The National Labor Relations Board's New Joint Employer Standard How Has It Changed the Legal Landscape?

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This article discusses the National Labor Relations Board's ("NLRB" or "Board") landmark decision in Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (August 27, 2015) and the impact of its new joint employer standard on private employers and the attendant liability associated with using contract labor. This article also discusses the influence of the Board's new joint employer standard on the Department of Labor, the U.S. Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs and explores how each agency has recently expanded its view of what constitutes joint employment.

Summary of the Browning-Ferris Decision and the NLRB's New Joint Employer Standard

In the landmark case, Browning-Ferris Industries of California, Inc. ("BFI") operated a waste recycling facility and subcontracted employees from Leadpoint Business Services ("Leadpoint") to sort recyclable items and to perform basic housekeeping functions. The Teamsters filed a petition to represent these employees under the theory that BFI and Leadpoint were joint employers. BFI countered that its supervision over the subcontracted employees was, at best, indirect.

The NLRB's Previous Joint Employer Standard. Under the Board's previous joint employer standard, which had been in effect for over thirty years, joint employer status only existed where "two separate entities share or codetermine those matters governing the essential terms and conditions of employment." See TLI, Inc., 271 NLRB 789 (1984), Laerco Transp., 269 NLRB 324 (1984). The level of control asserted by the potential joint employer needed to be "direct and immediate" as to employment actions such as hiring, firing, discipline, supervision, and direction. See, e.g., Airborne Freight Co., 338 NLRB 597 (2002).

The NLRB's New Joint Employer Standard. On August 27, 2015, the Board transformed the joint employer standard into a two-part test that now considers: (1) whether a common law employment relationship exists; and (2) whether the potential joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining." The critical distinction is that "control" can now be direct, indirect (through an intermediary) or even a reserved right to control, whether or not that right is ever excised.

Under this new standard, the Board found BFI was a joint employer with Leadpoint. Disagreeing with the Board's determination, BFI refused the Teamsters request to bargain. The Teamsters then filed an unfair labor practice charge and on January 12, 2016 the Board found that BFI and Leadpoint, as joint employers, had violated the National Labor Relations Act by refusing to recognize or bargain with the Teamsters. BFI and Leadpoint have appealed to the U.S. Court of Appeals for the District of Columbia Circuit[1]. A decision on the pending appeal is not anticipated before the fall.

Impact on the U.S. Department of Labor

It is clear that the NLRB's new standard was influenced, at least in part, by the research and writing of Wage and Hour Administrator, David Weil. Prior to Weil's appointment to the Administrator role in 2013, Weil authored a book entitled

"The Fissured Workplace, Why Work Became So Bad For So Many And What Can Be Done to Improve It" and used statistical references to argue that the increased use of contract labor, like subcontracting and franchised operations, created a negative impact on the health and safety of low-wage workers.

The influence of Weil's research on the NLRB's General Counsel, Richard Griffin, Jr., became increasingly apparent when Griffin's office cited Weil's statistics in its amicus brief filed in Browning-Ferris. Building on Weil's momentum, the Office of the General Counsel argued that the Board had the power to modify its interpretation of the NLRA to address changes in employment relationships and urged the NLRB to modify the joint employer standard "to take into account the economic and industrial realities" of the modernized workplace. In most respects, the Board accepted Griffith's challenge.

While the NLRB and the DOL's respective positions on joint employment are distinguishable - the NLRB evaluates the level of "control" asserted by a putative joint employer, while the Wage and Hour Division uses a multi-factorial economic realities test - the intentional broadening of who constitutes a "joint employer" and the rationale asserted by each agency is strikingly similar.

The Wage and Hour Division. On January 20, 2016, the Wage and Hour Division issued Administrator's Interpretation No. 2016-1 ("AI"), which addresses joint employer status under the Fair Labor Standards Act and the Migrant and Seasonal Agriculture Worker Protection Act.

