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THE NLRB'S DECISION IN *BROWNING-FERRIS INDUSTRIES* OF CALIFORNIA (2015) ONE MONTH LATER: IS THE SKY FALLING FOR EMPLOYERS?

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The short answer to the question is, "Not yet." *Browning-Ferris Industries of California, Inc.*[1] expanded the definition of joint employer under the National Labor Relations Act (the "NLRA" or the "Act") and is arguably the National Labor Relations Board's (the "NLRB" or the "Board") most significant decision of 2015. Many believe that *Browning-Ferris* will have far-reaching effects for years to come, including beyond the unionized workplace. This article discusses

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the decision, selected key potential implications for employers, and takes a brief look at the early fallout from *Browning-Ferris*.

The Decision

On August 27, 2015, the three-member Democratic majority of the Board (in its own words) "modified the legal landscape for employers with respect to one federal statute, the National Labor Relations Act," specifically regarding the application of the joint employer standard. The Board recognized that the standard itself remained the same, specifically that "the Board may find that two or more statutory employers are joint employers of the same statutory employees if they 'share or codetermine those matters governing the essential terms and conditions of employment.' The key inquiry in any joint employer analysis under the Act is the extent of the putative joint employer's control over the terms and condition of employment of the employees in question." But the Board announced a new application of that standard.

> We will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry.
>
> Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.

In other words, under the Board's new joint employer test, an entity apparently can be deemed a joint employer if (1) it does not actually exercise any control over employees' terms and conditions of employment, but (based on a contract or otherwise) theoretically could at some undetermined point, or (2) it does not directly exercise any such control, but rather exercises control through a third party.

The underlying case involved employees of Leadpoint Business Services ("Leadpoint") who were assigned to work at BFI Newby Island Recyclery ("BFI") in Milipitas, California as sorters, screen cleaners, and housekeepers. A union petitioned to represent approximately 240 of these employees, naming both Leadpoint and BFI as employers. The NLRB Regional Director issued a decision finding that Leadpoint was the sole employer of the employees. The Union filed a request for review of that decision by the Board. And for reasons explained more fully below, the Board voted to overturn the Regional Director's decision and held that BFI was a joint employer with Leadpoint.

Not surprisingly, the 3-2 decision was along party lines, with the three Democratic members voting to expand the joint employer standard and the two Republican members in a spirited dissent voting to maintain the status quo. The politics of and debate between the majority and minority about what the existing joint employer standard was, and the extent to which the majority ruling was consistent with past precedent, is interesting. But we will focus in the next section on the factors that the Board relied upon in fashioning its decision, which should be useful to employers trying to assess how this ruling might impact their own workforces.

The Majority's Factors Demonstrating Joint Employer Relationship

We summarize below key facts the Board relied upon in finding that BFI was a joint employer.

Hiring, Firing, and Discipline. The Board found that BFI had significant control over hiring and firing at Leadpoint under their contract and had exercised that control on limited occasions. For instance, BFI required Leadpoint employees to pass drug tests and barred the hiring of individuals who previously had worked for BFI but who BFI had deemed ineligible for rehire. Further, while BFI claimed that it had never exercised them, under its contract with Leadpoint, BFI retained the rights to: (a) require that Leadpoint employees satisfy certain standard BFI selection procedures and tests, (b) reject any worker that Leadpoint referred to its facility "for any reason or no reason," and (c) "discontinue the use of any personnel" that Leadpoint had assigned.

Supervision, Direction of Work, and Hours. The Board also found that BFI exercised control over "the processes that shape" the day-to-day work of Leadpoint's employees. It noted as being of "particular

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importance" BFI's unilateral control over the speed of the streams and specific productivity standards for the waste and recyclable materials that the employees sorted. The Board noted that BFI managers told Leadpoint employees to work "faster and smarter" and frequently counseled them against stopping the stream of materials for sorting. Further, while communicating to Leadpoint employees through Leadpoint supervisors, BFI assigned specific tasks that needed to be completed, specified where Leadpoint employees were to be positioned, and provided near-constant oversight of employee work performance. Moreover, on many occasions, BFI managers met directly with Leadpoint employees and provided detailed work directions regarding the stream of materials, addressed customer complaints and business objectives, discussed preferred work practices, and assigned employees to tasks that took precedence over work assigned by a Leadpoint manager.

