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Legal Update

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CONTROVERSIAL NLRB DECISION IMPOSES NEW JOINT EMPLOYER STANDARD

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The National Labor Relations Board (NLRB) has issued a long-awaited decision in *Browning-Ferris Industries of California, Inc*. The decision relaxes the joint employer standard under the National Labor Relations Act (NLRA). Consequently, the NLRB will no longer require that a joint employer possess and exercise the authority to control its workers' terms and conditions of employment. An employer now may qualify as a joint employer under the NLRA even if it has only reserved the authority to control terms and conditions of employment and does not directly exercise such authority.

The joint employer standard determines whether an entity, which is not the official employer of certain workers, is nonetheless considered their employer and must comply with NLRA obligations regarding those workers. An employer who is considered a joint employer with an independent third party may therefore be held responsible for the third party's NLRA violations and may have collective bargaining obligations with respect to the third party's workers. Accordingly, the NLRB's new joint employer standard may have important consequences for employers who use contingent or temporary workers and for franchisor-franchisee, contractor-subcontractor, user-supplier, lessor-lessee, parent-subsidiary, predecessor-successor, creditor-debtor, and contractor-consumer business relationships. For example, the NLRB has taken the position that McDonald's, through its franchise relationship, is a putative joint employer with its fast food franchisees and therefore shares liability for the franchisees' NLRA violations. The NLRB now has 155 open cases against McDonald's.

Background

The NLRA imposes a comprehensive set of requirements for industrial relations and employers' bargaining obligations. NLRA violations can result in significant liability for employers. For example, if the NLRB finds that an employer has committed an unfair labor practice, the NLRB will order the employer to cease and desist from the practice and take action to remedy the violation. This can include reinstatement for employees who were unlawfully fired, as well as back pay, payment of dues, fines, or other costs. In 2014, the NLRB received $44.6 million in monetary remedies. Thus, it is important to identify the proper "employer" with respect to who is bound by the collective bargaining agreement, the duty to bargain with a union, strikes and picketing issues, and other obligations under the NLRA.

In *Browning-Ferris*, the NLRB considered whether Browning-Ferris Industries (BFI) and Leadpoint Business Services (Leadpoint) were joint employers of the sorters, cleaners, and housekeepers whom the union sought to represent. Leadpoint (the supplier firm) had provided these workers to BFI (the user firm) under a temporary labor services agreement. The agreement between BFI and Leadpoint expressly stated that Leadpoint would be the sole employer of the personnel it supplied and that nothing in the agreement would be construed as creating an employment relationship with BFI.

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Under the terms of the agreement, Leadpoint was responsible for recruiting, interviewing, testing, selecting, and hiring personnel to work for BFI. Leadpoint also employed separate supervisors for its temporary personnel at BFI's facility. In addition, while the agreement did not permit Leadpoint to pay its workers more than what BFI paid its employees, Leadpoint set the workers' pay and was their sole provider of benefits. Furthermore, although BFI established the facility's schedule of working hours and shifts, Leadpoint was solely responsible for scheduling shifts for its workers, scheduling workers for overtime, and administering requests for sick leave and vacation.

The NLRB's Ruling

Despite these facts indicating that Leadpoint—not BFI—controlled the terms and conditions of employment, the NLRB ruled that BFI was a joint employer with Leadpoint. In reaching this conclusion, the NLRB found that it needed to revise its joint employer standard due to changing economic circumstances and, in particular, the drastic increase in the procurement of employees through staffing and subcontracting arrangements.

The NLRB ruled against BFI and held that BFI shared, or codetermined, matters governing the essential terms and conditions of employment for the Leadpoint employees. The NLRB also found that BFI had exercised its right to control such terms, both directly and indirectly. The NLRB emphasized that, under the agreement, BFI retained the right to require that Leadpoint meet or exceed BFI's own standard selection procedures, including drug testing. The agreement also prohibited Leadpoint from hiring workers that BFI deemed ineligible for rehire. Thus, even though BFI did not participate in Leadpoint's day-to-day hiring process, the NLRB concluded that BFI still codetermined the outcome by "imposing specific conditions on Leadpoint's ability to make hiring decisions." In addition, under the agreement, even if Leadpoint determined that an applicant was qualified, BFI retained the right to reject any worker "for any reason or no reason."

The NLRB also focused on BFI's ability to discontinue the use of any Leadpoint personnel. Although BFI managers had testified that they never discontinued use of a Leadpoint employee, the NLRB found that there were two instances where BFI managers reported employees' misconduct to Leadpoint and requested their dismissal. In response, Leadpoint immediately removed the employees from their duties, conducted its own investigation, and dismissed them from the BFI facility shortly thereafter.

The NLRB further noted that BFI exercised "ultimate control" over the processes that shaped the day-to-day work and the pace of the work where BFI specified the number of Leadpoint workers, dictated the timing of shifts, and determined when overtime was necessary. The NLRB found that BFI exercised "near-constant oversight of the employees' work performance," even if its directives were communicated through Leadpoint supervisors. BFI also required Leadpoint workers to obtain the signature of a BFI representative attesting to their hours worked each week; otherwise, BFI could refuse to pay Leadpoint for time claimed by a worker. Thus, the NLRB concluded that BFI retained the ultimate right to dictate who worked at its facility, made the core staffing and operational decisions that defined all employees' workdays, and played a significant role in determining employees' wages.

The Reaction by Congress

In response, Congress has introduced legislation to roll back the NLRB's decision. The proposed "Protecting Local Business Opportunity Act," S. 2015, H.R. 3459, 114th Cong. (Sept. 9, 2015), would amend the NLRA so that two or more employers will only be considered joint employers if each

employer "shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate." The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions and the House Subcommittee on Health, Employment, Labor, and Pensions, which will consider the bill before sending it to the House or Senate for a vote. It remains to be seen whether the bill will survive committee review and be enacted.

Conclusion

In light of *Browning-Ferris*, and pending further action by Congress, employers who use contingent/temporary workers or staffing agencies should review their arrangements and consult with counsel regarding the effects of the NLRB's broad decision. In addition, employers who have user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships may also need to revisit the terms of these relationships with counsel to review potential joint employer issues.

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