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NLRB Throws Out Years of Joint-Employer Precedent – Adopts Two-Part Test For Joint-Employer Status

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The National Labor Relations Board (NLRB or Board) has thrown employers a curve by overruling 30 years of long-standing decisions that narrowed the circumstances under which a joint-employer relationship could be found to exist. In a closely-watched decision, the Board revised its joint-employer standard, dictating a broader two-step test that will result in entities that use contingent workers more likely being deemed joint employers for union representation purposes. *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015).

Two-Part Joint Employer Test

In its 3-to-2 decision, the Board reaffirmed a 1982 joint-employer standard under which the Board will find that two or more statutory employers are joint employers of the same employees if they share or codetermine the essential terms and conditions of employment. First, the Board will determine whether the putative employer has a common-law employment relationship with the employees in question. If that relationship exists, the Board then will determine whether the employer possesses sufficient control over the employees' essential terms and conditions of employment to permit meaningful collective bargaining.

Employer Need Not Exercise Control Over Employees

Over the past 30 years, joint-employer cases have defined the degree of control that an employer must assert over the workers to be deemed a joint employer. Those cases, including *Laerco* and *TLI*, required that the putative employer actually exercise control over the terms and conditions of employment to be deemed a joint employer. In addition, exercising that control had to be direct and immediate, not of a limited and routing nature. Simply possessing the authority to exercise control, without actually exercising that control, was not enough under long-standing Board law.

That requirement is now gone. The Board ruled, in *Browning-Ferris*, it will no longer require that a joint employer exercise its authority to control the terms and conditions of the employees' employment. The proper inquiry will be whether the statutory employer “possesses sufficient control over the work of the employees to qualify as a joint employer with” another employer. In addition, control exercised indirectly, such as through an

agent or intermediary, may be sufficient to establish joint-employer status.

BFI Deemed A Joint Employer With Temp Agency

After articulating its revised test, the Board applied it to the BFI case at hand. The case arose after a union sought to include certain workers at the BFI Newby Island Recyclery in a bargaining unit during a union election. The workers were employed by Leadpoint Business Services, a temporary labor services agency, and were assigned to work at BFI's recycling plant as sorters, screen cleaners and housekeepers. The contract between BFI and Leadpoint specifically stated that Leadpoint was the sole employer of the workers and there was no employment relationship between BFI and those workers.

The Board concluded that BFI was a joint employer of the workers with Leadpoint. Contributing factors leading the Board to determine that BFI is a common-law employer and shares or codetermines essential terms and conditions of employment include:

- BFI retained the right to require that Leadpoint meet or exceed BFI's own standard selection procedures and tests, requires drug tests and prohibits Leadpoint from hiring workers deemed to be ineligible for rehire by BFI;
- BFI retained the right to reject any worker that Leadpoint refers to its facility “for any or no reason” and to discontinue the use of any personnel that Leadpoint assigned to it;
- BFI managers had requested the immediate dismissal of certain workers due to misconduct and Leadpoint dismissed them from BFI's facility shortly afterward;
- BFI controlled the speed of the material streams and specific productivity standards for sorting;
- BFI managers assigned specific tasks that need to be completed, determined where workers are to be positions and exercised near-constant oversight of workers' performance;
- BFI identified the number of workers it needs, the timing of the shifts and when overtime is necessary, even though Leadpoint selects the specific employees who will do the work;
- Despite Leadpoint determining pay rates, administering payroll and benefits and retaining payroll records, BFI prevented Leadpoint from paying employees more than BFI employees in comparable jobs and used a cost-plus model under the contract;
- After a new minimum wage law went into effect, BFI and Leadpoint entered into an agreement for BFI to pay a higher rate for the services of Leadpoint employees.

As a result of finding that BFI was a joint employer of these workers, the Board ordered the Regional Director to open and count the impounded ballots cast by the employees in the petitioned-for unit. If the employees voted for union representation, BFI will have to collectively bargain over the terms and conditions of employment over which it retains the right to

control.

Implications For Employers

The Board seeks to prevent companies from insulating themselves from the application of labor laws by using temporary or other contingent workforces and this new standard will further their goal. This new, broader standard for joint-employer status will make it easier for unions to include contingent workers into bargaining units at the facilities for which they are providing services. In addition, as pointed out by the dissent, this change "will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts and picketing."

If your organization uses contingent workers, you should review your existing labor services agreements and, to the extent possible, renegotiate any terms that reserve your right to control the terms and conditions of the contingent workers' employment. You also should attempt to eliminate any functional oversight and decision-making to ensure that you are not exercising any control, whether directly or indirectly, over the contingent workers. The reservation of the right to dictate any terms or conditions of employment, or the actual exercise of that control in any way, is likely to lead you to be deemed a joint employer of those workers.

We will keep you posted on any new developments, including any appeals of this decision.

If you have any questions about this decision and joint-employer status, please contact me at BMumaugh@hollandhart.com or 303-290-1067.
