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Rhetoric vs. Reality: The Joint Employer Standard

Examining the Real-World Impact of the NLRB's Controversial Browning-Ferris Decision

In the aftermath of the National Labor Relations Board's (NLRB) Aug. 27, 2015 decision in Browning-Ferris Industries (BFI), which saw the creation of a new "joint employer" standard in federal labor law, questions have been raised about the real-world impact of the ruling on millions of local businesses. As Congress considers the Protecting Local Business Opportunity Act (PLBOA), it's important to separate the common myths from the facts.

Myth: BFI is an isolated case decision and joint employer will be determined on a case-by-case basis.

FACT: The NLRB appears poised to broadly apply the BFI standard. The NLRB's majority wrote in their BFI decision: "(W)e have decided to restate the Board's legal standard for joint-employer determinations and **make clear how that standard is to be applied going forward** (page 15, BFI decision)." Employers have no clarity as to where the line will be drawn moving forward.

Myth: While BFI was an isolated case, the Freshii "case" shows that the NLRB is reasonable to franchising and not out to destroy the franchise business model.

FACT: Freshii was an effectively meaningless advice memorandum authored by the NLRB's Division of Advice that does not have the force of law. BFI, which was issued after the Freshii memo, was a case decided by the full National Labor Relations Board that has precedential value on all subsequent cases.

Myth: BFI is a contracting case, not a franchising case. Franchises need not worry about being considered joint employers.

FACT: Franchising is contracting. Every franchisor-franchisee relationship is based on a franchise agreement, which is a contract. BFI sets a precedent that is greatly disruptive to the future of all franchise businesses. The language of BFI is written broadly to apply to an array of business contracts.

Myth: Supporters of the PLBOA really just want to prevent workers from being able to collectively bargain.

FACT: S. 2015/H.R. 3459 is a one-sentence bill that restores the pre-Aug. 27 joint employer standard in the National Labor Relations Act (NLRA), which protects small businesses and entrepreneurs from liability that is not theirs. Nothing in the bill changes employee collective bargaining rights provided by Section 7 of the NLRA.

Myth: The BFI decision means that only a company that has "direct" control or "substantial" control over another company's employment terms – such as who to hire and how much to pay – will be deemed a joint employer under the NLRB's new standard.

FACT: The NLRB's new joint employer test, based on direct, "indirect" or even "potential" control of another company's employees, is so ambiguous that no contractual relationship is safe from a joint employer finding. While the new joint employer standard refers to an indirect or potential control test, it does not reference "substantial" control, which means employers could be found joint employers by participating in limited business acts.

Myth: The BFI decision is simply a return to the traditional or common law, pre-1984 joint employer standard.

FACT: There is no pre-1984 common law joint employer standard under the NLRA. The NLRB clarified its joint employer test based on "direct control" in its 1984 TLI and Laerco decisions. Overall, courts and the NLRB have consistently and repeatedly found that for a joint employer relationship to exist, a company must exercise direct, significant control over the terms and conditions of employment of the other entity's employees.



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Myth: The new joint employer standard will actually be good for small business because, faced with increased NLRA liability, brand companies and franchisors will yield more control to the small businesses with which they hold contracts.

FACT: Small business livelihoods are threatened because the new “indirect control” standard may compel brand companies to either exercise more direct control over subcontractors or sever relationships altogether.

Myth: Brand companies and franchisors often share brands, logos, marketing materials, and other resources with subcontractors and franchisees. Therefore, they should be jointly liable for NLRA violations.

FACT: Marketing and advertising have nothing to do with employment practices. The NLRA’s old joint employer standard was intended to protect businesses from unnecessary involvement in labor negotiations or fights involving workplaces where they do not exercise any direct control. In adopting this new indirect control standard, the NLRB makes employers potentially liable for employees they do not employ and whose working conditions they do not directly control.

Myth: Employees working in franchises are employees of the franchisor.

FACT: Local franchise business owners hire and manage their own employees. Moreover, they run their own businesses and have direct control over their own hiring practices, working conditions, wages, and hours of operations. They have distinct employer identification numbers, file their own taxes and are responsible for following all applicable local, state, and federal laws. A franchisor has no direct control over the hiring, firing, discipline, supervision and direction of its franchisee’s employees.

Myth: The new joint employer standard established in the BFI decision is simply a slight reinterpretation of the NLRA.

FACT: The NLRB’s embrace of the nebulous “indirect control” joint employer standard is unprecedented and massive; resulting in almost any economic or contractual relationship now triggering a finding of joint employer status under this new standard. The NLRB’s long-held standard deemed businesses joint employers only when they share direct and immediate control over essential terms and conditions of employment, including hiring, firing, discipline, supervision, and direction.

Myth: The BFI decision only reinterprets the NLRA, and won’t have any impact on other statutes.

FACT: It is unclear if other agencies will adopt the NLRB’s joint employer standard. However, we do know that the Department of Labor (DOL) and Occupational Safety and Health Administration (OSHA) have developed new draft guidelines instructing investigators to gather similar information from franchisors and franchisees unrelated to workplace safety. Other agencies may also impose similar joint employer liabilities for employment discrimination, sexual harassment, wage and hour compliance, independent contractor misclassification, immigration and workers’ compensation.

Myth: The BFI decision only affects large corporations.

FACT: The NLRA covers nearly all private sector businesses, small and large, and their employees. Therefore, the BFI decision could impact the operations of all businesses, both small and large, including the ability of small businesses to control their own operations and enter into contracts with other entities.

Myth: Lawyers and lobbyists are creating fear for small businesses where none should exist. The BFI ruling will have no impact on small businesses. The PLBOA is purely intended to help big business.

FACT: **The new joint employer standard based on “indirect control” could be applied to nearly any conceivable business relationship.** All small and large businesses could be negatively impacted.

These are the facts and the reason why Congress should provide certainty to America’s small businesses and immediately pass the “Protecting Local Business Opportunity Act” (S. 2015/H.R. 3459) to restore the long-standing joint employer standard.

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