To address the effects of Weil's "fissured workplace," the AI sets out two models for assessing joint employer relationships. Under a "horizontal joint employment" relationship, two employers can be liable where they are sufficiently associated with or related to each other with respect to the employee. The test focuses on the association between two employers that already have an explicit employment relationship with an employee, like multiple restaurants operating under a common ownership, and which use the same management to schedule the same employees for work at all locations.

By contrast, "vertical joint employment" examines the economic realities of the relationship between the employee and the putative joint employer. This analysis applies where the employee has an employment relationship with one employer (typically a staffing agency) and the economic realities show that he/she is economically dependent on, and thus employed by, another entity involved in the work.

Despite the legal distinctions between the NLRB and Wage and Hour Joint Employer Standards, the emphasis on the relevance of indirect control over the work performed is perfectly aligned.

The Family and Medical Leave Act. The Department of Labor issued recent guidance on how joint employment should be analyzed under the Family and Medical Leave Act. In January 2016, the agency issued Fact Sheet No. 28N, which details the responsibilities for primary and secondary employers engaged in joint employment. While the Fact Sheet did not pave new ground under the FMLA, it did indicate that joint employment will become an enforcement priority, and it signaled the inevitable expansion of those entities that will be considered joint employers.

The Occupational Safety and Health Act. Shortly after the NLRB handed down *Browning-Ferris*, the Office of the Solicitor for the U.S. Department of Labor circulated a draft policy indicating that the agency was considering whether to broaden its joint employment enforcement. While the draft policy pertained primarily to the franchise model, it is clearly applicable to other contract relationships. The effect of the draft policy will be to give OSHA access to a broader range of employers that have previously escaped liability for alleged health and safety violations due to the use of contract labor.

Under the draft policy, a joint employment relationship will be found where "the corporate entity exercises direct or indirect control over working conditions, has the unexercised potential to control working conditions or [is] based on the economic realities." By all accounts, this policy suggests a merger of the NLRB's joint employer standard and that offered by the Wage and Hour Division.

The U.S. Equal Employment Opportunity Commission

Historically, joint employment concerns have been less prominent in the discrimination and harassment contexts. However, in the EEOC's amicus brief in *Browning-Ferris*, the agency encouraged the NLRB to abandon its prior standard and to adopt the common-law agency test used by the EEOC under Title VII.

While the EEOC's test is notably broader than the previous NLRB standard, both tests focus on who actually controls the essential terms and conditions of employment. Moreover, now that the NLRB has broadened its standard to include indirect, or a reserved right to control, whether or not that right is ever exercised, the EEOC will almost certainly see it as an opportunity to expand its own definition of joint employment and to take a more aggressive enforcement stance against potential joint employers. This would translate to significant expansion of investigations. It could also mean new EEOC-initiated and class/collective actions against employers that exercise little or no control over their contracted workforce.

The Office of Federal Contract Compliance Programs

The OFCCP has expressed an interest, in light of *Browning-Ferris*, to expand its reach over organizations that provide services or supplies to federal contractors, even if that entity itself holds no federal contracts. The OFCCP plans to accomplish this expansion through the broadening of its "single entity" test.

To determine whether the agency has jurisdiction over a company without a federal contract, the OFCCP applies a five-factor test focusing on whether the ownership, management and operations of the contracting and non-contracting entities are sufficiently related to warrant treating them as a single entity. The test focuses primarily on whether the ownership, management, and operations of the separate entities are, in fact, sufficiently interrelated to warrant treating them as an integrated enterprise or a single entity. A business or organization need not meet all five factors to be considered a single entity with a covered Federal contractor.

Looking specifically at *Browning-Ferris*, the NLRB's ruling will allow a broader interpretation of whether one entity exercises day-to-day control over the other through the management or supervision of the entity's operations; whether the personnel policies of the entities emanate from a common or centralized source; and whether the operations of the entities are dependent on each other.

This transition is critical because federal contractors can have numerous relationships with subcontractors, suppliers and vendors, all of whom may now find themselves at increased risk of being classified a "single entity" with federal contractors and liable for complex and onerous compliance mandates like affirmative action requirements, data collection, reporting, auditing and more.