Additionally, the Board found that BFI specified the number of workers that it required, dictated the timing of work shifts, and decided when overtime would be necessary. And while BFI did not select the specific Leadpoint employees who would perform the work on any given shift, those employees were required to obtain the signature of an authorized BFI representative for their hours each week in order to get paid.

Wages. In addition, the Board found that BFI played a significant role in determining Leadpoint employee wages. Under the parties' contract, Leadpoint determined employee pay rates, administered payments, retained payroll records, and was responsible for employee benefits. Leadpoint was contractually barred from paying its employees more than any BFI employees performing the same work. Further, while recognizing that a "cost-plus" contract (where BFI reimbursed Leadpoint for labor costs plus a certain percentage markup) alone did not establish control, the Board stated that it could support a finding of joint control when coupled with the aforementioned ceiling on Leadpoint pay.

The Minority's Dissent

In an impassioned dissent, the two-member Republican minority stated that the majority's change in the joint employer standard will:

> …subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing.

In addition to discussing what it viewed as the errors in the majority's reasoning, the dissent highlighted several examples of a "virtually unlimited" range of contractual relationships that could be encompassed within the majority's expanded joint employer definition:

- Insurance companies that require employers to take certain actions with employees in order to comply with policy requirements for safety, security, health, etc.;
- Franchisors (see below);
- Banks or other lenders whose financing terms may require certain performance measurements;
- Any company that negotiates specific quality or product requirements;
- Any company that grants access to its facilities for a contractor to perform services there and then continuously regulates the contractor's access to the property for the duration of the contract;
- Any company that is concerned about the quality of the contracted services; and
- Consumers or small businesses who dictate times, manner, and some methods of performance of contractors.

The dissent also raised the alarm that the majority did not substantively discuss the potential adverse consequences of such a "sweeping change in the law." In particular, the dissent noted that:

> Indeed, [the majority] profess to limit themselves to the issue of joint bargaining obligations in the user-supplier context, with a disclaimer that their decision "does not modify any other legal doctrine or change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act.

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One Month Later

While it is no doubt too early to tell for certain the long-term ramifications, we provide a brief look into the first month after the *Browning-Ferris* decision. On September 14, 2015, the Regional Director confirmed that Local 350, International Brotherhood of Teamsters, the union seeking recognition in *Browning-Ferris* (the "Union"), had won the election and certified the Union as the exclusive collective-bargaining representative of the Leadpoint employees. On September 25, 2015, the Union filed an unfair labor practice charge with the NLRB challenging the refusal of Republic Services Inc. (the successor company to BFI) to bargain with the Union. The refusal to bargain puts the parties on track to ultimately have the NLRB's expanded joint employer definition reviewed by the Court of Appeals.

Through September 27, 2015, there has been one Board decision and one decision by an administrative law judge regarding joint employer status, neither of which cited *Browning-Ferris*. Likewise, there have been 15 court decisions in which the court actually analyzed and made a ruling on whether a party was a joint employer. Those court decisions generally dealt with discrimination under Title VII or analogous state laws or wage and hour violations under the Fair Labor Standards Act or analogous state laws, and only one of them cited *Browning-Ferris*.

The one case that did cite *Browning-Ferris*, *Nardi v. ALG Worldwide Logistics and Transport Leasing Contract, Inc.*, 2015 U.S. Dist. LEXIS 123355 (N.D. Ill., September 16, 2015), had nothing to do with unions or the NLRA, but rather was a sex discrimination and retaliation lawsuit under Title VII. The plaintiff, Nardi, worked for ALG Worldwide Logistics (ALG), who, in turn, utilized Transport Leasing/Contract, Inc. (TLC), a professional services organization (PEO), to provide human resources services, including payroll and benefits administration. Noting that to "conclude otherwise in this case would elevate form over substance," the court rejected Nardi's claim that TLC was her joint employer with ALG, noting several key facts: (1) TLC's client companies generally "recruit, interview, and hire their own candidates;" (2) TLC did not review or direct her work; (3) TLC did not set her hours or discipline her; and (4) only ALG management played any role in the warnings that lead to her disputed termination.

