

## Labor and Employment Alert

September 10, 2015

### If you read one thing...

- NLRB outlines new test for determining joint employer relationships though full extent of the implications remain unclear
- Two businesses can be joint employers even where there is only indirect or unexercised control by one business over the terms and conditions of the other businesses' employees
- It may be prudent for businesses to evaluate their contractual arrangements for the possibility of a joint employer finding



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### The NLRB's New Joint Employer Standard Creates Confusion and Uncertainty for Employers

On August 27, 2015, the National Labor Relations Board (NLRB or the "Board") issued its long-awaited decision in *Browning-Ferris Industries of California, Inc.* in which it addressed the question of whether a staffing firm is the joint employer with another business to which the staffing firm provides workers. The Democratic-majority Board substantially redefined what it means to be an employer under federal labor by no longer requiring a joint employer to possess direct and immediate control over terms of employment of another company's employees. Instead, two businesses can be joint employers and, therefore, subject to union organizing and bargaining for the same employees, where there is indirect or unexercised control by one business over the terms and conditions of another businesses' employees. Unless reversed on appeal, the decision is likely to have far-reaching implications, potentially establishing joint employment relationships in a wide array of business arrangements, including with parent-subsidiaries, franchisor-franchisee, creditor-debtor and other settings.

#### The Board's Decision

The case arose out of an effort by the International Brotherhood of Teamsters to organize employees working at a California recycling facility operated by Browning-Ferris Industries (BFI). The Board was asked to determine whether BFI and its staffing services subcontractor, Leadpoint Business Services, were joint employers of the workers at the facility. In April 2014, the Board asked for amicus briefs on whether a new joint employer standard was needed thereby signaling its intention to revisit the existing standard in the case.

Prior to its decision, the Board would deem two separate and independent business entities joint employers if they shared or codetermined matters governing the essential terms and conditions of employment. *Laerco Transportation*, 269 NLRB 324 (1987). The standard required a showing that the

putative joint employer meaningfully affected matters related to the employment relationship through direct and immediate control of one or more essential terms of employment. *Airborne Freight*, 338 NLRB 597 (2002). Such control had to be more than limited and routine. *TLI, Inc.*, 271 NLRB 798 (1984). And it also had to be more than just an unexercised right in the parties' relationship.

Citing "the diversity of workplace arrangements in today's economy," a divided (3-2) Board concluded that the prior standard was "out of step" with the realities of the current workplace. As a result, the Board adopted a new standard that no longer requires evidence of direct authority to control terms and conditions of employment or evidence that any control has actually been exercised by the putative joint employer. Indirect and/or unexercised control is now sufficient to support a joint employer finding.

The "existence, extent and object of a putative joint employer's control" will be closely scrutinized under the Board's new standard. While the test is highly fact-sensitive and will be resolved on a case-by-case basis, the Board provided several examples of the type of control that may satisfy the new test including:

- the authority to open and close a plant based on production needs
- the authority to inspect and approve work
- the authority to reject workers; control over the number of workers
- the authority to impose wage limits; and the authority to impose broad operational contours of the work
- authority retained in a written agreement, even if never exercised, is also relevant to and, perhaps, dispositive of the joint employer inquiry.

### **What Now?**

Despite the Board's claim that the new standard was not a significant departure from the prior one, this decision will most certainly sow confusion in labor-management relations. It is not clear how the multi-factor test described by the Board will apply in any given circumstance or to other business arrangements. The dissent points out, for example, that joint employment relationships might now be found in a wide array of business settings, including user-supplier, lessor-lessee, parent-subsidary, contractor-subcontractor, franchisor-franchisee and creditor-debtor.

The implications for a finding of joint employer status are also left vague. For example, under the new standard, the Board writes that a "joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control." But a finding of joint employer status is typically not confined to a single issue, and it is often the case that issues in a collective bargaining relationship are interrelated. For example, a putative joint employer may allegedly control a particular issue like schedules, but schedules could be related to staffing levels, which, in turn, could be related to wage levels an employer pays.

Other unanswered questions by the Board following the BFI decision include:

- What, if any, are the limits on unexercised, indirect control that may result in joint employment?
- The Board states that only control relative to terms of employment is relevant to the joint employer analysis and that control relative to “underlying economic facts that surround an employment relationship” is not relevant. How will it be determined what is, in fact, a term of employment versus an underlying economic factor?
- If an employer’s bargaining obligation is limited only to the terms of employment that it controls, are liabilities for unfair labor practices similarly limited? Are the financial and other obligations under the collective bargaining agreement similarly limited?
- How does a “user firm” that is deemed to be a joint employer go about terminating its contract with a unionized service provider without running afoul of federal labor law?
- How, if at all, will secondary boycott protections apply to the entities involved in a joint employer relationship?
- How will joint employers be viewed by multiemployer pension funds for purposes of withdrawal liability?

The Board’s new joint employer standard will presumably be reviewed in this and possibly future cases by the federal courts of appeal and possibly the Supreme Court. Additional NLRB litigation will also provide guidance on the scope and meaning of the new standard. In the meantime, however, companies will be forced to confront these and many other uncertainties arising out of the Board’s decision.

### **The Upshot.**

It is not clear at this point whether the standard the Board describes in the BFI case will survive. The lengthy dissent provides a comprehensive roadmap for how BFI or another challenger might frame its appeal.

In the meantime, Congress may attempt to reverse BFI. Introduced on September 9, 2015, by Chairman of the House Committee on Education and the Workforce Rep. John Kline (R-Minn) and in the Senate by Chairman of the Senate Committee on Health, Education, Labor, and Pensions Lamar Alexander (R-Tenn), the Protecting Local Business Opportunity Act would provide that “two or more employers may be considered joint employers for purposes of this Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate.”

Regardless of how things unfold on an appeal or on the Hill, the BFI decision provides an opportunity for businesses to review their contractual arrangements with subcontractors, service providers, vendors, suppliers and others to assess the risk of a joint employer finding. Companies should evaluate the degree of control contained in any such contractual arrangements. The extent to which businesses have control (even if that control is not actually exercised) over essential terms of employment such as hiring, firing,

scheduling, discipline, wages and benefits should be weighed against the potential risk of increased union organizing and other union-related liabilities. Employers who opt to maintain these types of contractual arrangements should take steps now to defend against these potential claims.

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