

NLRB Imposes Broad New Joint Employer Standard

On August 27, 2015, the National Labor Relations Board ("NLRB") issued *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186, a sweeping decision that expands the definition of "joint employer" for purposes of the National Labor Relations Act ("NLRA"). Abandoning 30 years of precedent that required "direct" and "immediate" control over employees' working conditions for a finding of joint employer status, the NLRB held instead that "indirect" or "potential" control is sufficient. Moreover, no longer does the employer have actually to exercise any control for a finding of joint employer status. Rather, as long as some degree of direct or indirect control is reserved for the putative joint employer in the contract with the labor provider, that alone is sufficient to establish joint employment. Because this new standard will subject many entities to new bargaining obligations, strike and protest activity by unions and potential liability for the unfair labor practices of other entities, any company that utilizes the services of another entities employees' (such as subcontractors, franchisees or staffing agencies) must be aware of this decision.

In the decision, Browning-Ferris Industries of California, Inc. ("BFI") contracted with a labor supplier, Leadpoint, for workers to perform a variety of tasks at its waste management facility. BFI required that Leadpoint's employees meet certain qualifications and pass drug tests, but it was not directly involved in hiring Leadpoint's employees. Leadpoint provided supervisors on site as well, and while there was some evidence that BFI directed Leadpoint employees' work from time to time, Leadpoint had "sole responsibility to counsel, discipline, review, evaluate, and terminate personnel who [were] assigned to BFI." The contract between BFI and Leadpoint, however, reserved for BFI the right to reject or discontinue using any worker that Leadpoint referred to its facility "for any or no reason."

The Regional Director of Region 32 found these facts insufficient to establish that BFI was a joint employer of Leadpoint's employees because the evidence of BFI's control was only limited and routine. On appeal, the NLRB did not specifically disagree with that finding. Rather, it took issue with past NLRB precedent that held that "indirect" control was insufficient to establish joint employer status. Noting the changing economy due to the rapid growth of contingent workforces, the NLRB



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reversed that precedent and held that indirect or even "potential" control over working conditions may now support a finding of a joint employment relationship, even if that control is not actually exercised by putative joint employer.

Impact

Simply put, this decision will make it easier for unions to organize industries that rely heavily on staffing agencies and labor contractors to supply workers on a permanent or temporary basis. It will also impact traditional business relationships such as parent/subsidiary, franchisor/franchisee, contractor/subcontractor and lessor/lessee. If joint employer status is found, unions will be able to impose a duty to bargain on the user employer as well as the supplier employer, embroil the user employer in labor disputes (including picketing, strikes and boycotts) and subject the user employer to liability for the unfair labor practices of the supplier employer. Thus, employers will need to carefully review their current business practices and contracts with labor suppliers to reduce the risk of being found a joint employer under the NLRA.

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