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What *Browning-Ferris* means to you: The NLRB's new test for joint employer status

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The NLRB has just issued its long awaited decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (August 27, 2015). The decision was 3 to 2 with both of the Republican members dissenting from the decision. This decision has extensive implications beyond employer-employee relationships with repercussions for franchise companies in particular, and businesses generally. Based on this decision, companies may want to now amend their contracts regarding the control they reserve or assert over their subcontractors and franchisees. Companies may also elect to sever ties with contracting agencies and bring those jobs in-house to avoid attenuated liability for employees that they do not supervise or otherwise exercise great control over.

Based on this decision, a company that hires a third-party contractor to perform services at the company's facilities, for example, may be considered a joint employer of the third-party contractor's staff, even without the company exercising any active control or supervision over the contractor's staff. With such a broad definition of who may be considered an employer, this may effectively open the door for unions at franchisee businesses to negotiate with franchisor corporations, like McDonald's, effectively stretching the bargaining relationship from employee-franchisee to employee-franchisor.

Factually, the case arose out of an effort by the Teamsters Union to organize two groups of workers at a BFI recycling plant—those employed directly by BFI, and a second group of workers employed and supervised by Leadpoint Business Services, who assigned those employees to perform services at the BFI facility. BFI and Leadpoint were parties to a temporary labor services agreement which stated that Leadpoint was the sole employer of its staff. In seeking to organize the second group, the Teamsters urged that the Leadpoint employees were really under the control of BFI. The Regional Director of the NLRB, following prior precedent of the NLRB, ruled that there were two employers and ordered separate elections. The Teamsters appealed.

The Board reversed the Regional Director's decision and took the opportunity to significantly change its standard for determining whether an employer is a joint employer with another entity. The Board concluded that BFI and Leadpoint were joint employers, relying on BFI's reserved authority under the staffing contract and indirect control over essential terms and conditions of employment of the Leadpoint employees working at the BFI facility. The majority of the Board

held that retroactively, in all pending matters, the Board will now “examine how control is manifested in a particular employment relationship” to determine whether a joint employer relationship exists.

In doing so, the majority characterized its decision as a return to the “traditional” joint employer standard. The Board will now follow a two-part test to determine if two entities share or codetermine the essential terms and conditions of employment, first determining whether there is a common-law employment relationship with the employees in question, and, if so, whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining. In making such decisions, the Board will no longer require evidence that a joint employer actually exercises control over essential terms. Instead, from now on (and subject to the likely legal challenges), the Board will focus only on “whether one statutory employer possesses sufficient control over the work of the employees to qualify as a joint employer with another employer.” Thus, the existence of such control, even if exercised indirectly—such as through an intermediary—will establish joint employer status.

The Board’s majority characterized its longstanding precedent as “unjustifiably narrow” and “out of step” with changing economic circumstances. Its opinion spoke of the economic realities and the significant use of temporary employees in the current workplace as well as the number of subcontracting and other relationships that allow one employer to control the employees of another.

There was a vigorous dissent attacking the majority’s decision as outside the Board’s statutory authority, and arguing that the majority’s decision ignored both over 40 years of NLRB precedent and court decisions. The dissent characterized the decision as abandoning a longstanding test that provided certainty and predictability for an ambiguous standard. Dissenting board members Philip Miscimarra and Harry Johnson wrote, “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.”

In light of the Board’s decision, companies should carefully review their service agreements and practices with third-party providers for potential aspects of “shared” control. Even if companies do not perceive themselves as exercising control over the terms and conditions of a third-party provider’s employees, merely possessing or “reserving the right” to exercise such authority may be sufficient. While no one factor is dispositive under the Board’s revised standard, employers with contracts permitting them to demand drug tests or background checks, to reserve the right to reject a worker, or to even specify the number of workers required on a particular project, may find that they possess sufficient control to implicate the new joint employer status. While many expect the Board’s decision will be challenged, in the interim, companies should take a cold, hard look at their potential exposure under this new era of joint employers.

We suggest that language regarding employee specifications for third-party contractors or franchisees be amended to be suggestive rather than mandatory. This may provide some protection against the joint employer finding as long as no control is exercised over the subcontractor or franchisee in the employment area. We await the NLRB’s case against McDonald’s, which will use this new “economic reality test” imposed by the NLRB which will provide additional specificity for franchise companies.

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