Insight

IN-DEPTH DISCUSSION

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# House Hearing Explores Legislative Remedy to Joint Employer Confusion

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On July 12, 2017, the U.S. House Committee on Education and the Workforce held a hearing concerning the need for legislation to redefine the joint employer standard.[1] As many employers are aware, the interpretation of when employers constitute "joint employers" has been expanded in the last few years, by the U.S. Department of Labor, the National Labor Relations Board, other regulatory bodies, and the courts. In the hearing, led by Chairwoman Virginia Foxx (R-NC), several witnesses highlighted the difficulties posed by the evolving joint employer standard, particularly for small businesses. Witnesses and representatives considered whether legislation could alleviate, or might aggravate, the confusion felt by many employers. This summary provides a background of this emerging issue as well as a brief overview of the hearing.

## Evolution of the Joint Employer Standard

The rapid transformation of the joint employer standard began two years ago, with the National Labor Relations Board's August 27, 2015 ruling in *Browning-Ferris Industries of California, Inc.* There, the Board broadened the test for determining joint employment and assessing liability under the National Labor Relations Act (NLRA). The standard shifted from one where the purported joint employer exercised "direct and immediate" control over the other entity's employees, to a much looser "indirect" control standard. The case originated when the Teamsters Union sought to represent a staffing agency's employees working at a recycling facility and named the facility as a joint employer. The Board, disagreeing with its own regional director, concluded the staffing agency and its client were joint employers, relying on the facility's indirect control and reserved contractual authority over the supplied employees' essential terms and conditions of employment.

1 The full hearing, on "Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship," can be viewed at https://youtu.be/sbecc0KJRjc.

The *Browning-Ferris* holding—which is currently on appeal before the U.S. Court of Appeals for the D.C. Circuit—upended decades of long-standing precedent. It also appeared to conflict with other Board guidance. In April 2015, for example, the Board issued an Advice Memorandum analyzing the relationship between a franchisee, Nutritionality, and its franchisor, Freshii, concerning the operation of a single casual restaurant in Chicago. In that guidance ("the Freshii Memo"), the Board's associate general counsel concluded that Nutritionality and Freshii were not joint employers, either under then-existing Board precedent or under the proposed standard that was adopted in *Browning-Ferris* months later.

Yet, as Representative Bradley Byrne (R-AL) pointed out in Wednesday's hearing, the Board declined to clarify the applicability of the Browning-Ferris decision to the franchise context earlier this year, despite a request from 13 House Democrats. By letter dated June 27, 2017, the current general counsel, a holdover from the Obama administration, stated only that the Freshii Memo "speaks for itself and, of course, should be read in light of subsequent developments," including *Browning-Ferris*.

The reconfiguration of the joint employer standard has continued outside the Board's realm as well. The recent decision from the Fourth Circuit Court of Appeals in *Salinas v. Commercial Interiors Inc*. came up repeatedly throughout the hearing, for example.[2] In Salinas, the appellate court announced a new six-factor joint employer test for claims brought under the Fair Labor Standards Act (FLSA), ultimately finding joint employment. In doing so, the court rejected tests already used by other circuit courts, which focus on the economic realities between the alleged joint employers. According to witness Roger King, Senior Labor and Employment Counsel with HR Policy Association, the *Salinas* opinion thus not only created yet another FLSA joint employment test but planted the seeds for increased litigation from plaintiffs seeking to test this theory in other jurisdictions.

Several witnesses testified as to the patchwork of joint employer tests applicable in varying scenarios. Richard Heiser of FedEx Ground asserted that, by his count, at least 15 different standards are in play among the circuit courts, federal regulations, and agency interpretations. Mary Kennedy Thompson of Dwyer Group, testifying on behalf of the International Franchise Association, referred to the fact that both the Occupational Health and Safety Administration and the Department of Labor's Wage and Hour Division released administrative directives expanding their approaches to joint employment since *Browning-Ferris*. Mr. King added that the EEOC's interpretation of joint employment under Title VII involves a complicated 15-factor test.

On the other hand, additional witnesses and commentators contended that the much-maligned patchwork of tests among claims and agencies is not the result of sheer whim or abuse of authority. As these witnesses pointed out, variations arise, at least to some extent, due to the different statutory schemes underlying the particular joint employer analysis. That is, because the purpose of the FLSA is different from the purpose of the Occupational Health and Safety Act or the NLRA, it makes sense that the standards employed in these contexts may differ. In defense of continued reliance on multi-factor, common-law standards, these individuals argued further that the joint employer determination necessarily involves a fact-specific analysis because there are so many types of industries, employers, and contractual relationships.

