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September 2, 2015

NLRB Vastly Expands Joint-Employer Doctrine

As you may recall, in our 2014 year-end advisory, we predicted that, in 2015, the National Labor Relations Board ("NLRB" or "Board") would modify its joint-employer standard to make it much easier for unions and employees to establish joint-employer relationships under the National Labor Relations Act (the "NLRA" or the "Act").

Last Thursday, this prediction, unfortunately, came true. In a landmark 3-2 decision in *Browning-Ferris Industries of California*, 362 NLRB No. 186 (August 27, 2015), the NLRB overturned multiple NLRB decisions dating back more than 30 years and dramatically revised the joint-employer standard under the NLRA. As a result, the Board has created great uncertainty for many businesses operating through a wide-array of modern business relationships, such as contractor/subcontractor, franchisor/franchisee, parent/subsidiary, user/supplier, etc. In a 21-page majority decision — followed by a nearly 30-page scathing dissent — the Board majority removed what it claimed were extra requirements that had been improperly grafted onto the joint-employer standard over the last several decades and ruled that exercising "direct, immediate control" over workers would no longer be a requirement for finding joint employer status under the NLRA. Rather, joint-employer status may now be found where the putative joint employer exercises mere "indirect control" over workers' terms and conditions of employment, or simply reserves the right to exercise such control (even if it has never actually done so).

Case Background

In 2014, the International Brotherhood of Teamsters, Local 350 (the "Union") filed a petition seeking to represent 240 employees of Leadpoint, a subcontractor in California performing sorting, screen cleaning, and housekeeping services. In that petition, the Union claimed that Browning-Ferris, a waste and recycling services company, was a joint employer because it contracted with Leadpoint, pursuant to a temporary labor services agreement, to obtain the services of Leadpoint's employees.

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The Regional Director for NLRB Region 32 issued a decision and direction of election finding that, based on well-established law, Leadpoint was the sole employer because, *inter alia*, it had sole responsibility for recruiting, hiring, disciplining, evaluating, directing, and terminating the employees in question. An election was held to determine whether the Leadpoint employees wanted to be represented by the Union; however, the ballots were impounded after the Union filed a request for review of the Regional Director's decision. In the Union's request for review, it urged the Board to find that Browning-Ferris and Leadpoint were joint employers under existing Board law or, alternatively, to adopt a new joint-employer test that would enable this result. The Board granted the Union's petition for review in April 2014 and sought briefs from the litigants and other interested parties.

The Board's Decision

Under prior Board precedent, the test of whether two entities were joint employers focused on their respective ability to directly and immediately control the essential terms and conditions of the workers' employment, such as through hiring, discipline, termination, suspension, etc. If the control exercised by a putative joint employer was reserved contractually but not exercised in practice, merely "indirect," or "direct" but "limited and routine," no joint-employment relationship would be found. This remained the governing legal standard for more than thirty years and has served as a legal underpinning for many modern business arrangements in existence today.

Claiming a need to revisit this standard in light of the proliferation of contingent workers in the economy, and citing its statutory obligation to keep NLRB law current with the realities of the modern workplace, the Board majority ruled that two or more entities will now be deemed joint employers of a single workforce if (1) they are both employers within the meaning of the common law, and (2) they share or codetermine those matters governing the essential terms and conditions of employment. In defining this standard, the Board held that the initial inquiry will be whether a common-law employment relationship exists with the employees in question (*i.e.*, the common-law right to control test). If this common-law requirement is satisfied, the inquiry then becomes whether the putative joint employer possesses sufficient control over employees' "essential terms and conditions of employment to permit meaningful collective bargaining." To determine whether sufficient control exists, the Board majority stated that it will consider – among other factors – whether an employer has directly or indirectly exercised control over essential terms and conditions of employment, or reserved for itself the authority to do so.

Applying its new standard to the case at hand, the Board majority ruled that Browning-Ferris is a joint employer of Leadpoint's employees. Specifically, the Board found that Browning-Ferris reserved the right in its temporary labor services agreement to directly or indirectly control various aspects of the Leadpoint workers' employment, including with respect to their hiring, firing, wages, hours, and

supervision, and *actually* exercised direct or indirect control over several aspects of their work. The upshot of this ruling is that Browning-Ferris will be required to recognize and bargain with the Union should it prevail in the impounded election. The company will also have to confront the ongoing possibility of joint liability for any unfair labor practices committed by Leadpoint, even in cases where it may have had no actual knowledge of the alleged statutory violations.

In their lengthy dissent, Board Members Philip Miscimarra and Harry Johnson began by noting that "the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships" and criticized the majority's new test as contrary to Congressional intent, the common law, and long-standing Board and federal court precedent. In addition, the dissent argued that the majority's opinion impermissibly revives the "economic realities" test, which had been specifically rejected by Congress under the 1947 Taft-Hartley amendments to the NLRA. The dissent decried the majority's new joint-employer standard as "impermissibly vague and overbroad" and warned that it will have "substantial adverse consequences" on the collective bargaining process and the administration of the NLRA, as well as on employers, employees, contractors, and the economy as a whole.

Although *Browning-Ferris* will likely be challenged in the federal courts, the entire appeals process could take years to reach a resolution. Meanwhile, Congressional efforts to reverse the Board's decision might go nowhere, as there is likely insufficient support among Democrats to help overcome a Senate filibuster, notwithstanding current Republican-control of Congress.

The Board's decision reflects a sea change in the law that will likely pose significant financial and legal risks for many businesses going forward. Companies should take action now to minimize the risk of joint-employer liability arising from their relationships with their subcontractors, franchisees, staffing agencies, vendors and related entities. It is imperative that companies re-evaluate these business relationships from the bottom-up in light of the far-reaching inquiry that will now be undertaken by the NLRB under its new rule. It should be added that other federal agencies have been spearheading efforts in this regard as well. For example, the U.S. Department of Labor ("DOL") recently announced that it is exploring an expansion of joint-employer liability for OSHA violations, and the DOL's Wage and Hour Division has ratcheted up actions against "deep pocket" companies alleged to be co-employers or joint-employers. The Equal Employment Opportunity Commission not only filed an *amicus* brief in *Browning-Ferris* urging the Board to expand its joint-employer doctrine but has been arguing for expanded liability on this basis as well before the federal courts.

If you have any questions about the issues discussed in this article, please contact Philip Repash or another attorney at the firm at (212) 758-7600.