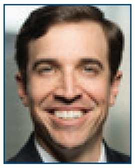
The Ever-Changing Joint Employer Standard Under the NLRA Enters the Administrative Rule-Making Realm: What Retailers Can Expect

By Jonathan E. Schulz



By now, most companies are at least aware of the possibility of being held liable for violations of worker protection statutes committed by their franchisees, subsidiaries, or third-party contractors. Under the doctrine of joint-employer liability, a company—depending on the degree of control it maintains or exerts over terms of employment—may be deemed a joint employer of the employees of a separate company with whom it contracts.

To protect themselves, companies need to know what type and amount of control over employment terms could be sufficient to trigger joint-employer liability and deem them an employer of another company's employees. Unfortunately, the National Labor Relations Board ("NLRB") continues to change the joint-employer standard under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151, *et seq.*

Following the recent vacatur of a decision setting forth the then-current standard, the NLRB has apparently given up on using the facts of a particular case as a vehicle to delineate the joint-employer standard. Instead, the NLRB will engage in administrative rulemaking to set its joint-employer standard, and it very recently released its Notice of Proposed Rulemaking ("NPRM") setting forth a new proposed rule. A review of the changes to this standard over time should help retailers understand how we got here and how to prepare for the forthcoming changes.

Browning-Ferris Standard: Authority to Control Can Be Sufficient

While the NLRB's joint-employer jurisprudence predates 2015, its *Browning-Ferris* decision in that year – which provides some historical context to the standard—is a good starting point. In that case, the NLRB noted that its *official* joint-employer standard was premised on a Third Circuit opinion decided in 1982. *Browning-Ferris Indus. of Cal, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186, at 1 (2015) (citing *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117 (3d Cir. 1982)). That Third Circuit decision explained as follows:

> where two or more employers exert significant control over the same employees-where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment-they constitute "joint employers" within the meaning of the NLRA.

691 F.2d at 1124. According to a majority of the Board deciding *Browning-Ferris*, the NLRB, since 1982, has deviated from that standard and has "imposed additional requirements for finding joint-employer status, which have no clear basis in the Third Circuit's decision, in the common law, or in the text or policies of the [NLRA]." 362 NLRB No. 186, at 1. Therefore, the majority of the Board in *Browning-Ferris* reaffirmed the above-excerpted standard and, importantly, clarified what the standard *did not* require:

> We will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint employment inquiry. . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.

Id. at 2 (emphasis in the original).

Hy-Brand Standard: Actual Exercise of Control Required

A little more than two years later, with a differently comprised Board, *Browning-Ferris* was overruled in a highly critical majority decision borrowing heavily from the dissent in *Browning-Ferris*. *See Hy-Brand Indus. Contractors, Ltd. & Brandt Constr. Co.*, 365 NLRB No. 156 (2017). The majority in *Hy-Brand*—ironically just like the majority in *Browning-Ferris*—claimed to be "return[ing] to the principles governing joint-employer status that existed prior to that decision." *Id.* at 2. Under the standard set forth in *Hy-Brand*:

> [A] finding of joint-employer status requires proof that the alleged joint-employer entities have actually exercised joint control over essential 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."

Id. at 35 (emphasis in the original).

Vacatur of *Hy-Brand*: Nullifying the Overruling

On February 9, 2018, the Office of Inspector General ("OIG") for the NLRB issued a report identifying problems underlying the deliberative process in the *Hy-Brand* matter. Specifically, a party in the *Browning-Ferris* matter was represented by the former law firm of a Board member in the *Hy-Brand* majority named William Emmanuel. Because the *Hy-Brand* majority opinion largely incorporated the *Browning-Ferris* dissent, the OIG deemed the deliberative process in *Hy-Brand* to be a mere continuation of that in *Browning-Ferris*. Accordingly, the OIG concluded that Member Emmanuel should have recused himself from consideration of *Hy-Brand* and that his failure to do so called into question the validity of that decision.

A couple weeks later on February 26, 2018, and following motions by the Charging Parties, the Board formally vacated *Hy-Brand*. *See Hy-Brand Indus. Contractors, Ltd. & Brandt Constr. Co.*, 366 NLRB No. 26 (2018). The effect of this overruling was to reinstate *Browning-Ferris* and the joint-employer standard set forth in that majority decision. *See id.* ("Because we vacate the Board's earlier Decision and Order, the overruling of the *Browning-Ferris* decision is of no force or effect.").

Administrative Rulemaking: A Proposed Return to the *Hy-Brand* Standard

Left with a joint-employer standard it does not like, the current Board is apparently uninterested in waiting for the right set of facts to come along that will enable it to change the standard through case law. Instead, the Board, on May 9, 2018, announced that it is considering administrative rulemaking to address the standard for determining joint-employer liability under the NLRA. Following a letter from three Democratic Senators expressing concern about the NLRB's approach, the NLRB Chairman, Jon Ring, clarified in a June 5, 2018 letter that "[a] majority of the Board is committed to engage in rulemaking, and the NLRB will do so." Chairman Ring further stated that a NPRM would be issued by the end of the summer at the latest.