With respect to *Browning-Ferris*, the court in Nardi merely noted that the Board had expanded the circumstances in which the joint employer test from labor law cases can be met. Interestingly, the Nardi court thereafter noted that:

> ...there appears to be no significant difference between the test articulated in labor law cases and the test that appears in employment discrimination cases: both focus on the extent of control and supervision an entity exerts over the plaintiff, though the economic realities test [from employment discrimination cases] also examines the financial underpinnings of the relationship.

Of the 15 cases, the court in four of the cases found that the third party in question was a joint employer, and, in 10 cases (including *Nardi*), the court declined to find the third party was a joint employer.

Early franchisor example. The 15th case, was *Ochoa, et al. v. McDonalds, et al.*, 2015 U.S. Dist. LEXIS 129539 (N.D. Cal., September 25, 2015). Ochoa is the first of more than a dozen pending cases where the issue is whether McDonald's franchisors can be liable as joint employers for harm allegedly suffered by employees of McDonald's franchises. Specifically, Ochoa involves California Labor Code claims of a putative class of persons employed by McDonald's franchises in Northern California. Interestingly, franchisor was one of the key contractual relationships about which the minority in *Browning-Ferris* expressed concern. The court's opinion in Ochoa, however, makes no reference whatsoever to *Browning-Ferris*.

Plaintiffs in *Ochoa* named as defendants the owners and operators of the McDonald's franchises at issue, and McDonald's USA, McDonald's Corporation, and McDonald's California. The three McDonald's defendants moved for summary judgment that they were not joint employers of plaintiffs and the putative class members. The Ochoa court applied the joint employer test from the California Supreme Court's decision in *Martinez v. Combs*, 49 Cal. 4th 35 (2010) and granted in part the McDonald's defendants' summary judgment motion, holding that the McDonald's defendants did not directly employ plaintiffs or the putative class under the *Martinez* joint employer test. Given the other pending McDonald's

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joint employer cases, the extent to which the concerns of the minority in *Browning-Ferris* will be realized in the franchisor context remains to be seen.

Importantly, the McDonald's franchisors did not depart *Ochoa* completely unscathed. Another issue before court was whether McDonald's as a franchisor could be held liable as a joint employer under an ostensible agency theory. Perhaps in an homage to the upcoming Halloween holiday, *Ochoa* gave employers, particularly those concerned about the collateral damage from *Browning-Ferris*, a treat, but it also gave employers with unionized and non-unionized employees an undesired trick when it denied summary dismissal on the issue of whether the McDonald's defendants were liable as a joint employer under an ostensible agency theory of liability.

Employer Considerations

It will take years for the true long-term impact of *Browning-Ferris* to become apparent. And it is possible, whether through the legal appeals process or the Congressional appropriations process, that the expanded definition ultimately will not take effect. Indeed, still pending is the FY2016 Labor, Health and Human Services and Education and Related Agencies (Labor-HHS) Appropriations Bill approved by the U.S. Senate on June 23, 2015. Included in that $153.2 billion funding bill is a rider stating:

> None of the funds made available by this Act may be used to investigate, issue, enforce or litigate any administrative directive, regulation, representation issue or unfair labor practice proceeding or any other administrative complaint, charge, claim or proceeding that would change the interpretation or application of a standard to determine whether entities are "joint employers' in effect as of January 1, 2014.

The rider could, as a practical matter, preclude the NLRB from enforcing the expanded joint employer definition.

If enforced, however, it seems likely that the *Browning-Ferris* majority's holding that the unexercised right to control may suffice to establish a joint employer relationship will result in an increase in the number of third parties deemed joint employers under the Act. As the minority in *Browning-Ferris* explained, that expansion would no doubt have monumental effects on the way in which work is performed by employees and how business is conducted among companies. For the time being, businesses, particularly those encompassed in the "virtually unlimited" range of contractual relationships listed above, can work with legal counsel to assess the extent to which they may be at risk to be deemed a joint employer under the new and expanded definition and determine any steps that they may be able to take to mitigate such risk.

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1 *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner,* 2015 NLRB LEXIS 672; 204 L.R.R.M. 1154; 2014-15 NLRB Dec. (CCH) P16,006; 362 NLRB No. 186 *("Browning-Ferris").*