Despite the trend since 2015 toward expansion of the joint employment doctrine, the Trump administration has signaled its intent to return to more narrow, employer-friendly interpretations. For example, on June 7, 2017, Secretary of Labor Alex Acosta announced the withdrawal of a 2016 Wage and Hour Administrative Interpretation, an informal guidance that had established new standards for determining joint employment

2 Nina Markey & Andrew Rogers, *Fourth Circuit Decision Establishes New Six-Factor Test for Determining Joint Employment under the FLSA*, Littler Insight (Feb. 21, 2017).

under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act.[3] The House hearing stakes out another potential path for the current administration and legislative majority to rein in federal interpretations of "employment."

## Calls for a Legislative Fix

Throughout the hearing, witnesses from the employer community consistently urged the House to craft a legislative solution to simplify the law on joint employment. Witnesses described, based on their real-world experiences, how the shifting joint employment sands are hurting their business. In particular, Jerry Reese of Dat Dog in New Orleans, testifying on behalf of the Coalition to Save Local Businesses, explained how his plan to add franchises across the South is being hindered by the uncertainty involving the joint employer standard. He shared his concern that his company's need to maintain brand standards in franchisees, through training for example, exacerbates the threat that regulators will treat such controls as evidence of a joint employer relationship. Ms. Thompson echoed those concerns, noting that her employer has been pulling back the support provided to franchisees, out of fear that it will be considered a joint employer.

Witnesses recounted that they are thus forced to be conservative with their franchising plans not only because they are not sure how to proceed in balancing those relationships without violating the law but also because of the legal costs associated with figuring it out. Several witnesses expressed frustration that funds put toward legal and consulting fees—and, of course, fees devoted to any eventual litigation—would be better spent providing more business and franchise opportunities, higher wages, and increased benefits.

Witnesses explicitly requested that the House take up the issue and draft a bill clarifying the joint employer standard. They asserted that, with greater certainty of the legal landscape, small and large employers could develop more ambitious plans for growth. Chairwoman Foxx and Rep. Byrne endorsed a legislative approach. Indeed, both argued that it is Congress' duty to eliminate any such confusion in the law, and not the role of either the courts or executive branch.

Other witnesses and Committee members, however, disputed the need for new laws to address or reconcile the joint employer tests. They cautioned against adopting a one-size-fits-all legislative approach because, as noted earlier, there are numerous factors to consider in determining joint employer status in each unique scenario. They pointed out that the courts have been interpreting these same statutes using common law for decades and, moreover, that courts similarly would end up interpreting the terms of any new legislation. Even if a new law could add clarity, detractors noted that the alleged immunization of prime contractors and franchisors would result in a loss of worker wages and protections overall, especially because there may be no meaningful remedy available to workers who either cannot identify or recover from their employer.

## Potential Legislative Approaches

Witnesses at the hearing generally did not delve into the specifics of any potential bills, but a couple of their proposals are noteworthy. Mr. King suggested, for example, that legislation could retain some of the flexibility of the multi-factor tests by codifying approaches from the common law, while still fostering certainty. Mr. Heiser proposed a safe harbor provision, which would protect employers that maintain vendor compliance programs.

While not mentioned at the hearing, there has been a flurry of activity in the state legislatures on this topic, specifically in the franchise context. This year alone, at least eight states (most recently North Carolina, Alabama, and Arkansas) have enacted laws clarifying that franchisors are not the employers of franchisees or their employees, for purposes of state employment regulations. In some jurisdictions, such as Arizona, a franchisor may not be deemed an employer or co-employer unless it agrees, in writing, to assume that role.

3 Michael J. Lotito & Ilyse Schuman, *DOL Withdraws Joint Employer and Independent Contractor Guidance*, Littler ASAP (June 7, 2017).

This trend may continue, particularly if Congress is unable to address the joint employer issue in the near term or if federal proposals fail to account for the franchise relationship.

**What's Next?**

As Chairwoman Foxx pointed out in her closing remarks, the partisan divide is readily apparent in this ongoing debate. Republicans on the Committee seemed ready to answer the witnesses' calls for clarity through legislation, while Democrats appeared more concerned with maintaining pressure on employers to ensure accountability and safeguard worker protections. Littler will continue to monitor developments on this issue.