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## D.C. Circuit Wrestles with Board's Controversial Browning-Ferris Decision

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On December 28, 2018, [the U.S. D.C. Circuit Court of Appeals upheld](#) the National Labor Relations Board's ("NLRB" or "Board") joint-employer test as articulated in *Browning-Ferris Industries*, 362 NLRB No. 186. Interestingly, the Court further held that the Board had failed to properly articulate what constitutes "indirect control" for purposes of the joint-employer test, and remanded that issue to the Board for further consideration.

The Court framed the matter before it as "whether the common-law analysis of joint-employer status can factor in both (i) an employer's authorized but unexercised forms of control, and (ii) an employer's indirect control over employees' terms and conditions of employment," and determined that it can. The Court explained that the Board's joint-employer test as articulated in *Browning-Ferris Industries* finds extensive support in the common law of agency. Specifically, "retained but unexercised control has long been a relevant factor in assessing the common-law master-servant relationship." In other words, the Board properly held that it was appropriate to consider both unexercised and indirect control when deciding whether a given entity is a joint-employer of another entity's employees.

However, the Court further held that the Board "failed to differentiate between those aspects of indirect control relevant to status as an employer, and those quotidian aspects of common-law third-party contract relationships." Stated plainly, the Board failed to explain what constitutes "indirect control" for purposes of the joint-employer test. As a result, the Court remanded that issue to the Board for further consideration.

For employers that make use of contingent labor forces, the D.C. Circuit's decision is just another episode in the long-running joint-employer saga. Readers will recall that the Board is currently taking comments [regarding its proposed joint-employer rule](#) until January 14, 2019.

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