Joint Employer Rules Are Developing, But Still Far From Clear

By **Natalie Chan** and **Katherine Roberts** | April 16, 2019

The U.S. Department of Labor recently proposed a new rule that would significantly revise its interpretation of joint employer status under the Fair Labor Standards Act. The DOL's proposed rule, the first such proposed modification in over 60 years, follows the National Labor Relations Board's issuance of a proposed rule on joint employer status, as well as recent litigation over the NLRB's controversial joint employer test adopted in Browning-Ferris Industries of California Inc.

With the comment period for the DOL's proposed rule in the early stages, and the NLRB to issue a final rule on the joint employer standard in the near term, will the tumultuous joint employer debate finally come to an end?

DOL's Proposed Rule

The DOL's proposed joint employer rule, which was issued on April 1, 2019, sets forth a four-factor balancing test. The DOL derived this test from Bonnette v. California Health & Welfare Agency[1] in which the U.S. Court of Appeals for the Ninth Circuit ruled that state and county agencies were jointly liable as "employers" of in-home supportive services workers for purposes of the minimum wage provisions of the FLSA. The four key factors relied upon by the Ninth Circuit, and now recommended by the DOL, include whether a putative joint employer actually exercises the power to:

- Hire or fire an employee;
- Supervise and control an employee's work schedules or conditions of employment;
- Determine an employee's rate and method of payment; and
- Maintain an employee's employment records.

The DOL, in adopting this formulation, explains that additional factors may be relevant to the analysis, but only if they are indicia of whether the potential joint employer is "exercising significant control over the terms and conditions of the employee's work; or otherwise acting directly or indirectly in the interest of the employer in relation to the employee."

In providing guidance on how to apply the test, the DOL explains that, with respect to the first factor, a person's ability, power or reserved contractual right to act with respect to the employee's terms and conditions of employment would not be relevant to that person's joint employer status under the act. Only actions actually taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the FLSA.

The DOL also clarifies that, in determining the economic reality of the putative joint employer's status under the act, whether an employee is economically dependent on the putative joint employer is not relevant. Notably, the DOL also states that a business model, such as a franchise business model, and certain business practices, such as allowing an employer to operate a store on the person's premises, do not make joint employer status more or less likely under the act.

The DOL's more narrow proposal is a marked departure from its current joint employer standard, under which multiple entities can be joint employers of an employee if they are "not completely disassociated" with respect to the employment of the employee. The DOL explains that its proposed rule was intended, among other things, to promote certainty for employers and employees as to when an employer might be held jointly and severally liable as a "joint employer" for an employee's wages due under the FLSA.

A business found to be a “joint employer” for purposes of the FLSA would be on the hook for paying nonexempt employees at least the federal minimum wage for all hours worked and overtime for hours worked in excess of 40 in a workweek — otherwise it could be liable for back pay, double damages and other penalties for failure to comply with the law. Accordingly, the DOL’s new, less expansive rule — which focuses on the actual control an entity exerts, not reserved or theoretical control — will likely result in fewer joint employer relationships for federal wage and hour purposes.

NLRB’s Proposed Rule — Pending Final Rule

The DOL’s proposed rule comes on the heels of the NLRB’s issuance of a similar rule regarding joint employer status. In September 2018, the NLRB proposed a rule that would reestablish a decades-old standard for determining if a business shares bargaining obligations and potential liabilities under the National Labor Relations Act. Under the board’s proposal, an employer could be considered a joint employer under the NLRA “only if the two employers share or codetermine the employees’ essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction.”

The board further specifies in its proposal that to be deemed a joint employer “an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer’s employees in a manner that is not limited and routine.”

In its return to requiring “substantial direct and immediate” control, the NLRB’s proposed rule tracks its long-held standard prior to the 2015 decision in Browning-Ferris Industries of California Inc. d/b/a BFI Newby Island Recyclery.[2] In Browning-Ferris, the Obama-era board overruled decades-long precedent, articulating a new and broad standard by which two or more entities are joint employers if (1) they are both employers within the meaning of the common law, and (2) they share or codetermine those matters governing the essential terms and conditions of employment.

Notably, in Browning-Ferris, the board decided that joint employment status could be determined based on a business’ reserved authority to control (not actual exercise of control) and indirect control (not direct and immediate control) over terms and conditions of employment.

