



## D.C. Circuit Affirms Joint Employer Standard in End-of-Year Decision

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In one of its final [opinions](#) for 2018, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the joint employer standard established for collective bargaining purposes by the National Labor Relations Board (NLRB or Board) in an August 2015 [decision](#) that received significant attention from the business community, as well as Congress. Critics of the standard, which allows for consideration of a putative joint employer’s indirect or reserved control over a group of workers, have [argued](#) that it creates uncertainty about when two entities will be considered joint employers for purposes of the [National Labor Relations Act](#) (NLRA). In *Browning-Ferris Industries of California v. NLRB*, however, the D.C. Circuit maintained that the standard’s consideration of an entity’s indirect or reserved control has extensive support in the common law of agency. Nevertheless, the court returned the case to the Board, finding that the agency “did not confine its consideration of indirect control consistently with common-law limitations[.]” The D.C. Circuit asked the Board to “explain and apply its test in a manner that hews to the common law of agency.”

The D.C. Circuit’s decision was issued less than three weeks before the end of the comment period for a new joint employer rule. Following a change in the NLRB’s composition, the agency [proposed](#) the new rule in September 2018. Under the proposed rule, an entity would be considered a joint employer of a separate entity’s employees only if it possesses and actually exercises “substantial and immediate control over the employees’ essential terms and conditions of employment in a manner that is not limited and routine.” The Board maintains that the new rule will provide greater clarity to joint employer determinations by requiring evidence of direct and immediate control. In *Browning-Ferris*, the D.C. Circuit observed: “The Board’s rulemaking . . . must color within the common-law lines identified by the judiciary.” By excluding consideration of indirect or reserved control, however, the proposed rule could arguably face a future court challenge.

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## Background

The dispute in *Browning-Ferris* first arose in 2013 after a union [petitioned](#) to represent a group of workers placed in one of the company's recycling facilities by a staffing company, Leadpoint Business Services, pursuant to a labor services agreement. Under the agreement, Leadpoint was responsible for hiring the workers, determining their wages, and evaluating their performance. Browning-Ferris, however, established the facility's schedule of working hours, could reject or "discontinue the use" of a Leadpoint worker at the facility for any reason, and retained other rights pursuant to the agreement.

Applying a joint employer standard that had been in place since 1984, an NLRB regional director [determined](#) that Browning-Ferris and Leadpoint were not joint employers of the relevant employees. Under that standard, the Board had considered not only whether the putative joint employer shared the ability to control or codetermine essential terms and conditions of employment, but also whether it exercised direct and immediate control over these employment matters. The regional director concluded that Browning-Ferris did not control the daily work performed by the Leadpoint workers, and that the company's control over the workers' terms and conditions of employment was neither direct nor immediate.

On appeal, a majority of the Board's five members in 2015 not only [reversed](#) the regional director's decision, but adjusted the old joint employer standard. The majority described both the policies of the NLRA and the diversity of current workplace arrangements before "restating" a reconsidered joint employer standard. Acknowledging the increased use of staffing arrangements and contingent workers, the majority observed: "This development is reason enough to revisit the Board's current joint-employer standard . . . If the current joint-employer standard is narrower than statutorily necessary, and if joint-employer arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's 'responsibility to adapt the Act to the changing patterns of industrial life.'"

The majority concluded that two or more entities would be considered to be joint employers of a single workforce if they are employers under common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. The majority indicated that the Board would no longer require that employers exercise direct control over such employment matters. Instead, joint employer status could be established even if an employer's control over employment matters is indirect or reserved by contract.

The majority explained that consideration of an entity's indirect or reserved control over workers when making a joint employer determination is consistent with common law principles. These principles recognize an individual as being employed by an entity if he is subject to its control or right to control. The majority maintained that the Board's old standard disregarded consideration of an entity's right to control workers, particularly when that right is not exercised: "Just as the common law does not require that control must be exercised in order to establish an employment relationship, neither does it require that control (when it is exercised) must be exercised directly and immediately . . ."

