NLRB Establishes New Joint Employer Test

On Aug 27, 2015, the National Labor Relations Board (NLRB) dramatically revised its test for the joint employer doctrine, under which two or more companies, even if not affiliated, may be held liable for each other's labor violations, and otherwise become more easily subject to a host of federal labor laws. Prior to the recent action by the NLRB, the traditional test for joint employer status required an entity to exercise substantial and direct control over an employment relationship. Under the new test, joint employer relationships exist where, with or even sometimes without common ownership, one company effectively and actively participates in the control of labor relations and employment conditions of workers in the second company such that both are considered to be the workers' employers. An employer can be held liable not only for its own labor violations, but also its affiliated or related entities if those entities qualify as a "joint employer." Joint employers can be forced to participate in collective bargaining, regardless of which employer may be considered the primary employer.

One common, uncontroversial example of joint employers would be janitorial workers who are directly employed by a separate outside janitorial vendor, but who perform services in a factory, the owner of which then participates in—if not dictates—the hiring, firing, schedules, and services to be performed.

The NLRB established its new test in ***Browning-Ferris Industries of California Inc.*** by reviewing whether a recycler was the joint employer of approximately 240 workers provided by a staffing agency under a labor services agreement. The owner of the recycling plant allegedly communicated work performance directives and other productivity standards to staffing agency supervisors, who then managed the workers supplied by the labor service agreement.

Under the traditional standard for joint employer status, the owner of the recycling plant would not likely have been considered a joint employer, as the NLRB previously focused on the exercise of actual control over the workers, and it was not the recycling plant that exercised "actual" control—it was the staffing agency.

However, in *Browning-Ferris* the NLRB revised its joint employer status for the first time in over 30 years. Now, the NLRB will principally focus less on whether actual control is exercised, and will instead analyze the "existence, extent, and object" of an entity's control over workers. Under the new test, companies are joint employers of a single workforce if (1) they are both employers within the meaning of the common law; and (2) they share or codetermine, or have what the NLRB calls "reserve control" and "indirect control" over those matters governing the essential terms and conditions of employment.

The decision has already triggered substantial controversy, especially within the work of franchise and contingent employers, and congressional review is likely.

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Interested companies should contact not only experienced labor counsel to gauge the impact of this decision on their business operations, but also government relations professionals to discuss the possibility of involvement in governmental review of the decision

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