Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

NLRB Rejects Former Standards Following Appointment of New Members

Jon O. Shimabukuro
Legislative Attorney

January 18, 2018

With two new members appointed by President Trump, a newly constituted National Labor Relations Board (NLRB or Board) issued a series of significant decisions in the waning days of 2017. These decisions overturned several rulings issued during the Obama Administration that were heavily criticized by the U.S. Chamber of Commerce and others in the business community. Two NRLB decisions in particular – *Hy-Brand Industrial Contractors, Ltd.* and *PCC Structurals, Inc.* – are notable because they reversed earlier rulings, which had prompted the introduction of legislation in the 115th Congress – the Save Local Business Act (H.R. 3441) and the Representation Fairness Restoration Act (S. 1217/H.R. 2629) – aimed at wiping out the Obama-era rulings. In light of these recent decisions, proponents of the bills could conclude that further consideration of the measures is not needed. However, because the bills would prescribe additional standards beyond what was addressed by the Board, some might contend that enactment of the legislation is still warranted.

In *Hy-Brand*, the NLRB overturned its 2015 decision, *Browning-Ferris Industries of California*, which held that two or more entities would be considered to be joint employers of a single work force if they were employers at common law and they shared or codetermined matters governing the employees' essential terms and conditions of employment. In *Browning-Ferris*, the NLRB indicated that joint employer status could be established even if an entity's control over employment matters was indirect or reserved by contract. In *Hy-Brand*, however, the Board maintained that the joint employer standard established by *Browning-Ferris* was contrary to the National Labor Relations Act (NLRA) and distorted the common law that had been developed by the NLRB and courts. In particular, the Board emphasized that evidence of direct and immediate control is "essential to a finding of joint-employer status under common law."

In overruling *Browning-Ferris*, the Board indicated in *Hy-Brand* that it would use its prior standard to determine whether two or more entities are joint employers: "[A] finding of joint-employer status shall once again require proof that putative joint employer entities have *exercised* joint control over essential

Congressional Research Service
7-5700
www.crs.gov
LSB10062

employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'" This standard is consistent with the one contemplated by the Save Local Business Act (SLBA), a bill introduced in July 2017 in response to *Browning-Ferris*. The SLBA would amend the NLRA, as well as the Fair Labor Standards Act (FLSA), to recognize an entity as a joint employer only if it "directly, actually, and immediately . . . exercises significant control over the essential terms and conditions of employment[.]" Given the Board's return to a joint employer standard that resembles the one proposed by the SLBA, one might assert that the bill is no longer necessary. Enactment of the measure, however, would seemingly guarantee that a future Board could not resurrect the *Browning-Ferris* standard. By codifying a requirement for direct, actual, and immediate control over the essential terms and conditions of employment, the Board would be prevented from finding joint employment when control is only indirect or reserved by contract. Moreover, by also amending the FLSA, the SLBA would have an impact on joint employment for purposes of wage and hour standards that are beyond the NLRB's jurisdiction.

Like *Hy-Brand*, *PCC Structurals* also overturned an NLRB decision that was issued during the Obama Administration. *Specialty Healthcare & Rehabilitation Center of Mobile*, a 2011 ruling, made it more difficult for employers to challenge the scope of a proposed collective bargaining unit. In *Specialty Healthcare*, the Board indicated that an employer seeking to enlarge a proposed bargaining unit would have to show that any additional workers shared an "overwhelming community of interest" with the proposed unit's employees before they would be included in the unit. In general, a community of interest is established by assessing similarities in workers' job functions, skills, supervision, and other conditions of employment. Under the "overwhelming community of interest" standard, an employer would have to establish that there was "no legitimate basis" for excluding the additional workers from the proposed bargaining unit.

While the NLRB maintained that the "overwhelming community of interest" standard reflected "the language of the [NLRA] and decades of Board and judicial precedent," others criticized *Specialty Healthcare* for being too restrictive and allowing the creation of so-called "micro-units" that sometimes included only a small number of employees. For example, the U.S. Chamber of Commerce contended that "these micro-units mean that unions can use *Specialty Healthcare* to gain a foothold at a business even if a majority of workers do not support unionization."

In *PCC Structurals*, the Board rejected the "overwhelming community of interest" standard and returned to one that examines whether the interests of the workers in the proposed bargaining unit are sufficiently distinct from other employees to warrant a separate unit. The Board maintained that this revived standard better acknowledges the agency's obligation to make determinations about the appropriateness of a bargaining unit. Under the "overwhelming community of interest" standard, the Board contended that a proposed bargaining unit achieved "an artificial supremacy" that limited the agency's discretion. If an employer could not establish that additional workers shared an "overwhelming community of interest" with the employees in the proposed bargaining unit, they would be excluded from the unit, and the unit would be deemed appropriate.

The Board explained that the revived standard more accurately reflects the language of the NLRA. For example, section 9(b) of the NLRA states that the Board "in each case" will consider the interests of all employees to determine an appropriate bargaining unit. In addition, section 9(c) of the statute provides that "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling."

The Representation Fairness Restoration Act (RFRA) was reintroduced in May 2017 to respond to *Specialty Healthcare* and the "overwhelming community of interest" standard. In light of the Board's decision in *PCC Structurals*, one might contend that the legislation is no longer needed. If the RFRA were enacted, however, the NLRB would be required to consider eight congressionally enumerated

factors when determining whether a proposed bargaining unit is appropriate for purposes of collective bargaining. Specifically, the RFRA would amend the NLRA to provide that a bargaining unit is appropriate for purposes of collective bargaining if it includes employees who share a "sufficient community of interest." To determine whether employees share a sufficient community of interest, the Board would be mandated to consider eight factors, including the similarity of wages, benefits, and working conditions among workers, as well as the centrality of management and common supervision of workers. Notably, one of the factors – the bargaining history in the particular unit and the industry – is not one that the Board identified in its community of interest analysis in *Hy-Brand*. Thus, by codifying the community of interest factors, including one that references bargaining history and the relevant industry, the RFRA would likely do more than simply override the "overwhelming community of interest" standard.

Because the RFRA and the SLBA would prescribe new standards beyond what was addressed by the NLRB in *Browning-Ferris* and *Specialty Healthcare*, proponents of the two measures may decide that enactment of the bills is still warranted. The RFRA has been referred to the House and Senate committees of jurisdiction, but no further action has occurred since May. The SLBA was passed by the House in November and has been received in the Senate. Even if the SLBA is not further considered, however, the Board's rejection of the *Browning-Ferris* standard has alone pleased employers that arrange for the use of another entity's employees: "Indeed, the Board's decision to overrule *Browning-Ferris* provides businesses with greater certainty when entering into relationships with other entities, and further decreases the risk an employer will be found liable for a separate entity's unfair labor practices."