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The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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FLASH NO. 50
THE NLRB'S *BROWNING-FERRIS* DECISION REWRITES THE JOINT EMPLOYER FRAMEWORK, AND SERVES AS ANOTHER REMINDER FOR MOTOR CARRIERS TO REVISIT INDEPENDENT CONTRACTOR RELATIONSHIPS

In our last FLASH!, we discussed the Department of Labor Wage and Hour Division's attempted foray into legislation when it issued its "Administrator's Interpretation" regarding independent contractors. Now, not to be outdone by the Wage and Hour Division, the National Labor Relations Board has also decided to try its hand at crafting legislation to suit a political purpose in August 27's *Browning-Ferris Industries of California, Inc.* decision.

The decision, which marks a sea-change in labor law and a departure from decades of settled precedent, concerns the circumstances in which an employer can be considered a "joint employer" with an entity it contracts with.

For the past three decades, whether a joint employer relationship existed turned on the "single employer" test, that is, whether "two nominally separate entities are part of a single integrated enterprise so that, for all purposes, there is in fact a 'single employer.'" Under the settled framework, an entity could only be found to be a joint employer if it exercised *actual* control over the terms and conditions of employment of another entity's employees.

Last week's decision injects a great deal of uncertainty into an area of labor law which was, up until now, quite predictable. Under the new rule, an entity that maintains *any degree* of *indirect* or *reserved* control over *any* of the terms or conditions of employment (such as wages, hours, hiring, firing, discipline, or direction of work) of another entity's employees may suffice to trigger joint employer status.

In their newfound capacity as joint employer, affected companies may now be held responsible for unfair labor practices committed by a contractor. In the collective bargaining context, the joint employers' employees may be included in the bargaining units of employees of a contractor.

Though *Browning-Ferris* concerned the placement of temporary workers by a staffing agency, the decision's consequences reach much further. Indeed, as the decision's dissent pointed out, the consequences of the decision extend to any company that dictates the time, manner, or some method of performance of contractors, or indeed, "[a]ny company that is concerned about the quality of the contracted services."

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The potential for the decision to affect motor carriers who engage independent contractors is immediately apparent, and should not be understated. Nevertheless, the decision is not cause to panic. Instead, motor carriers should take the Board's decision as a reminder—along with the Wage and Hour Division's recent reminder—to closely examine contractual relationships and ensure that they are engaged in true ***arm's length relationships*** with contractors. Where *actual* control was once needed to establish a joint employer relationship, now fine print language in a contract which gives a carrier a right to control can be dispositive of such a showing, even if the power was *never exercised*.

An appeal of the Board's decision is likely forthcoming, and it is still possible congress may weigh in. We will continue to monitor this case and report any noteworthy developments. In the meantime, if you have any questions regarding this sudden expansion of the joint employer framework or how it may impact your independent contractor operations, the Benesch Transportation and Logistics Group is well versed in this area of law and would be happy to assist.

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