

Chapter 10

CITE AS

37 *Energy & Min. L. Inst.* 10 (2017)

Surprise! You Are a Joint Employer

C. David Morrison
Michael J. Spooner
Steptoe & Johnson PLLC
 Bridgeport, West Virginia

Synopsis

| | | |
|-----------------|---|------------|
| § 10.01. | Introduction..... | 247 |
| | [1] — Brief History of Joint Employer Under the National Labor Relations Act (NLRA)..... | 247 |
| § 10.02. | <i>Browning-Ferris</i> and the Expansion of the NLRB’s Joint Employer Doctrine | 249 |
| | [1] — Why Does It Matter If I’m a Joint Employer? | 249 |
| | [2] — The <i>Browning-Ferris</i> Standard | 250 |
| | [a] — Facts | 250 |
| | [b] — Board’s Holding and Reasoning | 251 |
| | [c] — Analysis and Future Implications | 253 |
| | [d] — The <i>Green Jobworks LLC</i> Decision | 255 |
| | [e] — The <i>Akima Global Services, LLC</i> Decision | 256 |
| | [f] — <i>Miller & Anderson, Inc.</i> Decision..... | 257 |
| | [3] — Other Issues..... | 258 |
| | [a] — Risk for Parent Corporations and Subsidiaries..... | 258 |
| | [b] — Franchisor Law and the McDonald’s Case | 259 |
| § 10.03. | Conclusion..... | 260 |

Joint-employer liability is a hot button issue for all employers in many ways. This chapter will focus on the joint employer doctrine only as it relates to the labor context and specifically the National Labor Relations Act. The doctrine has undergone significant change lately, and this chapter will attempt to provide both the context of the change and the implications that change may have.

§ 10.01. Introduction.

[1] — Brief History of Joint Employer Under the National Labor Relations Act (NLRA).

The NLRA’s primary protection for employees is the ability to bring claims of unfair labor practices against an employer or labor representa-

tive.¹ The Act broadly defines an employer as “any person acting as an agent of an employer, directly or indirectly.”² The joint employer doctrine is significant because it determines when an entity may be liable as an “employer” under the Act, even though the entity is not the employee’s contractual employer.³ When an entity is found to have joint employer status, it can result in unanticipated liability and responsibilities.

The National Labor Relations Board (NLRB) has used three standards for joint employer liability over the last 50 years. Prior to 1984, the joint employer doctrine was broadly construed.⁴ The Board repeatedly held that joint employer liability was found when an entity “exercised direct or indirect control over significant terms and conditions of employment of another entity’s employees”;⁵ possessed the potential to control terms and conditions of employment;⁶ or when the entity is essential for true collective bargaining to occur.⁷

The Board later narrowed the joint employer standard in the cases of *Laercro Transportation and Warehouse*⁸ and *TLI, Inc.*⁹ In both of these cases, the Board held that the entities in question were not joint employers because the entities’ supervision and direction of employees were limited and routine.¹⁰ In *TLI, Inc.*, the Board wrote “the supervision and direction exercised . . . on a day-to-day basis is both limited and routine, and considered with its lack of hiring, firing, and disciplinary authority, does not constitute sufficient control to support a joint employer finding.”¹¹ Later, in *Airborne*

1 29 U.S.C. §§ 151–69 (2012).

2 *Id.* § 152.

3 *Id.*

4 *Laercro Transp. & Warehouse*, 269 N.L.R.B. 324 (1984).

5 Brief of the General Counsel as Amicus Curiae at 4, *Browning-Ferris Indus. Of Cal.*, 362 N.L.R.B. 186 (2015).

6 *See, e.g., Hoskins Ready-Mix Concrete, Inc.*, 161 N.L.R.B. 1492, 1493 (1966).

7 *See Jewell Smokeless Coal Corp.*, 170 N.L.R.B. 392, 393 (1968) (noting that “industrial realities” made coal company a “necessary party to meaningful collective bargaining,” despite the fact that it played no part in hiring, firing, or directing employees).

8 *Laercro*, 269 N.L.R.B. 324.

9 *TLI, Inc.*, 271 N.L.R.B. 798 (1984).

10 *Laercro*, at 325–26; *TLI*, at 799.

11 *TLI*, at 799.

Freight Co., the Board clarified the standard, holding that the main element in determining joint employer status was “whether the putative joint employer’s control over employment matters is direct or immediate.”¹² However, simple, cursory authority to affect the terms and conditions was not sufficient to establish joint employer status. Instead, an employer also had to “meaningfully affect[] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction” before a joint employer relationship would be found.¹³

Much of this has changed, however, and the prior narrow construction has been challenged. More recently, in *Browning-Ferris Industries of California*,¹⁴ the Board decided to restate its long-standing legal standard for joint-employer determinations and broadened the reach of joint employment.¹⁵ In its decision, the Board concluded that the standard had been effectively narrowed over time without reason. The following section will discuss the Board’s restated standard, the implications of this decision, and why it matters. It will also discuss decisions that have analyzed and applied the new *Browning-Ferris* standard.

§ 10.02. *Browning-Ferris* and the Expansion of the NLRB’s Joint Employer Doctrine.

[1] —Why Does It Matter If I’m a Joint Employer?

This section will focus on the implications of being determined a joint-employer under the National Labor Relations Act (NLRA). The NLRA governs the relationship between employers and employees as it relates to organization, unionization, and bargaining over the terms and conditions of employment. If an employer is found to be a joint-employer, then it has obligations under the Act. Notably, joint-employers must bargain with the unions representing the employees and may be liable for unfair labor practices committed by its fellow joint-employers.

This can lead to a situation where an employer is legally responsible for employees that it has not hired, trained, and only marginally supervises.

¹² Airborne Freight Co., 338 N.L.R.B. 597, 597 (2002).

¹³ *Laerco*, at 325.

¹⁴ *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 186 (2015).

¹⁵ *Id.* at 2.