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National Labor Relations Board Adopts Expansive Joint-Employer Standard

In Decision with Potentially Large Ramifications, NLRB Holds That Joint-Employer Status Is Based on the Power to Control Terms and Conditions of Employment, Even If Such Control Is Indirect or Unexercised

SUMMARY

In *Browning-Ferris Industries of California*, Case 32-RC-109684, decided on August 27, 2015, the National Labor Relations Board ("NLRB" or the "Board") abandoned its long-standing test that an entity must both possess and exercise direct control over employees' terms and conditions of employment in order to be considered a joint employer and, thus, be required to bargain with a union. The new standard adopted by the Board provides that a joint-employer relationship may be found merely based on the putative joint employer's right to control terms and conditions of employment, irrespective of whether such control is directly exercised or exercised at all. The decision is of interest to any entity that uses the services of vendor employees on its premises, pursuant to agreements that give the entity at least some control over the selection of vendor employees or the manner in which those vendor employees work. It also poses potentially significant consequences for franchisors and franchisees.

BACKGROUND

The *Browning-Ferris* decision replaces a joint-employer standard that had been in place for years and was significantly more limited. Under the previous standard, the Board "may find that two or more entities are joint employers of a single work force . . . if they share or codetermine those matters governing the essential terms and conditions of employment," provided, however, that the joint employer "not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a limited and routine matter." That standard had

been endorsed by the Third Circuit in *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d.Cir. 1982) and explicated in subsequent Board decisions (principally, *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation*, 269 NLRB 324 (1984), both now reversed by *Browning-Ferris*). Once a joint employment relationship is found to exist, the joint employer has a duty to bargain with a union representing the employees.

THE NLRB'S DECISION

In *Browning-Ferris*, the Board "restate[d] the Board's legal standard for joint-employer determinations," holding that it "may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." The Board explicitly rejected the previous requirement that the joint employer must both exercise its authority to control the terms and conditions of employment and do so directly – according to the Board, the "right to control" any matter governing the "essential terms and conditions of employment" in and of itself is "probative of joint-employer status." Thus, the right to control need not be exercised or be exercised in any particular manner.

The Board justified its departure from the prior joint-employer standard by asserting that the *Browning-Ferris* standard: (i) better accords with the common law definition of employer; (ii) better reflects the "diversity of workplace arrangements in today's economy," in which "the procurement of employees through staffing and subcontracting arrangements, or contingent employment, has increased steadily"; and (iii) better fulfills the goals of the National Labor Relations Act, to encourage "the practice and procedure of collective bargaining."

Relying on the revised joint-employer standard, the Board held that Browning-Ferris Industries ("BFI") and Leadpoint Business Services ("Leadpoint") were joint employers and, thus, obligated to bargain together with the Sanitary Truck Drivers and Helpers Local 350 union, which had petitioned to represent Leadpoint's employees. BFI operates a recycling plant and contracted with Leadpoint to provide sorters, screen cleaners and housekeepers for its facility. The Board relied on certain contractual provisions in the BFI-Leadpoint agreement, as well as the on-the-ground conditions of the Leadpoint employees' work, to support its conclusion.

- *First*, the Board concluded that "BFI possesses significant control over who Leadpoint can hire to work at its facility" because the contract requires that Leadpoint's hiring process meet or exceed BFI's standards, requires that all employees be drug tested, and because BFI has the right to reject any worker for "any or no reason."
- *Second*, the Board concluded that BFI exercises control over "the processes that shape the day-to-day work" of the employees because BFI had unilateral control over the pace of the work and specific productivity standards; given that, the Board concluded that Leadpoint alone could not bargain meaningfully about "such fundamental working conditions as break times, safety, the speed of the work, and the need for overtime imposed by BFI's productivity standards."

