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NLRB Adopts Expansive Joint Employer Standard

On August 27, a sharply divided NLRB replaced its decades-old standard for determining "joint employer" status under the National Labor Relations Act with a far more expansive one. By a 3-2 vote in *Browning-Ferris Industries of California, Inc.*, the board significantly altered its definition of joint employment to include employers that do not actually control essential employment terms and conditions of a third-party's employees — but may affect them indirectly. As a result, businesses that use temporary or contingent worker, franchising and outsourcing arrangements are at increased risk of being deemed joint employers for collective bargaining and other purposes.

Background

Since 1984, the National Labor Relations Board (NLRB) has applied a joint employer standard under the National Labor Relations Act (NLRA) that deemed an entity to be a joint employer along with another entity only if it exercised direct and significant control over the other entity's workers. To support a finding of joint employment, both entities had to share actual, direct and immediate control over employees' essential terms and conditions of employment through hiring, firing, discipline, supervision and direction.

Joint employer status is significant in the union context because it creates bargaining obligations for one entity with regard to another entity's employees. For example, where a union already represents the employees of one entity, a finding of joint employer status may subject a non-union entity to the terms of an existing collective bargaining agreement. Joint employer status also opens the door to liability for another employer's unfair labor practices, and can subject an employer to picketing or other union activity that might otherwise be unlawful.

Browning-Ferris Industries of California, Inc.

Browning-Ferris Industries of California, Inc. (BFI) operated a recycling facility in Milpitas, California. BFI contracted with a staffing firm, Leadpoint Business Services (Leadpoint), for on-site workers to sort recyclable items, and to clean the sorting equipment screens and facility. BFI and Leadpoint had separate supervisors and lead workers at the facility, and maintained separate HR departments. In 2013, a Teamsters union sought

to represent a group of Leadpoint employees who worked at the facility as sorters, housekeepers and screen cleaners. In its petition for an NLRB-conducted election, the union claimed the workers were jointly employed by Leadpoint and BFI.

Longstanding Test Applied, then Reconsidered

Applying the established joint employer standard, the NLRB's regional director concluded that BFI did not exert sufficient control over Leadpoint's employees to be considered a joint employer under the NLRA. Rather, the regional director determined that Leadpoint was the sole employer primarily because BFI did not control the pay or benefits of the workers in question, and lacked authority to recruit, hire or fire them. An election was held, but the ballots were impounded pending the union's request for review by the full board.

On April 30, 2014, the board granted that request and subsequently invited interested parties to file *amicus* (friend of the court) briefs on whether the NLRB should maintain its decades-old standard for determining joint employer status or adopt a new one. The brief submitted by the NLRB's general counsel urged the board to adopt a new, broader "totality of the circumstances" test and find a joint employment relationship whenever an entity "wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence."

Election Results

A **statement** released by the Teamsters said the ballots cast in the April 2014 election were opened on Sept. 4, and workers voted by more than a 4-1 margin in favor of representation. If the NLRB ultimately certifies the union as the collective bargaining representative for the unit, BFI will have to decide whether to recognize and bargain with it. A refusal to do so would lead to further proceedings before the board, and then possibly to court.

> **Comment.** While the BFI case was pending before the board, the NLRB's general counsel announced that it would pursue unfair labor practice charges against McDonald's, USA, LLC and its franchisees as joint employers. In December 2014, the general counsel issued 13 consolidated complaints alleging that McDonald's and its franchisees violated workers' rights during nationwide minimum wage protests. The BFI case involved a subcontracting — rather than a franchise — arrangement, but it may offer insight into the board's approach in the McDonald's cases.

Board Resets Governing Standard

On August 27, 2015, a sharply divided NLRB issued a decision revising its longstanding joint employer standard. By a 3-2 vote along partisan lines, the board adopted a new, expansive definition of joint employer status under the NLRA. Under the new standard, two or more entities are joint employers if they: (1) are common-law employers; and (2) possess "sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining." No longer is actual control over the terms and conditions of employment necessary to show a joint employment relationship. Rather, the crucial question going forward will be whether an entity has the *potential* to exercise such control, even if it does not.

> **Comment.** Applying an economic realities test, recent DOL guidance said most workers are employees under the Fair Labor Standards Act. (See our July 16, 2015 *FYI Alert*.) Notably, the dissent in the *Browning-Ferris* decision maintained that the board's new standard was similarly applying an economic realities test to expand employer status under the NLRA. The majority opinion denied that it was.

Implications for Employers

The new joint employer standard is expected to have far-reaching implications in the union context for businesses that regularly use staffing agencies, contractors and franchise arrangements, and may trigger expanded definitions of the "employer" for purposes of other laws.

Expanded Obligations and Greater Liability under the NLRA

As a result of this decision, employers that enter into an arms-length transaction with an outside labor-supplying firm and do not directly control that firm's employees' terms and conditions of employment — but may affect them indirectly — may now be deemed joint employers of those employees for purposes of federal labor law. As such, both employers would be obligated to recognize and bargain with the union if the workers choose to be represented. Where a union already represents one employer's workers, a finding of joint employment status may subject the non-union employer to the terms of an existing collective bargaining agreement. As joint employers, each is responsible for the other's conduct. Thus, one employer may be liable for another employer's failure to bargain or other unfair labor practices. In addition, businesses found to be joint employers may be subject to strikes, boycotts and picketing that otherwise would be unlawful.

Congress Reacts, But….

Following their August recess, lawmakers quickly introduced a **bill** that would invalidate the board's *Browning-Ferris* decision. The bill would amend the NLRA to clarify that two or more employers may be treated as joint employers only if each shares and exercises actual, direct, and immediate control over essential terms and conditions of employment. Even if passed, the bill would almost certainly face a presidential veto. (See our **September 14, 2015** *Legislate*.)

> **Comment.** The *Browning-Ferris* decision eliminated the prior bright-line test for determining whether a joint employment relationship exists, but didn't provide clear guidance on how to determine joint employer status going forward. Still, employers that use temporary employees will likely find it increasingly difficult to avoid being deemed a joint employer with a temporary staff provider for union organizing, collective bargaining and other purposes.

Catalyst for Change in Other Federal Agencies?

While the NLRB's decision altered the definition of joint employment status in the union context, it does not change the definition(s) other federal agencies use for the laws they enforce — including the Affordable Care Act, Public Health Service Act, Internal Revenue Code, ERISA, Title VII and others. However, the board's action may spur agencies like the DOL, PBGC, IRS, EEOC, OSHA and OFCCP to rethink — and perhaps broaden the scope of — who is considered the employer for tax, wage and benefits, employment discrimination and other purposes.

> **Comment.** The EEOC filed an amicus brief in the BFI case, suggesting that it may be gearing up to follow in the NLRB's footsteps and more broadly extend potential liability for employment discrimination to franchisors and companies that use contingent workers.

In Closing

This decision substantially lowers the bar for finding joint employer status under the NLRA, and has great practical significance for many workplaces — especially where workers are employed by staffing agencies, contractors and franchisors. Businesses that rely on such arrangements should consider reviewing their business contracts,

indemnification agreements and working relationships with third-party service providers to minimize potential bargaining obligations and exposure to joint employer liability under the board's new standard.

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