

## What Does The Future Hold For Joint Employers?

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Aug. 27 will mark the anniversary of the landmark National Labor Relations Board decision in *Browning-Ferris Industries of California*, which loosened the standard for finding a joint employer relationship. Since then, it has been “The Year of the Joint Employer,” with Congress, the U.S. Department of Labor, trade groups and major employers weighing in on the issue.

Last month, the NLRB grabbed headlines again when it issued its decision in *Miller & Anderson Inc.* This latest development gives unions new ways of using the NLRB joint employer doctrine to organize. It also leaves employers wondering what exactly has changed, what lies ahead and what it means for their business relationships.



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### What Did Miller & Anderson Change?

When a union seeks to organize employees at a particular organization that it can represent, it must identify which classifications of employees will form an appropriate "bargaining unit." Since 2004, the NLRB has not allowed unions to force organization in a bargaining unit that mixes direct employees with those employed by "joint employers" — two or more employers who each have a level of control over the employees.

Doing so required the consent of all employers involved. Now, after *Miller & Anderson*, a union does not need employer consent to try to organize a unit that mixes direct employees with joint employees. Union campaigns are highly strategic, and *Miller & Anderson* gives unions a powerful new tool: They can use temporary employees to organize those of the direct employer (or vice-versa).

### The Link Between Browning-Ferris and Miller & Anderson

The NLRB is concerned that workplaces have changed in ways that make former interpretations of the National Labor Relations Act obsolete. The *Miller & Anderson* decision cites statistics about the increasing number of workers who are employed through temporary agencies, and states where temporary employment has expanded into a wider range of occupations. It claims that it has a "responsibility to adapt ... to the changing patterns of industrial life." That rationale draws a direct link between this case and *Browning-Ferris*. In that case, citing the same concerns and statistics, the NLRB loosened the standard for finding a joint employer relationship.

Before *Browning-Ferris*, companies were joint employers only if each one exercised direct and immediate control over the employees. Now, the NLRB may find a company to be a joint employer even if it does not exercise control in a direct and immediate way. The NLRB may also find a company to be a joint employer if in practice it does not exercise any authority at all, as long as it possesses the authority to control employees.

These are still live issues. The D.C. Circuit is currently considering an appeal of the NLRB's *Browning-Ferris* decision. In June, Microsoft and the HR Policy Association filed a well-publicized amicus brief arguing that the NLRB's loosened joint employer standard will deter companies from using their influence to promote corporate social responsibility efforts that improve working conditions in their supply chains. Miller & Anderson will also likely be appealed to the federal courts.

Meanwhile, the NLRB is litigating a high-profile case against a company that it claims is a joint employer: McDonald's. The NLRB alleges that McDonald's corporate is liable for violations of the NLRA, even where alleged unlawful conduct occurred at local franchises. If McDonald's and its franchises are found to be joint employers, coupled with the new rule of Miller & Anderson, it could aid in nationwide union organizing of the fast-food chain. Employees have already laid the groundwork for organizing — in fact many of the allegations of the current case against McDonald's involve the well-publicized fast food worker protests of recent years.

### **Other Joint Employer Battlefronts**

In Congress, the house appropriations committee recently considered a bill that would fund the NLRB — but prohibits it from using its funds to "change the interpretation or application of the standard to determine whether entities are 'joint employers'" from what the standard was as of Jan. 1, 2014. Democrats on the committee took aim at the provision, calling it part of an "assault on workers" that would stop the NLRB from enforcing "the responsibilities of joint employers." The committee approved the bill over their objection, sending it to the entire House for consideration. Other bills filed by John Kline, R-Minn., and Lamar Alexander, R-Tenn., in the House and Senate seek to more directly undo the *Browning-Ferris* decision.

The NLRB's focus on joint employment is corresponding, or maybe prompting, with changes to other federal regulations. In January, the administrator of the DOL's wage and hour division issued a new interpretation of joint employment under laws enforced by that agency, including the Fair Labor Standards Act. Under the administrator's interpretation, joint employers are jointly and severally liable for violations of those laws. Additionally, an employee's activities at various joint employers are aggregated. This means that the hours an employee works at two or more employers may be combined for purposes of calculating overtime owed to that employee.

### **What Is Next?**

Future NLRB cases will likely apply the joint employer doctrine to other forms of business relationships. Joint employment can come in many forms, including temporary agencies and other staffing and subcontracting arrangements, and, as the NLRB argues in the McDonald's case, franchising. The NLRB is looking at a wide range of business relationships and using the joint employer doctrine as a way to apply the NLRA to any sort of arrangement where more than one entity has control over employees.

As it stated in Miller & Anderson, "[t]o the extent that multiple employers will be required, as a practical matter, to cooperate or coordinate in bargaining, that is a function of the freely chosen business

relationship between user and supplier employers that defines all joint employer situations."

As these changes play out, employers should gain a clearer picture of how the NLRB and other government agencies will be applying the joint employer doctrine going forward. However, many employers are not waiting to re-examine their business relationships. In response to McDonald's arguments to the NLRB that it should not be considered a joint employer with its franchises, many companies are working to distance themselves from their partners who they fear could be considered joint employers.

McDonald's competitor, Subway, appears to be taking the opposite approach. On July 26, the company raised eyebrows when it entered into an agreement with the DOL to become even more involved in some terms and conditions of employment at its franchises. A leading trade group, the International Franchise Association, immediately issued a statement highlighting the risk of this move, given the NLRB's expansion of its joint employer doctrine.

There is no consensus on a single strategy employers should use in light of the changes to the joint employer doctrine. What many employers do have in common is that they are proactively re-examining business relationships in which more than one entity has the authority to exercise some control over employees, regardless of whether the entities involved are currently unionized or not. Some employers are determining that they must make changes now, despite the uncertainty in the joint employer doctrine. Others are not making immediate changes, but are actively strategizing for the future — whatever it may hold.

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