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CLIENT ALERT

NLRB Adopts New Standard for Determining Joint-Employer Status

AUGUST 2015

In a highly anticipated split decision, the National Labor Relations Board has adopted a new standard for determining joint-employer status under the National Labor Relations Act. *Browning-Ferris Industries of California Inc., d/b/a BFI Newby Island Recyclery, 362 NLRB No. 186* (August 27, 2015). The Board's decision will have far and wide-ranging consequences for employers, as well as potentially open new avenues for union organizing efforts in a variety of contexts.

The Board's decision reverses an August 2014 Regional Director Decision and Direction of Election that found Leadpoint Business Services Inc., which staffed employees at a Browning-Ferris (BFI)-owned recycling facility, was the sole employer of a petitioned-for unit of employees. Applying a new joint-employer standard "to better effectuate the purposes of the Act, in the current economic landscape," the Board found that the union established that BFI and Leadpoint "share or codetermine those matters governing the essential terms and conditions of employment" such that they are joint employers of the employees in the petitioned-for unit.

The Board's decision outlines its new test for determining whether a putative joint-employer meets the standard of sharing or codetermining matters controlling the essential terms and conditions of employment. The Board will first determine whether there is a common-law employment relationship with the employees in question. If this common law employment relationship exists, the Board will then consider whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.

The Board explained that the central considerations to these two determinations are the existence, extent, and object of the putative joint employer's control. The Board's examination will, thus, focus on how control is manifested in a particular employment relationship. Significantly, the Board stated that it will no longer require that a joint employer "not only possess the authority to control employees' terms and conditions of employment, but also *exercise* that authority." Moreover, the Board noted that a purported statutory employer's control need not be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.

Upon examination of the facts and analysis of the legal standards, the Board found BFI was an employer under common law principles and that it shared or codetermined those matters governing the essential terms and

conditions of employment for the Leadpoint employees. Specifically, the Board found that BFI exercised control over the employees—both directly and indirectly—in hiring, firing, discipline, supervision, direction of work, hours, as well as the determination of employee wages. Thus, the Board determined BFI and Leadpoint were joint-employers of the employees at issue.

The dissenting Board members took issue with the majority decision as "fundamentally" altering settled labor law. Arguing that the Board should adhere to the "joint-employer" test that has existed for 30 years without a single note of judicial criticism, the dissent opined that "the Board has substantially altered its interpretation of joint-employer status across the spectrum of private business relationship." The dissent further expressed concern that the majority's reformulation would impact a much broader body of law, "affecting multiple doctrines central to the Act that have been developed and refined through decades of work by bipartisan Boards, the courts, and Congress… the majority here gives insufficient consideration to the 'potentially massive' economic implications of its new joint-employer standard…"

Significantly, the Board admits that it has "modified the legal landscape for employers" with respect to the NLRA. However, the Board majority claims that "reevaluating doctrines, refining legal rules, and sometimes reversing precedent are familiar parts of the Board's work—and rightly so." The Board countered the dissent, claiming that the restated jointemployer standard "does not govern joint-employer determinations under the many other statutes, federal and state, that govern the workplace and that use a variety of different standards to determine whether a particular business entity has legal duties with respect to particular workers."

Employers should carefully evaluate the implications of this decision on their workforce. First, it expands the circumstances where an employer might be deemed liable for unfair labor practices committed by a third-party that provides supplemental or contingent employees who work in the employer's workplace. Second, it potentially gives unions the ability organize a workplace by focusing on contingent or supplemental employees, even though they are employed and directly controlled by a third-party. the majority here gives insufficient consideration to the 'potentially massive' economic implications of its new joint-employer standard…"

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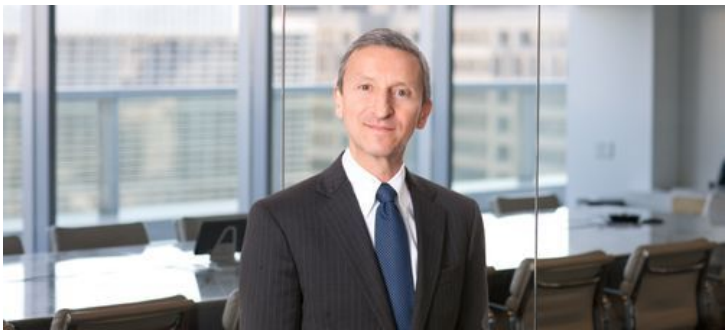

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