

NLRB

New Joint Employer Liability Test Tough to Undo, NLRB Counsel Says

BNA Snapshot

- Expanded joint employer liability for businesses likely target for future GOP-majority labor board
- NLRB general counsel says pending appeals court decision could limit efforts to tighten standard



By Chris Opfer

The National Labor Relations Board's controversial decision to expand joint employer liability may not be so easy for the Trump administration to undo, NLRB General Counsel Richard Griffin told Bloomberg BNA March 28.

A federal appeals court in Washington recently heard arguments in a case in which the board said a business that exerts indirect control over contractor, franchisee or staffing agency workers may be considered their joint employer for bargaining and liability purposes (Browning-

Ferris Indus. of Calif., Inc. v. NLRB, D.C. Cir., No. 16-1028). Griffin said the court could cement that standard by ruling in the board's favor, depending on how the judges word the decision.

"Depending on which way the D.C. Circuit decides the issue, it could, to some extent, cabin the ways in which the board could move away from the Browning-Ferris standard," Griffin told Bloomberg BNA. "Or, they could simply say that the board's interpretation is a permissible one as opposed to a required one."

President Donald Trump is expected to fill two openings on the five-member board to give the NLRB a Republican majority. That means the board may revisit the Browning-Ferris decision, as well as recent rulings allowing private university graduate assistants to unionize and recognizing "micro-units" within larger workforces for bargaining purposes.

Griffin said the board would likely be free to adopt a more restrictive joint employment standard if the appeals court rules against the NLRB or says only that the Browning-Ferris standard is permissible. If the court says the standard is the correct one, however, that may tie the board's hands for the foreseeable future.

Griffin, who was appointed by former President Barack Obama, also said he intends to remain on the job until his term expires in early November.

Critics Look to Congress

The board in 2015 ruled that California waste management company Browning-Ferris could be forced as a joint employer to bargain with sorters, screen cleaners and housekeepers provided by Leadpoint Business Services to work at a BFI recycling plant. BFI was a joint employer under a revised standard, the board said, because the company restricted who Leadpoint could hire for the jobs, forced Leadpoint to pay those workers no more than BFI employees in comparable jobs and dictated how quickly workers should be performing tasks.

Griffin championed a similar position before the decision. He also authorized regional directors to issue complaints against McDonald's USA LLC, alleging that the fast-food giant is a joint employer of workers at franchise restaurants.

"I think the board's decision is a very good decision," Griffin told Bloomberg BNA. "I think it's a very well-written, well-reasoned opinion."

Griffin wasn't in the courtroom during oral arguments in the appeals court earlier this month, but he said his understanding was that it "went well." Meanwhile, critics of the board's decision agree that the specifics of the appeals court's decision may dictate whether a Republican-majority board can peel back the ruling.

That's why some want Congress to step in with legislation to restore the more limited joint employer standard in place before the Browning-Ferris decision.

"There is a clear strategy by this NLRB and the unions to write this in a way that it is hard to undo," Matthew Haller, a senior vice president at the International Franchise Association, told Bloomberg BNA. "Yet there is a misperception on the hill that the Trump administration can wave a magic wand and make it go away."

The IFA has been leading the lobbying charge against joint employer expansion, arguing that the new standard could turn the business model on its head by forcing franchisers to take a much more active role in their franchisees' day-to-day operations. The group is pushing for a government funding rider or stand-alone legislation to block the Browning-Ferris standard.

To contact the reporter on this story: Chris Opfer in New York at copfer@bna.com

To contact the editors responsible for this story: Peggy Aulino at maulino@bna.com; Terence Hyland at thyland@bna.com; Christopher Opfer at copfer@bna.com