Advisory

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NLRB Broadens Joint Employer Test to Include Indirect Control

Last week the National Labor Relations Board issued a decision in *Browning-Ferris Industries,* reversing decades of precedent to revise the standard it will use to determine when two companies are joint employers. The NLRB's new standard significantly expands the reach of joint employer status in ways that will make businesses responsible for unfair labor practices and collective bargaining obligations that arise from their contractors' employees. The decision affects both unionized and non-union employers, as well as companies that may have no employees of their own.

The NLRB held that two or more otherwise unrelated entities may be found to be a joint employer of the same employees under the National Labor Relations Act "if they 'share or codetermine those matters governing the essential terms and conditions of employment.' In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."

Before the *Browning-Ferris* ruling, the prevailing doctrine typically required an entity to exert "direct and immediate" control over working conditions of employees to be considered a joint employer. Relevant factors in making this assessment included the right to hire, terminate, discipline, supervise and direct the employees. Under this test, the control exercised by the putative joint employer had to be actual, direct and substantial—not simply theoretical, possible, limited or routine.

The NLRB has now rejected the requirement of "direct and immediate" control in evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer. Under the new standard, the NLRB will consider, among other factors, whether an employer has exercised control over terms and conditions of employment *indirectly,* such as through an intermediary, or whether it has reserved the authority to do so. Under the new test, the phrase "terms and conditions of employment" continues to include those matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction, but the NLRB also expanded this to include, "dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance."

In *Browning-Ferris*, the International Brotherhood of Teamsters sought to represent a unit consisting of employees employed by Browning-Ferris Industries of California, Inc. and Leadpoint Business Services, a staffing firm providing temporary employees to clean and sort recycled products to Browning-Ferris, as joint employers. Applying then-current NLRB law, the Regional Director found Leadpoint to be the sole employer of the employees, and directed an election. After agreeing to review the decision and direction of election, the NLRB issued a notice in April, 2014 inviting interested parties to submit briefs addressing whether the NLRB should adopt a new joint-employer standard and, if so, what that standard should be.

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If you have any questions about this Advisory, please contact:

PETER LEFEBER
203.498.4329
plefeber@wiggin.com

JOHN ZANDY
203.498.4330
jzandy@wiggin.com

BETHANY APPLEBY
203.498.4365
bappleby@wiggin.com

CAROLINE PARK
203.498.4317
cpark@wiggin.com

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Applying its newly-stated standard to the case at hand, the NLRB found that Browning-Ferris is a joint employer of the employees provided to it by Leadpoint. Specifically:

- **Hiring, Firing, and Discipline.** The NLRB found that while Browning-Ferris does not participate in Leadpoint's day-to-day hiring process, it imposes conditions that affect Leadpoint's ability to make hiring decisions. For example, it requires that Leadpoint employees meet or exceed the selection procedures and tests Browning-Ferris used for its own employees, requires that all applicants undergo and pass drug tests, and prohibits Leadpoint from supplying to it employees that were not eligible for rehire by Browning-Ferris.

- **Supervision, Direction of Work, and Hours**. Browning-Ferris exercises control over productivity standards and speed of the sorting streams, and dictates the number of employees, the timing of shifts, and when overtime is necessary.

- **Wages.** Browning-Ferris prohibits Leadpoint from paying employees more than Browning-Ferris employees performing comparable work, creating what the NLRB characterized as a de facto wage ceiling.

In light of this ruling, every business should evaluate the risk of joint employer liability with third parties. This includes, but is not limited to, any entity that outsources work, those that regularly use contractors, such as janitorial services, or staffing agencies. The NLRB's new test involves a factual inquiry in every case, and companies are well-advised to review both their contracts and practices with these types of entities to assess the ways they could be considered to indirectly control the terms and conditions of employment of third parties' employees. If a company is found to be a joint-employer, it could be required to bargain collectively with its contractors' employees over the terms and conditions of employment that it may control, and could potentially face liability for unfair labor practice charges.

Businesses should prepare now for the potential that they must defend against organizing drives and unfair labor practice charges filed not only by their own employees, but against similar claims naming their contractors, subcontractors, franchisees, vendors and other entities that contract with them.

The ruling could have implications for franchisors, whose franchise agreements and business practices often mistakenly suggest some level of control, regulation, or oversight over the employees of their franchisees. The dissent in Browning-Ferris also raised this concern, particularly in light of franchisors' obligations under trademark law to "police" the use of their marks. Over the past couple of years, franchisors have experienced increased efforts to make them joint employers of their franchisees' employees for various purposes. As a result, the franchise community has been following developments in this area of law closely.