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The NLRB's Browning-Ferris Decision Significantly Lowers the Standard For Who Is a Joint Employer Under the NLRA

In *Browning-Ferris Industries of California, Inc.*, the National Labor Relations Board (NLRB or Board), in a 3-2 decision, expanded who may be considered a joint employer under the National Labor Relations Act (NLRA or the Act). The Board's decision significantly lowers the threshold for joint employer status, making it more likely that entities such as staffing agencies, franchisors, and contractors will be considered joint employers under the Act.

A joint employer finding is significant because this means that an entity may be subjected to joint bargaining obligations and potential joint liability for unfair labor practices or breaches of collective bargaining agreements.

Joint Employer Analysis Before *Browning-Ferris*

Prior to the Board's decision in *Browning-Ferris*, the standard for establishing joint employment was that both entities in question had to share the ability to control or co-determine essential terms and conditions of employment. Hiring, firing, supervising, and directing employees were generally considered to be the essential terms and conditions of employment. Board decisions further clarified that the type of control over the essential terms must be direct and immediate, and the alleged employer must have actually exercised that control — it was not enough that it may have reserved some level of control through a contract. Rather, the control had to be exercised in practice.

Joint Employer Analysis After *Browning-Ferris*

The Board significantly modified this approach in *Browning-Ferris*. The Board's stated new test, which sounds similar to the old test in words, but not in application, is that:

> "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 application of this test is where the Board makes sweeping changes. The Board will now evaluate the evidence to determine whether an alleged employer affects the means or manner of employees' work and terms of employment, either directly or indirectly. In other words, the control no longer needs to be direct or immediate. Additionally, the Board found that it is not critical that the entity actually exercise such authority so long as it possesses or reserves the right to do so.

The Board also expanded on those items found to be "essential terms and conditions" beyond just hiring, terminating, supervising, and directing employees. The Board included such things as dictating the number of workers to be supplied, setting work hours, controlling seniority and approving overtime, and assigning work and determining the manner and method of work performance.

In short, the new test makes widespread changes by finding indirect control significant in establishing an employment relationship, not requiring that such control actually be exercised, and including more terms and conditions of employment as relevant in this analysis that were previously not considered to be "essential."

Applying the New Test in *Browning-Ferris*

The issue before the Board in *Browning-Ferris* was whether Browning-Ferris, which operated a recycling facility, was a joint employer with LeadPoint, a staffing company that supplied employees to perform various work functions at the facility. Under the Board's old test, it is almost certain there would have been no joint employer finding. LeadPoint set its employees' schedules, engaged its own human resources manager to work at the Browning-Ferris facility, and had the sole responsibility to discipline, review, evaluate, and terminate its own employees. In addition, LeadPoint employed an Acting On-Site Manager, three shift supervisors, and seven line leads to manage and supervise LeadPoint employees working at the facility.

Nonetheless, applying the new test, the Board found sufficient evidence of direct and indirect control (relying on control both exercised and reserved by contract) to support its joint employer finding. The Board relied on the following facts in making its determination: Browning-Ferris gave LeadPoint supervisors fairly detailed directives concerning employee performance that the LeadPoint supervisors then communicated to their employees; Browning-Ferris set some conditions on hiring that LeadPoint was contractually bound to follow (must have appropriate qualifications and meet or exceed Browning's own standard selection procedures and tests); Browning-Ferris had the authority to discontinue the use of LeadPoint employees; Browning-Ferris determined when overtime was necessary; and Browning-Ferris' contract with Leadpoint prohibited LeadPoint from paying its employees more than Browning-Ferris paid its own employees who performed comparable work.

Takeaways and Potential Implications

The primary change resulting from Browning-Ferris is that indirect control over terms and conditions of employment may now be enough to create a joint employment relationship. Unfortunately, the Board's decision fails to provide any real clarity on just how much indirect control may be sufficient to create such a relationship. The two dissenting members take issue with how broad the majority's decision appears to be, stating that "the number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited." The dissent then lists the following examples:

- Insurance companies that require employers to take certain actions with employees in order to comply with policy requirements for safety, security, health, etc.;
- Franchisors;
- Banks or other lenders whose financing terms may require certain performance measurements;
- Any company that negotiates specific quality or product requirements;
- Any company that grants access to its facilities for a contractor to perform services there, and then continuously regulates the contractor's access to the property for the duration of the contract;
- Any company that is concerned about the quality of the contracted services; and
- Consumers or small businesses who dictate times, manner, and some methods of performance of contractors.

The dissent's list showcases the potential reach of the Board's new test and the potential to significantly alter the landscape of how employment is understood under the NLRA.

While employers wait for the Board to issue more decisions further delineating the scope of this test, there are some practical steps employers can take. Employers can revise their contracts to clarify that control over terms and conditions of employment rests with the contractor, use as little detail as possible in directing the work of the contractor, and stay out of all hiring, firing, and wage-related decisions. Alternatively, some employers may choose to wait to make any changes until this decision is eventually challenged in federal court. Employers should discuss with counsel how to best respond to this change.

Ultimately, because of the wide array of factual arrangements involving contingent workers, franchisees, and independent contractors, and the reality of business relationships, there will certainly be some situations where letting go of some level of operational control is not a practical option. This must be weighed against the risk of being found to be a joint employer, and carefully evaluated when entering into and reassessing all business relationships.

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