Insight

# What the NLRB's New Joint Employer Decision Means for the Labor Market

BEN GITIS | DECEMBER 15, 2017

Yesterday, the National Labor Relations Board (NLRB) reversed its 2015 decision that had fundamentally broadened the "joint employer standard." This standard defines which companies are liable for the conditions of employees, and the 2015 decision made a company much more likely to be held responsible for the employment conditions in a separate business. This reality greatly impacted franchises and contractors. After yesterday's decision, however, the NLRB is returning to the standard it set in 1984.

## WHAT CHANGED?

The legal definition of "joint employer" comes down to how a firm impacts the employees of a separate business. Before 2015, the NLRB had held since 1984 that a firm is a joint employer only if it exercised "direct" control of the employees in another business. For instance, decisions about hiring, firing, supervision, and wages all constituted direct control. Its 2015 ruling in the Browning-Ferris Industries case, however, created a new "direct or indirect" control standard that is highly ambiguous and could be applied to a broader array of business arrangements.

In yesterday's decision, the NLRB ruled that two construction companies, Hy-Brand Industrial Contractors and Brandt Construction, are joint employers and are thus jointly liable for unlawfully firing seven workers. In making that decision, however, the NLRB overturned its 2015 ruling, asserting that the two construction companies are only joint employers because one exercised direct control over the other's employees.

## WHY THIS MATTERS

The NLRB's 2015 decision upended the franchise business model. Under the "direct or indirect" standard, a franchisor (such as the McDonald's corporate business) became much more likely to be held as a joint employer with its independent franchisees (such as the local McDonald's in your neighborhood). This joint liability inherently reduces the incentive to franchise: If a franchisor is responsible for a franchisee's workers, the franchisor will be less willing to sell franchise licenses to independent business owners.

This disincentive is highly problematic for the labor market because the franchise business model is one of the most dependable sources of job creation in the United States. An American Action Forum (AAF) report found that since 2012, franchise employment grew 3.4 percent annually, while non-franchise employment only grew at a 2 percent annual rate. If the 2015 joint employer standard led to franchise employment growth simply slowing to the non-franchise growth rate, it would have resulted in a loss of 1.7 million jobs.

Moreover, these consequences were not merely hypothetical. Evidence shows that the 2015 standard

immediately began damaging industries that rely on franchises. In a follow-up report, AAF found that the 2015 joint employer standard has already hurt hotel employees, more than one-third of whom work for franchises. In the years leading up to the NLRB's 2015 decision, hotel employment grew by 1.9 percent annually. After the 2015 decision, however, hotel jobs only rose by 1.1 percent. The joint employer decision was the likely culprit of this trend because the slowdown in job growth was driven by a sizable drop in franchise job growth. Jobs in hotel franchises went from growing 1.8 percent annually in the years before the 2015 standard to growing just 0.4 percent after. And the decision didn't just hurt those hoping to work in the industry: Wage growth stalled, work hours contracted, and total wages earned by all hotel workers declined.

## MOVING FORWARD

The NLRB's ruling yesterday to overturn its 2015 decision and end the ambiguous "direct or indirect" control joint employer standard is certainly a relief for franchises, their workers, and the labor market. Franchises can continue to add jobs at a rapid rate, and hopefully the industries that have struggled can soon recover. However, the now-current standard is not necessarily permanent. In a few years, a new NLRB could rule to reinstate the old, broader joint employer standard. Thus, legislative action remains the only sure way to concretely reverse the NLRB's 2015 ruling.