LEGAL NOTES

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# National Labor Relations Board Expands Joint Employer Standard: A Synopsis of the Ruling and Implications for Senior Living

***By Diane Marie O'Malley, Esq., Hanson Bridgett LLP***

> *Browning-Ferris Industries of California Inc. et al. v. Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters (Case No. 32-RC-109684) (August 27, 2015)*

In *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (August 27, 2015), the National Labor Relations Board ("Board") revised the standard for determining a "joint employer" for purposes of the National Labor Relations Act ("Act"). In so doing, the Board overruled thirty years of precedent, claiming that its recent decision represents a "return" to the test it set forth in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3rd Cir. 1982). Not surprisingly, the decision is split on party lines, with a strong dissent from the two Republican members.

It is unclear at this time exactly how this ruling will play out – most likely Browning Ferris will appeal the decision. However, the immediate impact of the decision is obvious - this new standard will subject many entities to new bargaining obligations, union strike and protest activity and potential liability for the unfair labor practices of other entities.

Thus, senior living providers, seniors housing owners and operators who utilize management companies, temporary workers or contract for certain work through temporary employment agencies or contractors may find themselves a joint employer under the new standard. Providers should also examine their relationships with parent, subsidiary, and other affiliated organizations.

## THE BACKDROP

The Act describes employer and employee obligations and rights in the collective bargaining arena. Among many other obligations, the Act requires *employers* to bargain with a union that its employees have selected as their designated representative. In 1980, a federal court held that this "duty to bargain" may extend to "joint employers" that may not consider themselves to be the "employer" of the represented employees.

Specifically, in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1125 (3rd Cir. 1982), *enfg*. 259 NLRB 148 (1981), the Third Circuit affirmed the Board's determination that Browning-Ferris Industries of Pennsylvania, Inc. and the trucking brokers with which it contracted were joint employers of truck drivers.

The Court stated:

> Where two or more employers exert significant control over the same employees— where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment — they constitute "joint employers" within the meaning of the NLRA.

In *Laerco Transportation,* 269 NLRB 324 (1984), *TLI, Inc.*, 271 NLRB 798 (1984), the Board narrowed this joint employer standard holding that "a joint employer not only possess the authority to control employees' terms and conditions of employment, *but also exercise that authority*." It also required that, to be relevant to the joint employer inquiry, the exercise of that control had "*to be direct, immediate, and not 'limited and routine*.'" This past week, the Board changed all that.

**Factual Background:**

Browning-Ferris Industries of California, Inc. ("BFI") employs workers at its BFI Newby Island Recyclery ("Newby Island"). The International Brotherhood of Teamsters, Sanitary Truck Drivers and Helpers Local 350 ("Union") represents those employees. BFI also contracts with FPR-II LLC, doing business as Leadpoint Business Services ("Leadpoint"), to provide workers to perform a variety of tasks at Newby Island. BFI requires Leadpoint's employees who will be working at Newby Island to meet certain qualifications, but BFI is not directly involved in Leadpoint's hiring of these employees, and pursuant to its contract with Leadpoint, Leadpoint had "sole responsibility to counsel, discipline, review, evaluate, and terminate personnel who are assigned to BFI."

The contract stipulated that Leadpoint was the sole employer of its personnel who perform work at Newby Island. BFI exerted indirect control over areas including wage rates. The Union petitioned to represent Leadpoint's employees at Newby Island on the basis that BFI was a joint employer.

A group of labor and employment law professors, and several labor organizations, who submitted briefs, urged the Board to adopt a new standard finding BFI a joint employer purportedly to reflect the modern workplace. Employer groups, in contrast, argued that the Board should adhere to its current standard and find that BFI did not have sufficient control over Leadpoint's employees such that it had to bargain with a union over those employees. The employer groups lost.

The Board stated:

> Having carefully considered the record and the briefs, we have decided to revisit and to revise the Board's joint-employer standard.

> Our aim today is to put the Board's joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the Act, to best serve the Federal policy of "encouraging the practice and procedure of collective bargaining." (Op. at p. 2)

The Board specifically found that its current standard was outdated. In fact, it appears that the decision, in the main, is the direct result of what the Board found to be a marked increase in the use of temporary agency workers. The majority noted a "recent dramatic growth in contingent employment relationships" and that the Board's existing joint employer standard was "out of step with changing economic circumstances," resulting in a "disconnect [that] potentially undermines the core protections of the Act for the employees impacted by these economic changes." The majority characterized its decision as "intended to address" the "Board's 'responsibility to adapt the Act to the changing patterns of industrial life.'"

