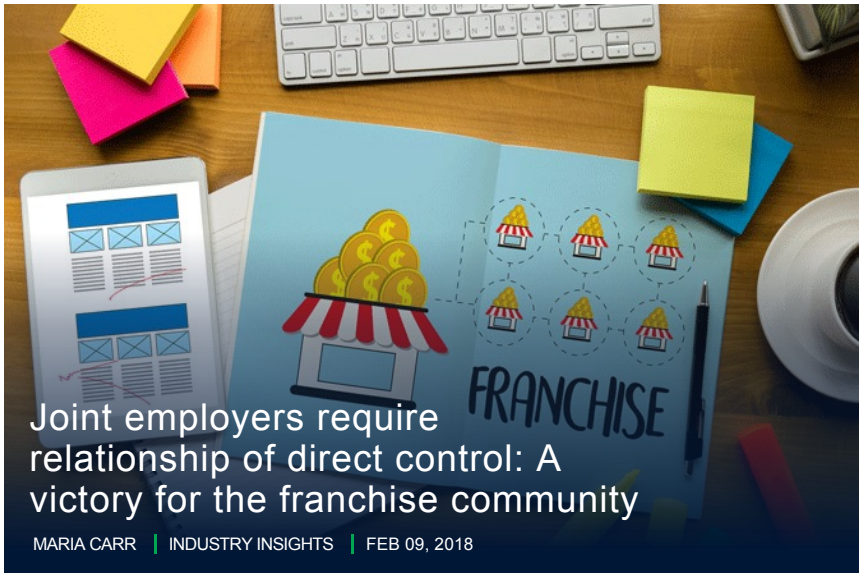

Joint employers require relationship of direct control: A victory for the franchise community

MARIA CARR | INDUSTRY INSIGHTS | FEB 09, 2018

Update: NLRB vacated this decision two months later

Imagine this situation: if you and another business owner co-own two sections of a related business together (perhaps a gas station and a nearby deli), you may sometimes have employees at the deli fill in at the gas station and vice versa. But did you ever consider whether you and your business-owner friend are "joint employers" of the employees of both the gas station and the deli?

Until the end of 2017, you would likely have been held to be joint employers or employers that could be held liable for the actions of one another's employees. After a recent decision by the National Labor Relations Board (NLRB), however, you would only be held to be joint employers if you actually exercised control over your friend's employees on a regular basis.

Last month, the NLRB issued a decision that is ultimately a victory for the franchise community. The NLRB held that two entities are joint employers under the National Labor Relations Act only if proof exists that one entity has actually exercised control over the essential employment terms of another entity's employees, and has done so directly and immediately in a situation that is not limited and routine.

MAJOR DEPARTURE FROM *BROWNING-FERRIS INDUSTRIES*

This decision represents a major departure from the NLRB's 2015 decision in *Browning-Ferris Industries*, which held that two entities could be held to be joint employers if one entity merely reserved the right to exercise control over another's employees and indirectly exercised such control. The *Browning-Ferris* decision greatly impacted the franchise community because a franchisee and a franchisor could be held to be joint employers – and jointly responsible for potential liabilities – even if a franchisor or franchisee did not actually exercise control over the other entity's employees. In the gas station/deli situation described above, you and your business-owner friend would likely have been found to be joint employers under *Browning-Ferris Industries* – even if these employees only temporarily filled in at one business, and even if you only provided direction when necessary. If you and your friend never actually regularly exercised control over one another's employees, you would no longer be joint employers under the NLRB's new decision.

5 REASONS THE NLRB OVERTURNED *BROWNING-FERRIS*

On Dec. 14, 2017, in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, the NLRB explicitly overturned the *Browning-Ferris* decision, noting that there are five major problems with that decision. Specifically:

1. The *Browning-Ferris* test exceeded the NLRB's statutory authority.
2. The decision in *Browning-Ferris* to overhaul the definition of "employer" was flawed, and ignored the fact that third party or "independent contractor" relationships continue to exist.
3. The NLRB modified the traditional "agency" standard itself, overstepping its authority. The common law standard of "agency" requires "direct control over one or more essential terms and conditions of employment" for an entity to be the "joint employer" of another entity's employees.
4. The Browning-Ferris decision abandoned a test that provided certainty, and began a vague and undefined standard; it took away employers' certainty or uncertainty as to what entities may or may not be held to be an "employer."
5. The Browning-Ferris decision may provide a more advantageous bargaining relationship for entities and individuals that do not participate in unions or collective bargaining, but the decision did not actually solve any problems.

The NLRB also specifically addressed the impact of the *Browning-Ferris* decision on the franchise community in the decision. The NLRB noted that "[f]or many years, the NLRB has generally not held franchisors to be joint employers with their franchisees, regardless of the degree of indirect control retained;" the NLRB also noted that the *Browning-Ferris* decision was "almost certainly momentous and hugely disruptive" on the franchise community, because franchisees and franchisors were left with uncertainty and doubt as to whether or not they could be held to be joint employers of one another.

In the *Hy-Brand* opinion, however, the NLRB noted that whether or not a franchisor is a joint employer may have more to do with protecting trademark protections than actual operational control; often, a franchisor needs to protect its intellectual property in the franchise relationship or risk engaging in "naked franchising." Specifically, the NLRB notes that "even though franchise law requires some degree of oversight and control by the franchisor over its franchisees, it was never the intent of Congress to make franchisors joint employers of their franchisee's employees," and the *Browning-Ferris* decision represented a major threat to that reality.

A MAJOR VICTORY FOR FRANCHISEES AND FRANCHISORS

As a result, the NLRB's major decision to step away from its *Browning-Ferris* opinion is a major victory for franchisees and franchisors. Both franchisees and franchisors can now be assured that they will not unintentionally be held to be a "joint employer" of one another's employees unless they actually exercise control over these employees on a regular basis, and franchisors can proceed with typical franchise relationships without the concern of extra liability.

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