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,* 269 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 set pay rates or provide benefits for the petitioned-for employees. Moreover, BFI had no direct control 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.

Acknowledging the breadth of its new standard, the Board claimed the change is necessary to address labor law jurisprudence that is "increasingly out of step with changing economic circumstances,

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particularly the recent dramatic growth in contingent employment relationship." Significantly, the Board also said its decision would facilitate more collective bargaining. That prophecy is nearly certain to come true since many formerly separate entities will now be considered the same entity for labor law purposes.

Applying the new standard in *Browning-Ferris,* the Board reversed the Acting Regional Director's decision and found BFI, in fact, was a joint employer of the 240 employees with Leadpoint. The Board reviewed the temporary labor service agreement between BFI and Leadpoint, which was terminable at will by either party to the agreement, and which allowed BFI to reject any worker that Leadpoint referred to its facility, as evidence that BFI possessed control over Leadpoint employees. Moreover, while BFI did not participate in day-to-day work assignments, it did have unilateral control over specific productivity standards, which the Board described as a "clear and direct connection between BFI's decisions and employee work performance."

Finally, while BFI did not set employee wage rates, or provide employee benefits, the Board looked at the parties' cost-plus contract, in conjunction with a contractual provision restricting Leadpoint from paying employees more than BFI employees who performed the same work, as an indication of control. (The decision said, "BFI and Leadpoint are parties to a cost-plus contract, under which BFI is required to reimburse Leadpoint for labor costs plus a specified percentage markup. Although this arrangement, on its own, is not necessarily sufficient to create a joint-employer relationship, it is coupled here with the apparent requirement of BFI approval over employee pay increases. Thus, after new minimum wage legislation went into effect, BFI and Leadpoint entered into an agreement verifying that BFI would pay a higher rate for the services of Leadpoint employees.") The Board also noted that BFI set safety standards on its site that Leadpoint employees had to follow.

Dissent

In a strongly worded 29-page dissent, Board Members Philip A. Miscimarra and Harry I. Johnson said the decision "rewrites the decades-old test for determining who the 'employer' is." The dissent further challenged the decision as incorporating aspects of the "economic realities" test proposed by the General Counsel and as "impermissibly exceed[ing the Board's] statutory authority."

Implications

Browning-Ferris significantly broadens the definition of "employer" under the Act to include unrelated companies that might share some direct or even indirect control over each other's workforce. The decision upends 30 years of well-established Board precedent. Even more critical is the impact the decision could have on businesses that rely on nontraditional workforces (i.e., independent staffing services, subcontractors, distributors, and franchisees). They now will be exposed to unfair labor practice liability, collective bargaining obligations, and economic protest activity, including strikes, boycotts, and picketing based on working relationships with other companies with whom they have no ownership ties whatsoever.

Left unresolved by *Browning-Ferris* is how the Board's new joint employer analysis may affect the agency's *Oakwood Care Center* (343 NLRB 659 (2004)) approach to representation cases involving temporary employees working alongside the host employer's employees; at present, a union can represent a unit including both employers' employees only if both employers agree. Will this decision add impetus to a reported Board willingness to alter those arrangements, too?

Anticipation of the Board issuing a new standard may have affected the actions of other agencies. For example, the Occupational Safety and Health Administration recently began gathering information about the relationship between franchisors and franchisees, which suggests that it may contemplate citations against fast food and other franchisors for violations of the Occupation Safety and Health Act of 1970. It already had indicated it would regard temporary service employers and host employers as joint employers for OSHA liability in certain instances. It is also likely that the Equal Employment Opportunity Commission, which filed a friend-of-the-court brief in *Browning-Ferris,* will follow the Board's lead, along with the Department of Labor. This is based, in part, on the deference other agencies typically provide to the Board.

The immediate impact of the Board's decision, which will apply retroactively in representation cases, is significant. Many contractors and contractees, franchisor/franchisees, distributors and their representatives, and other companies that share common operations are now at risk for being classified as joint employers.

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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