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Labor & Employment ADVISORY ■

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Back to the Future? The NLRB Clouds the Waters of Joint Employment

In a landmark decision overturning 30 years of established precedent, the National Labor Relations Board (NLRB) has expanded the definition of "joint employment" for purposes of assessing joint-employer status under the National Labor Relations Act (NLRA). *See Browning Ferris Industries of California et al v. Sanitary Truck Drivers and Helpers, Local 350*, Case 32-RC-109684 (August 27, 2015). As a result, staffing agencies and the businesses to which the agencies provide workers are more likely to be found to be joint employers for the purposes of the NLRA. In a split 3-2 decision, the NLRB held that the joint-employer standard it previously used is the result of its imposing additional and narrower standards than compelled by the NLRA or by the common law definition of the employment relationship. Acknowledging that control over the work is the central inquiry in the joint-employer determination, the NLRB has now decided that an employee need not show that the putative employer's control was actually exercised or that such control was direct and immediate. Instead, even the unexercised ability to control, or control exercised indirectly – such as through an intermediary – may establish joint-employer status. Ultimately, the NLRB held that it may find that two or more companies are joint employers of the same worker if they "share or codetermine those matters governing the essential terms and conditions of employment."

Factual Background

Browning-Ferris Industries (BFI) contracts with Leadpoint Business Services to provide workers to perform sorting and cleaning services at a BFI recycling facility. The agreement between BFI and Leadpoint provides that Leadpoint is the sole employer of its workers and that nothing in the agreement was to be construed as creating an employment relationship between BFI and Leadpoint's workers. Per the agreement, Leadpoint would be responsible for recruiting, interviewing, testing, selecting, hiring, disciplining, reviewing, evaluating and terminating its employees assigned to the BFI site. Leadpoint employs onsite supervisors and human resources staff who manage its employees at the BFI facility on a day-to-day basis. Leadpoint also solely determines its workers' pay rates, although it cannot pay a rate in excess of that of a BFI full-time employee performing similar tasks. As would be expected, BFI retained control over many aspects of its business by, for example, establishing the facility's schedule of working hours and determining how much and which recycled material streams ran through the facility.

The International Brotherhood of Teamsters sought to unionize the 240 full-time, part-time and on-call sorters, screen cleaners and housekeepers employed by Leadpoint who work at the BFI facility. The union's representation petition claimed that Leadpoint and BFI are joint employers, such that BFI should also be required to bargain with the petitioned-for employees if the petition were to be successful. The NLRB regional director rejected the union's

argument and instead found that Leadpoint was the sole employer of its employees who perform services for BFI. The union filed a request for review, contending that the regional director ignored significant evidence and in the alternative, that the board should reconsider its standard for evaluating joint-employer relationships. The NLRB granted review and invited briefing on, among other questions, whether the board should adopt a new standard for determining joint-employer status.

The NLRB's Decision

The NLRB overturned the regional director's finding that BFI was not a joint employer of Leadpoint employees. In its decision, the NLRB articulated that the regional director's findings and the board's own prior decisions were unduly narrow in two ways: (1) by focusing on a party's actual exercise of control over workers, rather than considering potential control that could be exercised; and (2) by requiring such control to be direct and immediate, and not limited and routine. While acknowledging that the existence of a common law employment relationship is necessary but not, standing alone, sufficient to find joint-employment status, the board nonetheless held that two or more entities are joint employers if "they share or codetermine those matters governing the essential terms and conditions of employment." The NLRB stated that "[i]n evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may 'share' control over terms and conditions of employment or 'codetermine' them, as the Board and the courts have done in the past."

In applying this new standard, the NLRB found that BFI was a joint employer of the workers provided by Leadpoint. In reaching this conclusion, the board focused on a number of facts, including:

- Although BFI did not participate in Leadpoint's day-to-day hiring, it has "significant control" over who can be hired by requiring that Leadpoint ensure that applicants meet or exceed its own selection criteria, pass drug tests and have not previously been deemed ineligible for rehire by BFI.
- Through its agreement with Leadpoint, BFI retains an "unqualified right to discontinue the use of any personnel" and actually recommended the dismissal of workers on two occasions.
- Leadpoint workers must adhere to BFI's safety policies, and BFI can enforce such policies against Leadpoint employees.
- BFI assigns tasks to Leadpoint employees, decides where workers are positioned and monitors the work product of the Leadpoint workers.
- Although Leadpoint creates the schedules for individual workers and decides who will work on which shift, BFI specifies the number of workers needed, determines the timing of shifts and when overtime is required.
- BFI has "unilateral control over the speed of the streams and specific productivity standards for sorting."
- Even though Leadpoint determines its employee's wages, administers wage payments, retains payroll records and provides employee benefits, it cannot pay its workers a wage that is greater than the wage of BFI's own employees.
- The parties' agreement provides for BFI's payment to Leadpoint to be based on a "cost-plus" basis, meaning that it reimburses Leadpoint for labor costs and also pays a specified percentage mark-up. This payment structure, along with the "apparent requirement of BFI approval over employee pay increases" – evidenced by the parties entering a new agreement following a minimum wage increase – points to a joint-employer relationship, according to the board.