General Recommendations and Conclusion

While the impact of the NLRB's new joint employer standard has been significant and reverberations continue to resound within the Labor Board and several of its sister agencies, employers are encouraged to do their "due diligence" to determine their potential vulnerability to joint employer arguments and have a strategic discussion about what steps might be taken to minimize exposure. As part of this discussion, the organization might assess the cost/benefit of greater or lesser control over aspects of its relationship with third party vendors. For example, an employer (referenced below as "host company") taking steps in an effort to minimize the potential for a joint employer finding should consider (among other things):

- Reviewing and revising third party service ("vendor") agreements to reinforce that the host company is not a joint employer of vendor employees.
- Making sure vendors have their own employment policies and procedures. These can be reviewed as part of a host company's due diligence when deciding whether to enter into or renew a vendor agreement.
- Avoiding participation in vendor training programs and/or providing unnecessary training materials.
- Avoiding involvement with vendor discipline and essential employment decisions such as hiring/firing.
- Reviewing and revising indemnification language contained in vendor agreements.
- Limiting reporting obligations to information necessary to protect the brand.
- Bringing contracted work in-house.

While employers are encouraged to consider these practical strategies and to implement preventive changes as soon as practicable, it is important to note that the fate of the new standard and potentially its downstream effects are not necessary set in stone. Aside from the pending circuit court appeal, which is described above, the NLRB's composition could change as a result of the 2016 Presidential Election. If so, the decision could be overturned and the downstream effects tempered. However, for now, employers utilizing contract labor must plan for increased scrutiny and greater potential for joint employer liability.

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[1] In the wake of *Browning-Ferris*, several states have introduced legislation aimed at protecting businesses from the wide-ranging effects of the NLRB's decision in *Browning-Ferris.* For example, the "Protecting Georgia Small Business Act" amends Georgia's Labor and Industrial Relations Code to provide that neither a franchisee nor a franchisee's employee is considered an employee of a franchisor for "any purpose." The Act goes into effect on January 1, 2017.

Seven other states including Texas, Louisiana, Tennessee, Wisconsin, Michigan, Indiana, and Utah have all passed similar legislation prohibiting a franchisor from being considered an employer or co-employer of franchisee employees. Legislative efforts have also been introduced in California, Colorado, Massachusetts, Oklahoma, Pennsylvania, Vermont, and Virginia and legislators in Wyoming, North Carolina, Arizona, and Colorado are evaluating similar measures.

Additional Resources

- New Texas Law Says Franchisors Generally Not Employers of Franchisees' Workers, Kristin L.

Bauer and Philip B. Rosen, Jackson Lewis, P.C., July 13, 2015

- Labor Board Sets New Standard for Determining Joint Employer Status, James M. Stone, Philip B. Rosen, Roger S. Kaplan, Howard M. Bloom and Kathleen M. Tinnerello, Jackson Lewis, P.C., August 28, 2015
- Draft DOL Policy Lists "Economic Realities" as Key OSHA Test of Joint Employer Status, Jackson Lewis, P.C., September 16, 2015
- U.S. DOL Issues Guidance on Joint Employment Under the FLSA and MSPA, Tressi L. Cordaro, Jackson Lewis, P.C., January 21, 2016
- Browning-Ferris Appeals 'Joint Employer" Decision to U.S. Court of Appeals, Howard M. Bloom, Philip B. Rosen and Kathleen M. Tinnerello, Jackson Lewis P.C. February 1, 2016
- Browning-Ferris Appeals NLRB's Landmark Joint Employer Decision to U.S. Court of Appeals, Jackson Lewis, P.C., March 8, 2016
- Doubling Down: NLRB Joint Employer Standard Under Dual Review, Howard M. Bloom, Philip B. Rosen and Kathleen M. Tinnerello, Jackson Lewis, P.C., April 22, 2016
- New Georgia Law Says Franchisors Generally Not Employers of Franchisees or Franchisees' Workers, Jonathan J. Spitz, Jason R. Carruthers and Kathleen M. Tinnerello, Jackson Lewis, P.C., May 5, 2016

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