



The Daily Dish

The Economic Cost of the Joint Employer Saga

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Eakinomics: The Economic Cost of the Joint Employer Saga

The joint employer saga has been amazing. Recall that the legal definition of “joint employer” comes down to how a firm impacts the employees of a separate business. Beginning in 1984 the National Labor Relations Board (NLRB) [held](#) that a firm is a joint employer only if it exercised “direct” control of the employees in another business. In 2015, however, the Obama-era NLRB [ruled](#) in the Browning-Ferris Industries case in favor of a “direct or indirect” control standard that left a lot of ambiguity and potential for litigation, and could be applied to a broader array of business arrangements. In December 2017 the NLRB reversed this expansion of the joint employer definition in the Hy-Brand case, rescinded the Browning-Ferris decision, and restored the direct control standard.

That seemed to end the Obama-era effort to empower unions (and effectively destroy the franchise business model). Then, out of nowhere, the Inspector General at the NLRB began an investigation into whether NLRB member William Emmanuel should have recused himself from the vote in Hy-Brand on the grounds that his previous law firm had worked on the same issue during his tenure. Regardless of the (weak) merits of this reasoning, the NLRB promptly reconsidered Hy-Brand and vacated the decision. “Direct or indirect” was back as the standard.

This story might seem like harmless legal games, but there is a lot at stake for the economy. For example, the Tax Cuts and Jobs Act (TCJA) had as its central goal raising the long-term growth rate of the U.S. economy. But as AAF’s Ben Gitis and Gordon Gray [point out](#), “The continually changing joint employer standard may also limit the pro-growth benefits of the TCJA. In particular, until the circumstances in which a ‘joint employer’ is recognized are settled, it is difficult to imagine the franchise sector will utilize the new tax law to expand rapidly.” They then go on to estimate that “the TCJA provided franchised businesses with \$12 billion in savings, based on 2016 estimated income. Assuming these savings grow at the rate of projected GDP, these savings would amount to over \$140 billion over the next 10 years.”

This research is a good reminder of the need to settle the joint employer standard and remove the harmful effects of the 2015 standard on the labor and capital markets. It is also a reminder of the more general cost that uncertainty in public policy imposes on economic growth.