employer status where an entity exercised direct or indirect control over significant terms and conditions of employment, where it possessed the unexercised potential to control such terms and conditions of employment, or where "industrial realities" made it an essential party to meaningful collective bargaining. However, in 1984, the NLRB adopted a new standard for determining joint-employer status under the NLRA. In two decisions—*TLI, Inc.*, 271 NLRB 324 (1984), *enfd. mem.*, 772 F.2d 894 (3rd Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984)—the NLRB narrowed the joint-employer standard under the NLRA, making it easier for companies to evade joint-employer status and thereby evade the requirements of the NLRA. The NLRB provided little explanation or legal doctrine to support its 1984 decisions.

Since the NLRB's unexplained narrowing of the joint-employer standard in 1984, contingent and alternative workforce arrangements (reliance on temporary staffing firms, contractors, and subcontractors to outsource services traditionally performed by in-house workers) have become more common, resulting in a "fissuring" of the workplace.[1] The weakened joint-employer standard created an opportunity for employers to avoid the bargaining table by contracting for services rather than hiring employees directly. Firms were thereby able to retain influence over the terms and conditions of employment while evading the obligation to bargain with employees under the NLRA.

In 2015, the NLRB's decision in *Browning-Ferris Industries*, 362 NLRB 186 addressed this issue. In the decision, the Board adopted a joint-employer standard that requires all firms that control the terms and conditions of employment to come to the bargaining table, ensuring that workers are again able to engage in their right to collective bargaining. The *Browning-Ferris* decision was later reversed back to the 1984 joint-employer standard in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No 156 (2017).

However, the *Hy-Brand* decision was short-lived. The charging parties in the case filed a motion for reconsideration, objecting to NLRB Board Member William Emanuel's participation in the case when his former law firm represented a party in *Browning-Ferris*. At the time *Hy-Brand* was decided, *Browning-Ferris* was still an active case pending in the U.S. Court of Appeals for the D.C. Circuit. The NLRB Inspector General determined that *Hy-Brand* presented the same issue as *Browning-Ferris* and

[1] David Weil, *The Fissured Workplace: Why Work Became So Bad and What Can Be Done to Improve It* (Cambridge, Mass.: Harvard Univ. Press, 2014).

that member Emanuel violated ethics rules by participating in a case involving the same issue as a case involving his former law firm. Following the Inspector General's determination, the NLRB vacated *Hy-Brand* in February 2018. The U.S. Court of Appeals for the D.C. Circuit later affirmed the *Browning-Ferris* joint-employer standard in December 2018.[2]

Employer liability under the NLRA

Employers face narrow liability under the NLRA. The act does not provide for monetary penalties against an employer. At most, the NLRB can order an employer to bargain with workers, to reinstate an employee fired in violation of the act, to pay back wages to a wrongfully fired employee, or to cease and desist from engaging in conduct that violates the act. In spite of this, corporate lobbying groups have claimed that the NLRB's joint-employer standard will "significantly alter the face of American business" and "inflict serious damage to our nation's economy."[3] Considered against the narrow liability potentially imposed on employers under the NLRA, these claims are without merit.

Furthermore, under the NLRB's *Browning-Ferris* decision, the joint employer determination remains a fact-based inquiry. This means that the Board examines the specific circumstances of each case and reaches a determination based on those considerations. Nothing in the decision implies that all employers in a specific industry will be found to be joint employers under the NLRA. The Board has also clearly stated that in cases where an employer is found to be a joint employer, that employer would only be required to bargain with its workforce about the terms and conditions that the employer has enough control over for bargaining to be meaningful.[4]

What about franchise arrangements?

Like any joint employer inquiry, the NLRB evaluates franchise arrangements on a case-by-case basis. The determination of joint employer liability is a fact-specific analysis that depends on many factors. Nothing in the *Browning-Ferris* decision specifically addresses the franchise arrangement.

The political debate about franchise liability under the joint-employer standard tends to revolve around the impact on small businesses—the franchisees. This is misleading. This is not about franchisee liability—franchis*ees* are already considered employers under the NLRA because they hire and control employees. This is about whether franchis*ers* may now face liability under the *Browning-Ferris* joint-employer standard. However, a franchiser only faces liability if it insists on a franchise contract in which it

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[2] https://www.cadc.uscourts.gov/internet/opinions.nsf/A1D3A01EDFAB1B8A852583710055207A/$file/16-1028-1766137.pdf

[3] International Franchise Association (IFA), "While Congress Is Away, NLRB Still Plays, Upending Joint Employer Standard for Franchise Businesses" (August 25, 2015).

[4] *BFI Newby Island Recyclery*, 362 NLRB 186, slip op. 2 (2015) fn. 7.

retains control over fundamental terms and conditions of employment. If the terms of a franchise contract allow the franchiser to reserve the right to set rates of pay or scheduling practices, or to approve hiring or disciplinary decisions, the franchiser is a joint employer and must be at the bargaining table in order for workers to engage in meaningful collective bargaining. Otherwise, the franchiser would not be considered a joint employer and would not be required to bargain with employees under the NLRA.

Where does the joint-employer standard currently stand and what does it means for workers?

In September 2018, the NLRB proposed a rulemaking regarding the joint-employer standard under the NLRA in an effort to reverse the *Browning-Ferris* standard[5], which was finalized in February 2020.[6] Under the finalized rule, an employer may be found to be a joint employer only where the employer possesses and exercises substantial direct and immediate control over a worker's essential terms and conditions of employment in a manner that is not limited and routine. This change in the joint-employer standard under the NLRA would result in fewer joint employer findings, leaving more workers unable to hold the firms that play a role in determining the terms and conditions of their employment accountable for violations of labor law.

The NLRB's finalized rule weakens the joint-employer standard under the NLRA, costing workers on the order of $1.3 billion a year.[7] The finalized rule would also make it nearly impossible for many workers to bring all firms who control their wages and working conditions to the bargaining table, frustrating workers' fundamental right under the NLRA to engage in collective bargaining—and contributing to weak wage growth for working people and rising inequality.

The joint employer provisions in the PRO Act would reinstate joint employer protections back to the *Browning-Ferris* standard.

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[5] The Standard for Determining Joint Employer Status, 83 Fed. Reg. 46681–44697 (September 14, 2018).
[6] Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 11184–11236 (February 26, 2020).
[7] Celine McNicholas and Heidi Shierholz, "EPI comments regarding the standard for determining joint-employer status," comments submitted to the National Labor Relations Board, December 10, 2018.