- And, *third*, the Board concluded that BFI "plays a significant role in determining employees' wages" because BFI forbids Leadpoint from paying employees more than BFI employees performing comparable work, because BFI and Leadpoint are parties to a cost-plus contract, and because the contract required BFI's approval over employee pay increases.

With respect to whether BFI's control was exercised directly or indirectly, the Board stated: "BFI communicated precise directives regarding employee work performance through Leadpoint's supervisors. We see no reason why this obvious control of employees by BFI should be discounted merely because it was exercised via the supplier rather than directly."

THE DISSENTING OPINION

Two Commissioners submitted a vigorous and lengthy dissenting opinion. The dissent faulted the Board for abandoning a test "that provided certainty and predictability" and replacing it with "an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, even if this is based solely on a never-exercised 'right' to exercise 'indirect' control over what a Board majority may later characterize as 'essential' employment terms." Moreover, the dissent faulted the Board's analysis of the BFI-Leadpoint relationship, arguing that it would be "hard to find any two entities engaged in an arm's-length contractual relationship involving work performed on the client's premises that lack" the types of interaction highlighted by the majority.

The dissenting opinion raised a number of arguments against the revised standard:

- *First*, the dissenters noted that the new standard will cause confusion as to the appropriate bargaining parties in circumstances in which the user employer (*i.e.*, the employer that contracts with a vendor to provide employment services) contracts with multiple supplier employers. Noting the Board's statement that, "as a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses authority to control," the dissent pointed out that the new test provides "no guidance as to when and how parties may contract for the performance of work without being viewed as joint employers" and will "foster substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the 'employer' side." Among the analytical problems raised by "widening the net of 'who must bargain'" are ascertaining the identity of the bargaining unit (*e.g.*, all supplier employers or a subset) and whether bargaining will have to be segmented by issue to account for the particular terms and conditions a joint employer is deemed to have authority to control.
- *Second*, the dissent argued that a user employer with multiple vendor contracts, as to each of which it is deemed to be a joint employer, may be subject to picketing or other union activity that otherwise would have been considered an unlawful secondary boycott.
- *Third,* the dissent raised concerns about the implication of the new standard in the context of franchise arrangements, which the majority opinion did not address. The dissent noted, for example, that franchisors exercise control over franchisees' use of the franchisors' trademarks, and indeed are required by federal trademark law to do so in order to preserve their rights, yet doing so could result in a joint-employer finding under the new standard (*e.g.*, if a franchisor requires that a franchisee's employees wear particular uniforms).
- *Fourth,* the dissent pointed out that the majority's reference to the fact that the American workforce has changed over the years was a non sequitur, as there was nothing to prevent

workers for a vendor to seek to organize their workplace without involving a third party that has contracted with the vendor.

IMPLICATIONS

Employers may wish to review their contracts with vendors.

Employers may wish to review their contracts with vendors and service providers in light of the expanded joint-employer standard and, in particular, the Board's analysis of the BFI-Leadpoint contract. Employers may wish to consider amending agreements to remove provisions that suggest control over the terms and conditions applicable to the vendor's employees to the extent such clauses are not otherwise necessary for effecting the purpose of the agreement.

Employers should try to assess employee morale at service providers with which they are contemplating contracting.

The *Browning-Ferris* decision is significant because it puts a great many contractual relationships among businesses at risk of being deemed joint employers and, thus, oblige both parties to bargain with employees pursuant to the National Labor Relations Act. Because the impetus for any bargaining demand would arise out of the service provider's workforce, employers are advised to assess employee morale at a service provider before contracting.

The NLRB's decision is likely to be challenged on a number of grounds.

The new joint-employer standard is likely to be challenged on a number of grounds, including that it goes beyond the NLRB's authority by departing from the common law agency standard and arguably conflicts with other federal statutes. BFI does not have an immediate right to appeal. Rather, a challenge to the standard would need to take place in the context of an employer, after being found to be a joint employer, refusing to bargain and being subject to an NLRB order, after which an appeal could be filed.

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