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EEOC Urges Federal Appellate Court to Uphold NLRB's Expansive Definition of "Joint Employer"

October 26, 2016 | Blog | By

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The U.S. Equal Employment Opportunity Commission (EEOC) recently entered the *Browning-Ferris* saga, filing an amicus brief in support of the **new joint employer test** articulated by the National Labor Relations Board (NLRB) in August 2015. Drawing comparisons to its own joint employer test, the EEOC urges the D.C. Court of Appeals to uphold the NLRB's pliable, fact-specific test to determine whether an entity sufficiently controls the terms and conditions of an individual's employment to be a joint employer.

What is the Browning-Ferris appeal?

A NLRB regional director previously found that Browning-Ferris was not a joint employer with one of its contractors. On review, the NLRB discarded its then joint employer standard, which required direct and immediate control over the employees, in favor of a new standard that allows for joint employment upon a finding that the employer exercised *indirect control* over employment conditions (or even a reservation of rights to do so). The NLRB further stated that "[a]ll of the incidents of the relationship must be assessed," *i.e.*, a totality of circumstances standard of review. Applying this new test, the NLRB reversed the regional director's finding and deemed Browning-Ferris a joint employer. Browning-Ferris **appealed** the decision to the D.C. Court of Appeals.

What did the EEOC have to say?

In its brief, the EEOC urges the appellate court to uphold the NLRB's new joint employer test on the grounds that (i) Title VII – the statute the EEOC is charged with enforcing – is based upon the National Labor Relations Act – the statute the NLRB is charged with enforcing; (ii) both Title VII and the NLRA define "employer" similarly; and (iii) both statutes remedial in nature. Additionally, the EEOC attempts to dismiss arguments that the NLRB's flexible joint employer test is vague and unworkable by giving examples of how its own flexible, totality of the circumstances joint employer test (which is consistent with the NLRB's test) has been applied by courts without apparent issue, and that flexibility is important because "employment relationships take many forms."

Why did the EEOC weigh in?

The EEOC likely jumped into this fray because a judicial decision upholding the NLRB's new joint employer test will provide further validation to the EEOC's own preferred broad joint employer test, which has not been adopted by the courts with any uniformity and which would make it easier for the EEOC to hold multiple employers liable for discrimination – especially those operating in fissured industries that utilize contingent workers. This is a gamble, however, as the EEOC's test may then be called into question if the court rejects the NLRB's test. We will continue to keep an eye on this appeal.

Authors