Employers and pro-employer groups see the NLRB’s proposed rule as a welcome return to the pre-Browning-Ferris standard. The NLRB and DOL proposed rules bear similarities, and both reflect the current administration’s apparent desire to restrict joint employer relationships.

Both, for example, emphasize that the actual exercise of control (not reserved authority to control) and direct control over employment terms and conditions are key factors in evaluating joint employer status. In practice, the rules, thus, will likely have a similar application. Nevertheless, discrepancies in how the factors are described and other subtle differences in the specific language of the proposed rules may create uncertainty or varied interpretations.

For example, in its proposal, the board underscored the need for “direct and immediate” control to find a joint employment relationship, and further explained that it was “inclined to find, consistent with prior board cases, that even a putative joint employer’s ‘direct and immediate’ control over employment terms may not give rise to a joint-employer relationship where that control is too limited in scope.”

Accordingly, the NLRB would find that “substantial direct and immediate control” is necessary before imposing joint and several liability on a putative joint employer. By contrast, the DOL’s proposal clarified that “indirect” action in relation to an employee may establish joint employer status under the FLSA; the DOL also noted that its four proposed factors weigh the economic reality of the potential joint employer’s active control, whether direct or indirect, over the employee.

D.C. Circuit Ruling in Browning-Ferris

Adding more uncertainty to the mix, the U.S. Court of Appeals for the District of Columbia issued a decision in Browning-Ferris on appeal in the middle of the comment period for the NLRB’s proposed rule.

On Dec. 28, 2018, the D.C. Circuit answered the question of "whether the common-law analysis of joint-employer status can factor in both (i) an employer's authorized but unexercised forms of control, and (ii) an employer's indirect control over employees' terms and conditions of employment."

In a 2-1 decision, the D.C. Circuit concluded that the board in Browning-Ferris properly considered a business' reserved right to control and its indirect control in assessing joint employer status, and found these to be "relevant factors" in the joint employer determination.

Specifically, the D.C. Circuit found that the NLRB "correctly determined that the common-law inquiry is not woodenly confined to indicia of direct and immediate control; an employers' indirect control over employees can be a relevant consideration." However, the court also held that the board "did not confine its consideration of indirect control consistently with common-law limitations," because it did not distinguish "evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting ..."

Therefore, the court remanded that aspect of the decision to the board for it to explain and apply its test in a manner consistent with the common law of agency. Notably, in the decision, the D.C. Circuit made clear that it was not deciding "whether the reserved right to control, divorced from any actual exercise of that authority, could alone establish a joint-employer relationship."

While the board might provide some clarity on these issues in its final rule, it may also find itself confined based on the court's ruling. This was among the reasons for the dissent. Specifically, in the dissenting opinion, Judge Arthur Randolph wrote: "Suppose the [Board's] final rule flatly disagrees with the Board's Browning-Ferris decision and reinstates the standard that had prevailed for decades. That is what the Board's Notice of Proposed Rulemaking suggests … [T]he majority opinion — without any reasonable explanation — threatens to short-circuit the Board's choice, to control and confine the scope of its rulemaking, and to influence the outcome of that proceeding."

Indeed, the court's decision holding that indirect control and reserved right to control are both relevant factors that fall within the common law definition of a joint employer, and its directive that the board's rulemaking "must color within the common-law lines identified by the judiciary," appear to directly conflict with the NLRB's proposed rule requiring substantial direct control to find a joint employer relationship.

What's Next

The DOL is currently collecting comments from the public to its proposed rule for a 60-day period through the end of May 2019, and the NLRB is expected to issue a final rule on joint employer status in the upcoming months (although it has not set a date to issue its final rule). In the meantime, the D.C. Circuit's ruling in Browning-Ferris has muddied the waters for employers left wondering what role reserved and indirect control will play in establishing a joint employer relationship. How and to what extent this decision will impact the NLRB's final rule remains to be seen.

Even though the influence and final scope of these rules is far from clear, it is likely that the rules will result in a standard that reduces the number of potential joint employment relationships — although that, too, could be subject to change with a potential change in administration.

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[1] Bonnette v. California Health & Welfare Agency , 704 F.2d 1465 (9th Cir. 1983)

[2] Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, 362 NLRB No. 186.

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