



Insights: Alerts

NLRB Expands Concept of Joint Employers

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On August 27, 2015, the National Labor Relations Board (“NLRB”) issued a decision that changed the way it approaches the question of whether two companies can be considered joint employers of the same group of employees for purposes of collective bargaining under the National Labor Relations Act (“NLRA”). The NLRB’s decision in *Browning-Ferris Industries of California, Inc.* enlarges the joint-employer definition in a way that could include entities such as franchisors, parent companies, and businesses that utilize temporary workers or subcontractors.

For decades, the NLRB required multiple entities to both possess and exercise direct and immediate control over a group of workers to be considered joint employers of those workers. However, the NLRB’s new position is that a company need not actually exercise control over workers to be considered a joint employer. Instead, it need only reserve the authority to control them, even if that authority is never exercised. Additionally, the NLRB stated that “control exercised indirectly – such as through an intermediary – may establish joint-employer status.”

The NLRB’s Decision in *Browning-Ferris Industries of California, Inc.*

The *Browning-Ferris* decision involved a company, Browning-Ferris Industries of California, Inc. (“BFI”), that used the services of workers provided by a professional services company called Leadpoint Business Services in running its business. The workers were hired and directly supervised by Leadpoint. However, the staffing agreement gave BFI certain control over which individuals could be hired, and BFI managers did oversee the work performed by the workers supplied by Leadpoint. BFI also controlled certain aspects of operations that affected the workers’ terms and conditions of employment, including the timing of shifts and breaks.

A union seeking to represent the workers supplied by Leadpoint to BFI asked the NLRB to reconsider the standard it had historically applied to analyze joint-employer status and recognize BFI and Leadpoint as the joint employers of the workers in question. Upon reconsideration, the NLRB adopted the revised, broader standard described above, reasoning that “the diversity of workplace arrangements in today’s economy has significantly expanded” and that a revised standard was necessary “to better effectuate the purposes of the Act in the current economic landscape.”

The revised standard announced by the NLRB allowed it to rely on BFI’s indirect control over the employment conditions of workers supplied by Leadpoint. For example, the NLRB considered the fact that BFI communicated working standards and directives to Leadpoint (rather than directly to workers supplied by Leadpoint) in concluding that BFI was a joint employer. In addition, the NLRB analyzed the contracts between BFI and Leadpoint and considered the authority BFI had to control the conditions of workers supplied by Leadpoint, regardless of whether BFI actually exercised that authority.

As a result of its new approach, the NLRB found that BFI had the authority to exercise enough direct and indirect control over workers supplied by Leadpoint to be a joint employer for collective bargaining purposes. Therefore, if the union that initiated this case is ultimately found to represent a majority of the Leadpoint-supplied workers at BFI, both BFI and Leadpoint would be obligated to bargain with the union over the terms and conditions of employment for those workers.

Practical Implications

While BFI may appeal the NLRB's decision in federal court and the ultimate issue may still depend on the outcome of such an appeal, the NLRB's decision in *Browning-Ferris Industries of California, Inc.* represents a significant departure from the previous standard for determining joint-employer status. If the NLRB's decision holds, that agency may, depending on the particular facts, find entities such as franchisors and companies that use subcontractors or temporary employees to be in a joint-employer relationship, potentially making it easier for workers to organize and requiring those entities to bargain with respect to workers who were previously not considered their employees. Although the *Browning-Ferris* decision arose in the context of a union-representation case, the joint-employer standard announced in the decision could also be applied in the context of an unfair labor practice case. This would mean that, in certain circumstances, entities such as franchisors and companies using subcontractors or temporary workers could be held responsible for ensuring that jointly employed workers are not denied rights and protections afforded by the NLRA, such as the right to discuss working conditions. Franchisors should review their agreements with franchisees to determine the extent to which they have authority to control indirectly the working conditions of franchisee employees, even if they do not exercise that authority. Similarly, companies should review subcontractor agreements and agreements with staffing agencies for comparable issues.

Kilpatrick Townsend's Labor and Employment attorneys will continue to monitor these issues and keep you informed of significant developments as they occur. In the meantime, feel free to contact our attorneys if you have any questions about this topic.

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