Labor Board Sets New Standard for Determining Joint Employer Status

By James M. Stone, Philip B. Rosen and Howard M. Bloom

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A sharply divided National Labor Relations Board has announced a new standard for determining joint employer status under the National Labor Relations Act. Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015). One of the most significant decisions issued by the Board in recent years, it is likely to impact the labor relations and business relationships of many companies.

Under the Board's (now) former standard, applied for three decades, a joint employer relationship existed only where “two separate entities share or codetermine those matters governing the essential terms and conditions of employment.” In particular, an employer had to “meaningfully affect[] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.”

TLI, Inc., 271 NLRB 798, 798 (1984); Laerco Transportation, 369 NLRB 324, 325 (1984). The essential element in this analysis is “whether a putative joint employer's control over employment matters is direct and immediate.” Airborne Express, 338 NLRB 597, 597, n.1 (2002). By broadening the standard in Browning-Ferris to include employers who may only affect employees’ terms and conditions of employment indirectly, the decision will sweep many more entities under the “joint employer” canopy, and increase labor union bargaining power accordingly.

Background

Browning-Ferris Industries of California, Inc. (BFI), operates a waste recycling facility in Milpitas, California. BFI subcontracts employees (sorters, housekeepers, and screen cleaners) from Leadpoint Business Services to sort recyclable items inside the facility and to perform basic housekeeping functions. On July 22, 2013, the Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters petitioned to represent approximately 240 of these employees. The union already represented approximately 60 direct BFI employees who worked on the exterior of the facility.

A hearing was held on the sole issue of whether BFI and Leadpoint were joint employers. Applying the existing joint employer standard, the Acting Regional Director found BFI was not a joint employer of the 240 Leadpoint employees because it did not share or co-determine those matters governing the essential terms of employment. The Acting Regional Director relied on the fact that BFI did not directly over recruitment, hiring, discipline, or termination, and no direct control over employee work assignments or scheduling. Finally, the Acting Regional Director stressed that BFI did not directly supervise employees or have any discretion to assign or grant overtime work.

The union sought review of the decision from the Board. Granting the union’s request, the Board not only sought briefs on the merits from the parties to the proceeding, but also invited other interested parties to file “friend-of-the-court” briefs on whether the Board should change its existing joint employer standard. Perhaps the most important friend-of-the-court brief was filed by NLRB General Counsel Richard F. Griffin, urging the Board to redefine a joint employer as any company which exercises direct, indirect, or potential control over employees' working conditions, or where “industrial realities” make the putative joint employer an entity essential for meaningful bargaining to occur.

Broad New Standard

Expressly overruling TLI, Laerco, and Airborne, the Board’s new standard evaluates:

1. whether a common-law employment relationship exists; and
2. whether the putative joint employer “possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful bargaining.”

Under the new standard, however, control can be established directly or indirectly, such as through an intermediary or through contractual provisions that preserve the right to control, whether or not that right is ever exercised.
Browning-Ferris protect their brand. In all cases, employers should evaluate whether they have the right to control, work with subcontractors, franchisees, distributors, and dealers, where they control only the product or structure. However, many others may seriously consider a more decentralized model of the way they operate.

Some employers may accept the risk of joint employer status to maintain their traditional operational structure. However, many others may seriously consider a more decentralized model of the way they work with subcontractors, franchisees, distributors, and dealers, where they control only the product or protect their brand. In all cases, employers should evaluate whether they have the right to control,
either directly or indirectly, a contracted employee.

It is likely that *Browning-Ferris* eventually will be appealed to a U.S. Court of Appeals. Other legal challenges to the decision are anticipated as the Board seeks to enforce the new joint employer standard. Likewise, while Congress may act in response to the Board’s decision, actual legislation is far from certain, and a Presidential veto always is possible. Change may have to await a Republican administration and Congress, and a reconstituted NLRB. Please contact the Jackson Lewis labor lawyer with whom you regularly work if you would like to discuss the implications of this case in more detail.

Jackson Lewis attorneys will be speaking about the NLRB decision at: *Redefining the Standard: Is Your Company Now a Joint Employer?*

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