The board concluded that "given BFI's 'ultimate control' over these matters, it is difficult to see how Leadpoint alone could bargain meaningfully about such fundamental working conditions as break times, safety, the speed of work, and the need for overtime imposed by BFI's productivity standards."

The Dissent

In a comprehensive, well-reasoned dissent, the two-member minority stated that their "fundamental disagreement with the majority's test is not just that they view indicia of indirect, and even potential, control to be probative of employer status, [but that] they hold such indicia can be dispositive without any evidence of direct control." The dissent cited cases showing that evidence of direct and immediate control is essential to a finding of joint-employer status under the common law and argued that the board essentially returned to the "economic realities" test that was previously rejected by Congress in relation to the NLRA. The dissenting members concluded that the revised NLRB standard injects uncertainty and ambiguity into the joint-employer determination, stating that "[t]he new test stands in marked contrast to the current test's focus on evidence of direct-and-immediate control of essential terms of employment, thereby establishing a discernable and rational line between what does and does not constitute a joint-employer relationship under the Act."

The Implications of the Decision

This decision will certainly have a significant impact on existing employers who contract for labor services. But even though the *Browning-Ferris* opinion is focused specifically on the staffing services industry, the new joint employment standard articulated by the board is likely to have a much broader impact. In a footnote, the board dismisses the dissent's argument that the new standard will impact the legal relationships between "lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer," saying that none of those situations were before it. Despite this attempted reassurance, entities in these various relationships do have cause for concern, as the NLRB's recent activities signal an intent to expand the joint-employer relationship more broadly than just in the staffing services arena.

For example, this decision follows complaints issued by the NLRB in late 2014 alleging that McDonald's and its franchisees are joint employers responsible for alleged NLRA violations. Many practitioners expect that the board will now impose the new joint-employer test created in *Browning-Ferris* when determining whether workers of franchisees are also properly considered to be employees of the franchisor. Such a move could strike at the very heart of the franchisor/franchisee relationship. Of necessity, franchisors must exercise certain control over a franchisee's operations in order to protect its trademark and ensure consistency in its larger operations. In the modern business format model of franchising, the current allocation of duties and responsibilities benefits both parties, yet this decision threatens to place liability on a party that has no contractual or direct operational control over the daily aspects of workplace behavior. By broadening the standards beyond the traditional understanding of control, and by allowing indirect and other less than clearly defined standards to be used to create an employment relationship with third parties, the NLRB's decision in *Browning-Ferris* facilitates the potential that, in future board decisions, franchisors could be found to be joint employers of their franchisees' workers for NLRA purposes. The decision could also be used in other contexts in which there is an attempt to impose vicarious liability on a franchisor for the acts of a franchisee's employees.

Will Other Agencies Follow Suit?

This decision also may pave the way for other federal administrative agencies to broaden their own interpretation of the joint-employer relationship. The Occupational Safety and Health Administration (OSHA), for instance, has sought advice from the U.S. Department of Labor (DOL) in devising an expanded joint-employer test in the wake of the NLRB's decision. In a drafted internal policy leaked to the press last week, OSHA expressly considers how franchisors can be held liable along with their franchisees for OSH Act violations. The document makes clear that, not only will the franchisor face an increased risk of liability, but it will likely be dragged into burdensome investigations involving alleged violations by its franchisees.

The DOL has also recently indicated an intent to expand when an entity is considered an "employer." Although not addressing the joint-employer issue, a memo drafted by the Wage and Hour Division of the DOL this summer focuses on the independent contractor relationship and underscores its position that the economic realities test applies when determining the employment status of workers under the Fair Labor Standards Act (FLSA). Importantly, the memo articulated the DOL's position that "most workers are employees" under the FLSA, which is consistent with the NLRB's expansive view of the employment relationship.

Next Steps for Employers

There is substantial opposition to the NLRB's ruling, but actions to overturn the rule are not likely to be immediately forthcoming. Although there are calls for Congress to legislatively overturn the NLRB's decision, such action is unlikely to garner enough support to pass in the Senate. A court decision winding back the board's revised joint-employer rule is also not imminent. BFI itself cannot challenge the NLRB's decision in court until certain steps in the collective bargaining process are completed. Another entity adversely affected by the decision will likely seek court intervention prior to BFI.

In the meantime, how businesses can contract for the performance of work without being found to be a joint employer will require focused review of the terms and conditions of many contractual relationships as well as a monitoring of their operative effect. Given the board's focus on an entity's *potential* control of a third-party's employees, employers should carefully consider contract provisions that reserve its right to control certain aspects of the employment relationship. As much as possible, entities that use third-party service providers should use the contract workers for aspects of the business that are readily distinguishable from those performed by their own employees and can be performed with minimal oversight by the entity. Employers might also consider reviewing any insurance policies that cover employment practices to determine whether potential liability for a third party's employees would be covered.

In the end, the board's decision has broad implications for any entity where a third party's employees provide services. Employers should work with counsel to determine the impact of the decision on their businesses and how to reduce the risk of potential joint-employer liability.

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