It specifically noted:

> The most recent Bureau of Labor Statistics survey from 2005 indicated that contingent workers accounted for as much as 4.1 percent of all employment, or 5.7 million workers. Employment in the temporary help services industry, a subset of contingent work, grew from 1.1 million to 2.3 million workers from 1990 to 2008. *As of August 2014, the number of workers employed through temporary agencies had climbed to a new high of 2.87 million, a 2 percent share of the nation's work force. Over the same period, temporary employment also expanded into a much wider range of occupations.* A recent report projects that the number of jobs in the employment services industry, which includes employment placement agencies and temporary help services, will increase to almost 4 million by 2022,

> making it "one of the largest and fastest growing [industries] in terms of employment."
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> *This development is reason enough to revisit the Board's current joint-employer standard.* "[T]he primary function and responsibility of the Board . . . is that 'of applying the general provisions of the Act to the complexities of industrial life.'" If the current joint employer standard is narrower than statutorily necessary, and if joint-employment arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's "responsibility to adapt the Act to the changing patterns of industrial life." (Op. At 13) (Emphasis added, footnotes omitted.)

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**Holdings:**

In a 3-2 decision, the Board, held:

> **The Board 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 further held that if "there is a common-law employment relationship with the employees in question," "the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."

The Board represents this decision as a "return" to the "traditional test" it had previously relied upon set forth in NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117 (3rd Cir. 1982). The Board opined that "[t]he Board's post-Browning-Ferris narrowing of the joint-employer standard" with "requirements that a putative joint employer's control be exercised and that the exercise be direct and immediate, not 'limited and routine'" is not compelled by the common law. "[D]irect, indirect, and potential control over working conditions" may now support a finding of a joint employment relationship."

Applying this new test, the Board found that BFI is a joint employer of Leadpoint's personnel working at Newby Island.

In a 28 page dissent, Members Philip A. Miscimarra and Harry I. Johnson, III argue that the majority "extend the definitions of 'employee' and 'employer' far beyond the common-law limits of agency principles that Congress and the Supreme Court have stated must apply." The dissent also raises some mundane, though, practical implications with which employers will have to grapple. It notes, for example, "no bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority's new standards." (Op. at p. 21)

The dissent believes the majority opinion does not advantage employers or unions.

> The majority abandons a longstanding test that provided certainty and predictability, and replaces 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. *This new test leaves employees, unions, and employers in a position where there can be no certainty or predictability regarding the identity of the "employer."* Just like the test of employee status rejected by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 530 U.S. 318, 326 (1992), the majority's new joint-employer standard constitutes "an approach infected with circularity and unable to furnish predictable results." This confusion and disarray threatens to cause substantial instability in bargaining relationships,

> and will result in substantial burdens, expense, and liability for innumerable parties, including employees, employers, unions, and countless entities who are now cast into indeterminate legal limbo, with consequent delay, risk, and litigation expense. (Op. at pp. 22-23)

**Implications:**

As the dissent notes, this "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." (Op. at p. 47)

Practically speaking, what does this mean? Corporate parent companies might be found liable for a subsidiary's unfair labor practice related to union activities at a community. Under the Board ruling, as was the case with BFI, a parent company could be forced to come to the table to negotiate. It could also be held responsible for any attempt to stop workers from unionizing or any interference, including intimidating workers or retaliating against workers trying to unionize. Recall that non-union companies can commit unfair labor practices – such as violating the rights of its employees relative to union organizing. Companies that use management services providers to operate a community could be considered joint employers with regard to illegal policies found in handbooks.

The Board's ruling is grounded on the finding that BFI's "role in sharing and codetermining the terms and conditions of employment establishes that it is a joint employer with Leadpoint." (Op. at p. 20) And, even the Board realizes, there are no bright lines that assist companies to determine if they are at risk. It noted, "as we have made clear, the common law test requires us to review, in each case, all of the relevant control factors that are present determining the terms of employment. (Op. at p. 20, fn 120)

Unfortunately, the paradigm in the senior housing industry rather resoundingly butts up against this Board ruling - senior housing providers would seemingly want some "control" over the means in which services are provided to residents and clients to assure quality of service - the individuals who provide those services are employees.

What to do? To the extent possible, as an initial matter, when drafting contractual relationships between entities, limit the circumstances under which the company has any control over the relations with the employees. For example, the company should have no control over wage rates; the financial structure of the contract should speak in terms of overall payments to the second company. The second company then sets rates based upon an overall budget. Second, from an operational standpoint, make sure that the two companies do not intermingle policies, handbooks, benefit plans, supervision or any other "employment" hallmarks. Third, the company should not be dictating or become involved in training, standards of conduct and other factors impacting an employee's behavior.

The concept of joint employer is not a new one and senior housing providers already need to be aware of joint employer issues as they relate to general employment laws. However, this Board ruling, if not overturned, adds a new layer of obligations and liabilities to entities that heretofore thought they could safely say they were "not employers subject to the Act."