BURR ALERT

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NLRB Redefines and Broadens the Joint Employment Standard

Just in time for Labor Day, the National Labor Relations Board's (the Board) Democratic majority handed the organized labor movement one of its biggest legal victories in recent years. The decision radically redefines the concept of "joint employment" and potentially impacts, as noted by the Board members, the jobs of 5.7 million contingent workers, 8.1 million franchisee workers, and thousands of business relationships.

The Board's new "joint employment" standard was announced in the representation case styled *Browning-Ferris Industries of California, Inc. v. Sanitary Truck Drivers & Helpers Local 350, International Brotherhood of Teamsters*, No. 32-RC-109684 (NLRB August, 27, 2015). There, the Board held that Browning-Ferris Industries (BFI) was the "joint employer" of third-party Leadpoint Business Services, LLC's (Leadpoint) contingent, or "temp," workers for purposes of determining what employer or employers bore a bargaining obligation to a union in the event impounded ballots gave a Teamsters Local the authority to represent the temp employees. The decision is earthshattering for customers of temp services and temp agencies themselves. This represents a step toward the unions' dream of inclusion of temps and customer employees in the same unit, and offers a pretty clear indicator of how the Board will treat franchise agreements in the pending McDonald's case.

For those companies that use contingent workers, the facts of the case may be strikingly familiar. Leadpoint recruited, interviewed, hired, trained, and assigned workers; BFI required that Leadpoint exclude former ineligible BFI employees, ensure candidates pass a drug test and determine that each "meet or exceed [BFI's] own standard selection procedures[.]" Leadpoint supervised and scheduled assigned employees; BFI controlled its facility's hours of operations and established expected productivity standards. Leadpoint determined pay under a cost-plus contract; BFI imposed wage caps and approved Leadpoint compensation increases. Leadpoint and BFI maintained separate benefits plans. Leadpoint decided discipline and discharge for its assigned workers; BFI reserved the right to require Leadpoint to assign an employee elsewhere.

First, the Board changed the rules. The Board stated that its 30-year-old standard for determining whether a joint employment relationship exists, which had considered whether companies maintained "direct and immediate control" over employment matters such as hiring and firing, did not reflect realities of today's workforce. No longer was exercise of direct and immediate control necessary; now, merely the *potential* to exercise control over a worker's wages and working conditions, regardless of whether that control is actually used.

Specifically, under the Board's new standard, "two or more entities are joint employers of a single workforce if (1) they are both employers within the meaning of the common law [i.e., they both control or have the potential to control working conditions or wages]; and (2) they share or

codetermine those matters governing the essential terms and conditions of employment." Most importantly, an entity such as BFI need only possess the authority.

Second, the Board made clear a typical temp arrangement could be treated as joint employment. Applying the foregoing sea change to the facts, the Board this time relied upon typical temp contract provisions to find that BFI was clearly the joint-employer of Leadpoint's workers. The Board relied upon the temp customer's (1) telling the temp agency what qualifications it wanted with respect to abilities, substance abuse, and past workplace failures; (2) retaining the right to require the agency to reassign a worker somewhere else besides its premises; (3) controlling the line speed, position and number per shift for those working under agency supervisors; and (4) had a cost plus contract with the customer approving increases during the contract term.

Third, the Board ensured that no employer could predict with any degree of comfort how the Board would weigh these factors going forward. Proudly declaring its action eliminates "certainty and predictability regarding the identity of the 'employer[,]'" the Board retained the subjective power to decide going forward in each case whether one or more of these factors would receive the weight the Board gave it here, but made clear that it regarded the type of arrangements that typify the customer-temp relationship as a device to "guarantee the freedom of employers to insulate themselves from their legal responsibility to workers[.]"

Finally, though offering little else in the way of guidance, the Board seemed clearly to telegraph the likely outcome of franchise cases pending against McDonald's Corp. and its franchisees. Directives that franchisors clearly intend as nothing more than protecting product brand easily can be manipulated as *potential* control of franchisee employees so that joint employment can be shoehorned where it neither fits nor is appropriate. Mindful that the General Counsel stated publicly last March that he felt joint employer in this context existed under the former "direct and immediate control" test, it is difficult to imagine a different result under the Board's new creation. The implications of the new standard are significant:

1) Employers will see the intended increased likelihood that unions will seek to organize contingent workers and franchisees;
2) User employers and franchisors will have bargaining obligations if contingent or franchisee workers unionize;
3) User employers and franchisors may be restricted in modifying or canceling contracts with staffing agencies or franchisees that have unionized or had union activity;
4) User employers and franchisors are exposed to increased liability from unfair labor practices for taking actions against contingent workers or franchisees;
5) Contingent workers are now "employees" of the user employer and may have greater property access rights to engage in solicitation and distribution; and
6) The next step in combining temps and customer employees into a single appropriate unit for organization is right around the corner.

The new standard goes into effect immediately, and applies retroactively. Have you evaluated your temp and franchise relationships? For a more detailed discussion of this important decision and its implications please contact:

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