By eliminating the requirement of direct and immediate control over workers' terms and conditions of employment, the majority indicated that it was returning to the Board's traditional joint employer standard. The majority explained that the emphasis on direct and immediate control evolved from earlier Board decisions that better reflected the common law and a recognition of indirect and reserved control as a factor in establishing joint employment. Applying the "restated" joint-employer standard to the case at hand, the majority concluded that Browning-Ferris and Leadpoint were joint employers of the relevant workers. The majority found examples of direct, indirect, and reserved control over the Leadpoint workers, including: Browning-Ferris's unilateral control over certain facility functions that had a direct connection to work performance; Browning-Ferris's requirement that all applicants pass drug tests; and Browning-Ferris's retained right to reject any worker referred by Leadpoint.

## ***Browning-Ferris Industries of California v. NLRB***

In *Browning-Ferris*, the D.C. Circuit [agreed](#) with the Board's determination that an entity's reserved or indirect control over workers' terms and conditions of employment should be considered when making determinations about its joint employer status. In reaching its decision, the court conducted a *de novo* review of the common law, and did not defer to the Board's judgment. The Supreme Court has held that the Board and the courts are to apply common law principles of agency when determining whether an entity is an "employer" under the NLRA. In this case, the D.C. Circuit maintained that interpreting the meaning of the common law did not require deference to the agency. The court explained:

Congress delegated to the Board the authority to make tough calls on matters concerning labor relations, but not the power to recast traditional common-law principles of agency in identifying covered employees and employers. Instead, the inquiry into the content and meaning of the common law is a "pure" question of law, and its resolution requires "no special administrative expertise that a court does not possess."

After reviewing the common law, including its own precedent, the D.C. Circuit maintained that there is extensive support for considering an entity's reserved or indirect control over workers when making joint employer determinations. The court noted that an employer's reserved right to control workers is relevant evidence of a joint employer relationship and is consistent with traditional common law principles of agency. Similarly, the court indicated that these common law principles do not require that control be exercised directly and immediately to be relevant to the joint employer inquiry.

While the D.C. Circuit affirmed the Board's 2015 joint employer standard, it remanded the case, finding that the agency failed to distinguish between routine contract terms and aspects of indirect control that are relevant to the question of Browning-Ferris's joint employer status. For example, the court noted that the ability to set the objectives, basic ground rules, or expectations for a third-party contractor like Leadpoint "cast no meaningful light on joint-employer status." Rather, the court emphasized that the Board should, on remand, identify those aspects of indirect control that specifically bear on the workers' essential terms and conditions of employment. According to the court, this kind of analysis would "hew to the relevant common-law boundaries that prevent the Board from trenching on the common and routine decisions that employers make when hiring third party-contractors and defining the terms of those contracts."

How the D.C. Circuit's decision might affect the Board's adoption of a new joint employer standard is not certain. As noted, the court stated its view that the agency's rulemaking must conform to common law principles. As proposed, the standard appears to disavow the "extensive support" in the common law for consideration of reserved or indirect control over workers' terms and conditions of employment when making joint employer determinations.

In light of the D.C. Circuit's decision, proponents of a joint employer standard that focuses exclusively on an entity's direct and immediate control of workers' terms and conditions of employment may look again to Congress for a legislative solution. During the 115<sup>th</sup> Congress, the House of Representatives passed the [Save Local Business Act](#) (SLBA), a bill that would amend the NLRA to recognize an entity as a joint employer only if it "directly, actually, and immediately . . . exercises control over [a worker's] essential terms and conditions of employment[.]" Enactment of the SLBA would have superseded the common law and Board determinations about when to identify an entity as a joint employer. The D.C. Circuit's decision could prompt the reintroduction of the SLBA or a similar proposal in the 116<sup>th</sup> Congress.