

Exacerbating Uncertainty: D.C. Circuit Issues Confusing Browning-Ferris Decision

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On December 28, 2018, the D.C. Circuit issued its [long-awaited decision](#) regarding the National Labor Relations Board’s (NLRB) [2015 decision](#) in *Browning-Ferris Industries*. Rather than bring clarity to the uncertainty and confusion that the NLRB had created with that 2015 decision—which overturned more than 30 years of precedent defining what entities would be deemed “joint employers” under the National Labor Relations Act—the D.C. Circuit exacerbated both. The extent of the confusing nature of the D.C. Circuit’s decision is illustrated by the conflicting headlines of various national news publications. One headline reported the court had “upheld” the NLRB’s *Browning-Ferris* standard. Many others reported that the court had “nix[e[d]” it.

The D.C. Circuit’s Decision

Confusion about the decision is understandable. The D.C. Circuit, in a 2–1 decision, held that the *Browning-Ferris* Board’s joint-employer standard appropriately recognized that indirect and potential

control are “relevant” factors in determining joint-employer status under the Act. Yet the court held that the Board had not applied those relevant factors within the parameters of the common law. The court identified a number of facts demonstrating indirect or potential but unexercised control that the Board had relied upon in *Browning-Ferris*, but which would not provide meaningful help when conducting a common law analysis because they do not show joint control over “the essential terms and conditions of employment.” Specifically, the court observed that setting “the objectives, basic ground rules, and expectations for a third-party contractor” would not provide meaningful guidance for a common law joint-employer analysis. Consequently, the court remanded the case to the Board for further consideration.

As the dissent noted, however, the court’s decision is “confused and confusing” in part because it does not answer a question crucial to the case: if indirect and potential control are “relevant” factors to a joint-employment analysis, *are they enough*—as the *Browning-Ferris* Board had concluded—to *alone* establish a joint-employer relationship (i.e., in the absence of actual exercise of control). As the Board did in *Browning-Ferris* in 2015, the court has now created more uncertainty—and its decision raises more questions than it answers.

Key Takeaways

Given the NLRB’s [pending effort to articulate a rule for determining joint-employer status](#), much of the court’s decision could have little impact. However, in articulating why—over the dissenter’s objection—the court had elected to address the merits of the case while the Board was engaging in relevant rulemaking, the court noted that the NLRB’s rulemaking must fit within the parameters of the common law as defined by the courts. That portion of the court’s decision makes the case far more consequential, as it shrouds the Board’s pending rulemaking effort with uncertainty as to what the court meant. Certainly, the court made clear that the Board cannot turn an entity into a joint employer if the common law would not have made it so (which is what the *Browning-Ferris* Board majority had done). But did the court mean that the Board lacks authority to adopt its proposed rule *requiring actual direct and immediate exercise of control* over another entity’s employees’ working terms and conditions to be deemed a joint employer under the Act? In other words, did the court mean that joint-employment status under the Act is co-extensive with the interpretation of the common law as articulated by the two-judge majority decision? Did the court mean the Board lacks authority to limit the definition of joint employment to be consistent with the purposes of the Act?

Unfortunately, the D.C. Circuit’s decision does little more than guarantee that the saga of uncertainty on which the 2015 *Browning-Ferris* decision launched the Act will continue for years to come. The court majority merely provided arguments for future challenges to any rule the Board is likely to adopt, effectively preventing the Board from conclusively returning by rulemaking to the stable definition of joint employment it had applied, consistently, for more than 30 years.

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