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## BLOGS

### Employment

# D.C. Circuit Embraces “Indirect Control” and “Reserved Right” Joint Employer Standard, but Remands *Browning-Ferris* Case to NLRB

The long-awaited decision of the D.C. Circuit Court of Appeals in an appeal challenging the controversial joint employer test adopted by the National Labor Relations Board in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), was released on December 28, 2018. *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 2018 WL 6816542 (D.C. Cir. Dec. 28, 2018). Although the D.C. Circuit’s decision was expected to either clarify or reject the NLRB’s August 2015 decision holding that a company could be a joint employer if it had an unexercised right to directly or indirectly control an employee’s terms and conditions of employment, it did neither. Rather, in what might be called a partial victory (or defeat) for each side, the court agreed that evidence of indirect control or unexercised control over the essential terms of employment is the correct standard for determining the existence of a joint employment relationship, but remanded the case to the NLRB to distinguish between restrictions on essential employment terms and controls that are “intrinsic to ordinary third-party contracting relationships.” In a 2-1 decision, the court made three points that will shift the focus of the joint employer debate in the future.

1. The court remanded the case to the NLRB for an explanation of what evidence of “indirect control” the Board believes is indicia of control over essential terms of employment. The court cautioned that the NLRB must “differentiate between those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third party contract relationships” that do not relate to essential terms of employment.
2. The Board must then determine which of those elements of control over essential terms and conditions of employment permit meaningful collective bargaining. Moreover, the Board must “clarify what ‘meaningful collective bargaining’ might require in an arrangement like this.”
3. The court held that the definition of “joint employer” is a common law concept that is solely within the jurisdiction of the courts to determine. The courts owe no deference to decisions of the NLRB relating to the definition of a “joint employer.”

Recognizing that the NLRB has published a proposed joint employer rule, the court noted that the proposal would only apply prospectively. Without directly commenting on the substance of the proposed rule, the court has clearly set out

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benchmarks that should impact its scope. How the Board will attempt to define “indirect control,” and how it will articulate a “meaningful collective bargaining” standard will likely take on new importance now that the court has undermined the NLRB’s presumed right to define “joint employer.”