Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

One Year After Browning-Ferris, Employers Decry Uncertainty

By **Matthew Bultman**

Law360, New York (August 16, 2016, 7:42 PM ET) -- After the National Labor Relations Board loosened its definition of a joint employer last August, companies rushed to understand the implications. One year later, management-side attorneys who talk about the decision still overwhelmingly come back to a single word: uncertainty.

"We've been sort of wandering through the wilderness for a year now," said DLA Piper partner Stuart Hershman, who specializes in franchising.

This month marks the one-year anniversary of the landmark Browning-Ferris decision, when the NLRB reversed its 30-year-old standard for when two or more businesses can be counted as joint employers of a single group of workers.

Before the decision, the joint employer standard rested on a business having "direct and immediate" control over terms and conditions of employment. In Browning-Ferris, the board revised the standard to include "indirect control," or the ability to exert such control.

The decision has inspired strong reactions, drawing praise from unions and sharp criticism from business groups.

Richard Griffin, the NLRB's general counsel, told Law360 he has never viewed the ruling as anything extraordinary. Rather, he sees it as a return to the historic standard that existed prior to the 1980s.

"I do think, for whatever reason, it has become a cause célèbre, when I think if you were to read the decision and put it in context as a lawyer ... the outcry seems somewhat in excess of what is merited given the relatively modest nature of the decision," he said.

A Vague Standard, So Far

The decision focused on the relationship between Browning-Ferris Industries of California and workers provided by a staffing agency, Leadpoint Business Services. The new standard has the potential to open companies up to liabilities — such as collective bargaining agreements — that previously may have only applied to third parties like vendors, staffing agencies or franchisees.

The NLRB has said a change to the joint employer standard was needed because the old standard hadn't kept pace with the changing economic conditions and the rise in contingent employment relationships.

The problem, business interests contend, is that the new standard is too vague and creates uncertainty about about what now constitutes control.

"It's definitely having an impact and I think it's having a significant impact on a lot of business decisions — how companies, lawyers and unions are approaching a lot of circumstances," said Steven Swirsky of Epstein Becker Green.

The NLRB is starting to rule on various cases that could provide businesses with more clarity on how the standard will be applied. Many will be paying close attention to a joint employer case the NLRB Office of General Counsel is pursuing against McDonald's Corp.

The Browning-Ferris decision has also been appealed to the D.C. Circuit, which could provide some additional guidance. In the meantime, businesses say they are left in limbo.

"People say, 'You just have to let the litigation play out,'" said Michael Lotito, who co-chairs the Workplace Policy Institute at Littler Mendelson PC. "Well, when you say something like that, you're basically saying to business, 'Don't invest, don't expand, don't make fundamental decisions because I can't tell you what the risk factors are going to be.'"

Playing Pin the Tail on the Donkey

A recent analysis from Littler Mendelson found that between Sept. 1 and May, more than 50 joint employer charges were filed again franchises. There are around 80 other charges against franchise businesses could lead to joint employer complaints, mostly in the fast-food and third-party staffing industries, the analysis found.

In addition, nearly 150 joint employer charges have also been filed against nonfranchised business, most by unions or union-affiliated groups, the firm said.

For lawyers, providing clients with advice can be like "playing pin the tail on the donkey," said Hershman, the DLA Piper franchise specialist. And given the uncertainty, he said franchisors are starting to distance themselves from franchisees, concerned the kinds of assistance and support they have traditionally provided could set them up for a joint employer finding.

Companies are also taking a hard look their relationships with staffing agencies and contractors, hesitant to get too involved in control of day-to-day aspects, including decisions about hiring or firing, wages and benefits, said Shook Hardy & Bacon LLP partner William Martucci.

"What this means as a practical matter for the contracting employers, is there will be more of a separation, if you will, in terms of the contractual language and the actual working relationship," he said. "The more there is that distinction that comes into play, it likely builds in higher costs and less flexibility."

Businesses Overreacting

A favorite example for management-side lawyers is a case involving Microsoft Corp. In 2015, the company drew praise from President Barack Obama for its corporate social responsibility initiatives, which required contractors in its supply chain to provide employees paid leave.

Not long after, a union representing employees of a supplier cited the policy to demand Microsoft engage in collective bargaining. The union, the Temporary Workers of America, filed an unfair labor practice charge when Microsoft refused. The charge was withdrawn earlier this month, but not before creating a stir in the business community.

"On one hand, the United States president has praised Microsoft for its market-leading CSR initiative," Microsoft wrote in a June amicus brief in the Browning-Ferris appeal. "On the other hand, the NLRB has adopted a joint employment standard that encourages unions to use the same policy to bring an unfair labor practices claim against Microsoft."

Michael Harper, a professor at Boston University School of Law, believes some on the business side are overreacting. In testimony to Congress last September, he said the significance of the Browning-Ferris decision had been "greatly exaggerated."

"In fact, BFI is nothing more than a narrowly crafted opinion that reinstates a prior definition of the joint employment relationship for purposes of collective bargaining under the regulatory umbrella of the National Labor Relations Act," he said at the time.

Wilma Liebman, the former chairwoman of the NLRB, expressed similar feelings, saying that anything the board does creates a lot of "hyperbolic reaction." She admits there is some uncertainty in the wake of Browning-Ferris, but she said that's the nature of the legal system.

"There's never any certainty with the law, both because the common law evolves and because one judge may be different than the next judge," she said.

What makes Browning-Ferris different, Martucci countered, is that for years there have been some fairly bright lines to determine who was a joint employer, particularly in the context of franchise arrangements.

"The aspect here that's more dramatic than simply the fact the law changes, is the fact the business model is now subject to attack when it had such a long run of being thought of as a bright-line distinction between what would be considered employment relationships and which way that employment relationship would run," he said.

Making Chicken Soup

To understand the murky landscape around the joint employer issue, Browning-Ferris can’t be looked at in isolation, attorneys said.

Just last month, the NLRB issued a decision that made it easier for temporary workers to unionize. In that case, known as Miller & Anderson, the board ruled employer consent isn’t required before an election covering temp workers and regular employees can take place.

Steven Bernstein, a regional managing partner at Fisher Phillips LLP, said this decision could in many ways prove more significant than the Browning-Ferris case.

"That's a much more recent decision and it has, I think, broader ramifications for employers in the organizing arena," he said. "I think that's the one that's ultimately going to make the biggest splash out there."

Littler Mendelson's Lotito said there are other factors too that have added to the uncertainty for businesses. The U.S. Department of Labor, for example, in January **issued guidance** about joint employment under the laws it enforces, including the Fair Labor Standards Act. Some attorneys have also noted the NLRB's broad authority in issuing investigative subpoenas in joint employer cases.

"You've got to put them all together in order to make a chicken soup here," Lotito said.

Looking ahead, the November election could have a dramatic effect on how the joint employer issue plays out. Traditionally, the mix of the five-member NLRB has been 3-2 in favor of the president's party. The president also appoints the general counsel of the NLRB.

"It's very easy to foresee that if there was a Trump majority on the board and a Trump general counsel, that Browning-Ferris would become something of a footnote to history, and Miller & Anderson," Swirsky said.

--Editing by Mark Lebetkin and Katherine Rautenberg.
