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NLRB Expands Joint Employer Standard in *Browning-Ferris* Decision

Recently, the National Labor Relations Board made sweeping changes to its "joint employer" standard, announcing a new test that will surely lead to more findings of joint employment relationships under the National Labor Relations Act. Under the new standard announced in *Browning-Ferris Industries*, a company is a joint-employer if it exercises "indirect control" over working conditions or if it has "reserved authority" to do so. This marks a significant departure from the joint employer test that the Board has used for decades, which required that a putative joint employer actually exercise control over terms and conditions of employment, as opposed to merely possessing the ability to do so.

In its 3-2 decision, the Board determined that Browning-Ferris Industries of California, Inc. (BFI), an owner and operator of the Newby Island Recycling facility, should be considered a joint-employer with Leadpoint Business Services (Leadpoint), a Phoenix-based temporary staffing agency, which supplies workers to the facility. BFI employs approximately 60 employees, most of whom work outside the recycling facility, moving and preparing materials to be sorted inside the facility. BFI contracts with Leadpoint to provide in-facility sorters, screen cleaners, and housekeepers under a temporary labor services agreement.

In June 2013, Teamsters Local 350 (the Union) sought to represent approximately 240 workers provided by Leadpoint to BFI, under a joint employer theory. The Regional Director concluded that Leadpoint was the sole employer of the petitioned-for employees. In making that determination, the Regional Director made various factual findings, including the following: (1) the agreement between BFI and Leadpoint expressly provides that Leadpoint is "the sole employer of the Personnel" it supplies to BFI, and "shall not be construed as creating an employment relationship" between BFI and the Leadpoint-provided personnel; (2) Leadpoint staff handles disciplinary concerns and training, sets workers' schedules, and deals with all human resources-related needs for the Leadpoint workers; (3) Leadpoint sets its employees' wages, pays them, provides them with insurance, and handles all requests for time off from its employees; and (4) Leadpoint invoices BFI for the employees' services, detailing the number of employees who worked during the billing period, the hours they worked, and their rates. The Union thereafter appealed the Regional Director's decision to the Board.

Under the former joint-employer standard—in place since 1984—the Board looked to "whether alleged joint employers

share the ability to control or co-determine essential terms and conditions of employment." *See TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transp.*, 269 NLRB 324 (1984). The TLI decision provided specific examples of what the Board meant by "essential terms and conditions of employment," including hiring, firing, discipline, and supervision. In subsequent decisions, the Board placed increasing emphasis on the type of control exercised, requiring that control to be "direct and immediate." *See, e.g., Airborne Freight Co.*, 338 NLRB 597 (2002).

During briefing, BFI and employer groups argued that modification of the joint-employer standard would undermine the predictability of the law in this area, which the Board has applied uniformly for over 30 years. Labor organizations, and the NLRB's General Counsel, urged the Board to adopt a new standard.

The Board majority justified its decision to overturn *TLI/Laerco*, by pointing to what the majority views as changes in the workforce of today's economy, concluding that the *TLI/Laerco* test was "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships."

The *Browning-Ferris* decision holds that two or more entities are joint employers of a single workforce if: (1) they share or codetermine those matters governing the essential terms and conditions of employment; and (2) they are both employers within the meaning of the common law. If these factors are met, the inquiry turns to whether an employer possesses "sufficient control" over employees to qualify as a joint employer, including an assessment of whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so.

The two Republican appointees on the labor board, Harry Johnson and Philip Miscimarra, strongly dissented from the 3-2 ruling. The dissent cautioned that "[t]his change 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."

The *Browning-Ferris* decision follows the NLRB General Counsel's July 2014 decision to treat McDonald's as a joint-employer of workers at franchised restaurants, a decision that many view as paving the way to increased unionization of independent contractors, temporary workers, and employees at independently owned and operated franchised businesses.

The *Browning-Ferris* theory of joint employment will have far-reaching and troubling impacts on employers throughout the United States, particularly in the franchisee/franchisor context where, with limited exceptions, franchisors have historically been found to not be joint employers of their franchisees' employees. In addition to facing joint liability for labor law violations, entities that are deemed to be joint employers under this new standard may face collective bargaining obligations and find themselves enmeshed in labor disputes between direct employers and labor organizations. Although joint employment status is a factual inquiry that will vary from employer to employer, companies that utilize contingent workers employed by another entity or staffing company, as well as parties to franchise agreements, should consider reviewing their employment practices, contractual arrangements and course of dealing in light of this significant change in the law.

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