Staying true to Chairman Ring's word, the Board, on September 14, 2018, issued its NPRM and requests for comments. *See Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681-01 (Sept. 14, 2018) (to be codified at 29 C.F.R. pt. 103). Consistent with the foregoing history, the NPRM notes that "[t]he last three years have seen much volatility in the Board's law governing joint-employer relationships." *Id.* at 46682. The Board claims that its new rule will address this volatility by "foster[ing] predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability." *Id.* at 46681.

The Board's proposed rule is effectively a return to the *Hy-Brand* standard. The proposed standard provides as follows:

> [A]n employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

Id. at 46686. Further limiting the scope of this proposed rule, the Board clarified that exerting control over contracted labor services "is not in and of itself[ ] sufficient justification" for imposing joint-employer liability; rather, there must be a demonstration that the employer "meaningfully affects matters relating to the employment relationship." *Id.* Similarly, even "'direct and immediate' control over employment terms may not give rise to a joint-employer relationship where that control is too limited in scope." *Id.* And finally, "it will be insufficient to establish joint-employer status where the degree of a putative joint employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer)." *Id.* at 46687.

In an effort to provide concrete examples of an otherwise abstract proposed rule, the Board provides twelve helpful factual examples meant to illustrate application of this proposed rule. *See id.* at 46696–46697. For example, if a franchisor requires a franchisee to operate its store between certain hours but the franchisor neither participates in scheduling assignments nor selects shift durations, the franchisor—under the proposed rule—would not be deemed to have exercised sufficient direct and immediate control over the franchisee's employees. *Id.* at 46697. On the other hand, if the franchisor and franchisee agree on a health insurance and retirement plan the franchisee must make available to its employees, the franchisor—under the proposed rule—has in fact exercised sufficient control over essential employment terms. *Id.*

The NLRB will receive and consider comments on the proposed rule from interested parties over a period of 60 days, through and including November 13, 2018. Parties may reply to existing comments for an additional week until November 20, 2018. Thereafter, the Board will formally promulgate the new rule. Even then, critics may seek to challenge the new rule in courts, meaning the dust will not settle on this forthcoming rule for some time.

How to Avoid Liability under the NLRA as a Joint Employer Going Forward

So, what does this all mean for retailers? For now, the *Browning-Ferris* standard applies to proceedings before the NLRB. Merely possessing authority – without ever even exercising it – can trigger joint employer liability. Companies would be well-advised to review franchise agreements or standard contracts with independent contractors to identify what, if any, control they retain over third-party employees. Retailers should then engage in a cost-benefit analysis of sorts—weighing the need to control employment terms and perhaps manage a brand against the possible exposure to joint employer liability.

However, reprieve for retailers is very likely right around the corner. The majority of the current Board is poised to promulgate a joint employer rule consistent with the *Hy-Brand* standard, which requires direct and actual control over another's employees, concerning essential terms of employment, in a manner that is not limited or routine. Once formally promulgated, this new rule will allow companies to maintain some level of supervision and control over third-party employees without risking liability for claims of those third-party employees brought under the NLRA.

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Addressing Spoliation in the Retail and Hospitality World

By Fred M. Heiser

Most retailers know not to destroy evidence that is relevant to litigation. Yet preserving the right evidence can be a difficult issue to navigate. And a retailer's failure to recognize what evidence to keep, or how to properly do it, can lead to spoliation exposure and penalties.

Spoliation and Its Potential Penalties

Spoliation is the destruction or failure to preserve evidence necessary to pending or contemplated litigation. For retailers, this can include evidence like incident reports, video surveillance, or electronically stored information (*i.e.* e-mails, computer files, or USB drives). Sometimes spoliation is intentional. But, more often, it occurs by accident. Either way, courts can impose weighty penalties against a retailer for failing to meet its obligation to maintain the right evidence and information once there is notice of a potential claim.

These penalties vary by jurisdiction. Still, they generally range from monetary sanctions to an instruction at trial that allows a jury to assume that missing evidence would have been unfavorable to a retailer that lost it. In the most egregious cases, spoliation sanctions can include the dismissal of defenses or the preclusion of evidence.

When necessary, courts will impose a combination of penalties to fully compensate one party for another party's spoliation. For example, in *Klipsch Grp. Inc. v. ePRO E-Commerce, Ltd.*, 880 F.3d 620 (2d Cir. 2018), the Second Circuit upheld multiple sanctions against a defendant for engaging in willful spoliation. Although only about $20,000 of actual, compensatory damages were at issue in *Klipsch*, sanctions against the defendant included: