FIRST ALERT

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NLRB Takes Aim at Contingent Workforce Arrangements

On August 27, 2015, the National Labor Relations Board fired its latest salvo against employers, this time lowering the threshold for a finding of "joint employer" status under the National Labor Relations Act. In Browning-Ferris Industries of California, Inc., the Board decided, in a 3-2 decision along partisan lines, that Browning-Ferris Industries of California, Inc. was a joint employer with Leadpoint Business Services, Inc., a staffing firm that supplied workers to a recycling plant owned by Browning-Ferris. As a result, Browning-Ferris could be obligated to recognize and bargain with the union selected by Leadpoint employees in an NLRB-supervised election.

"Under the new standard, actual and direct control of terms and conditions of employment is no longer the only indicia of joint employer status."

For labor law purposes, joint employer status means that two separate but distinct businesses have authority to assert authority over the working conditions of a single group of workers. For decades, the NLRB found that one business could be held liable for labor law matters at another employer only if it exercised direct and actual control over the workers in question. That approach meant that companies could keep at arms length workers supplied by staffing firms, temporary agencies, and employees of franchisees.

The Board began its review of the joint employer standard by observing that over the past 30 years, the procurement of workers through staffing and subcontracting arrangements -- the so-called contingent workforce -- has steadily expanded. The Board cited Bureau of Labor Statistics data that as of August 2014, employment by temporary staffing firms (just one subset of the contingent workforce) numbered 2.87 million workers, or 2% of the nation's workforce). Consistent with its congressional mandate "to apply the provisions of the National Labor Relations Act to the complexities of industrial life," the Board undertook to revisit its standard for joint employer status.

The Board's prior longstanding joint employer standard has its genesis in a 1982 case from the Third Circuit Court of Appeals in which the court found that joint employment under the NLRA is based on a finding that "one employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the

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employees who are employed by the other employer." NLRB v. Browning-Ferris Industries of Pennsylvania, 691 F.2d. 1117 (3d Cir. 1982). Beginning in 1984, the Board interpreted the Third Circuit's decision to find that two separate entities are joint employers when "they share or co-determine those matters governing the essential terms and conditions of employment." *TLI, Inc.,* 271 NLRB 798, 798 (1984). Joint employer status "requires a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *Laerco Transportation*, 269 NLRB 324, 325 (1984). Additionally, "the essential element in [joint employer] analysis is whether a putative joint employer's control over employment matters is *direct and immediate." Airborne Freight Co.,* 338 NLRB 597 (2002). In assessing control, it is the "actual practices of the parties" which govern, not the potential or contractually reserved right to control, which matter. *AM Property Holding Corp.,* 350 NLRB 998, 1000 (2007).

The Board in *Browning-Ferris Industries of California, Inc.* was highly critical of the joint employer standard that developed after 1984. Focusing on pre-1984 rulings, it observed that *TLI* and *Laerco* launched a 30-year period during which the Board inexplicably and without principle narrowed the joint employer test. Since 1984, "the Board's decisions have implicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status. The Board has foreclosed consideration of a putative employer's right to control workers, and has instead focused exclusively on its actual exercise of that control -- and required its exercise to be direct, immediate, and not limited and routine." *Browning -Ferris Industries of California*, at 10. The new *Browning-Ferris* decision greatly emphasizes the contractual right to control:

> Where a user employer reserves a contractual right to set a specific term or condition of employment for a supplier employer's workers, it retains the ultimate authority to ensure that the term in question is administered in accordance with its preferences. Even where it appears that the user, in practice, has ceded administration of a term to the supplier, the user can still compel the supplier to conform to its expectations. In such a case, a supplier's apparently independent control over hiring, discipline, and work direction is actually exercised subject to the user's control. If the supplier does not exercise its discretion in conformance with the user's requirements, the user may at any time exercise its contractual right and intervene. Where a user has reserved authority, we assume that it has rationally chosen to do so, in its own interest. There is no unfairness, then, in holding that legal consequences may follow from this choice.

Id. at 13-14.

According to this Board, it is the *right to control the work* of employees and their terms of employment that is probative of joint employer status. "The core of the Board's current joint-employer standard—with its focus on whether the putative joint employers "share(s) or codetermine(s) those matters governing the essential terms and conditions of employment"—is firmly grounded in the concept of control that is central to the common-law definition of an employment relationship." *Id.* at 13. The Board addressed the common law, finding that "under

common law principles, the right to control is probative of an employment relationship -- whether or not that right is exercised." *Id.* The Board concluded:

> The common-law definition of an employment relationship establishes the outer limits of a permissible joint-employer standard under the Act. But the Board's current joint-employer standard is significantly narrower than the common law would permit. The result is that employees covered by the Act may be deprived of their statutory right to bargain effectively over wages, hours, and working conditions, solely because they work pursuant to an arrangement involving two or more employing firms, rather than one. Such an outcome seems clearly at odds with the policies of the Act.

Id. at 15. Further emphasizing the centrality of the right to control, the Board continued:

> Where the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user's guidance, makes specific personnel decisions and administers job performance on a day-to-day basis, employees' working conditions are a byproduct of two layers of control. The Board's current focus on only direct and immediate control acknowledges the most proximate level of authority, which is frequently exercised by the supplier firm, but gives no consideration to the substantial control over workers' terms and conditions of employment of the user.

Id. at 14-15.

Striking the death blow to 30 years of Board precedent, the Board overruled *Laerco, TLI, A&M Property, and Airborne Express,* and concluded, "The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect." *Id.* The Board then announced the new joint employer standard, which it described as a return to the pre-1984 test endorsed by the Third Circuit in the 1982 *Browning-Ferris* case:

> The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.

Id. at 15. "Essential terms and conditions of employment," the Board held, are co-extensive with the NLRA's concept of mandatory subjects of bargaining, and includes matters relating to hiring, firing, discipline, supervision, and direction, along with wages, hours, and other terms and conditions which are mandatory subjects of bargaining, such as 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. *Id.*

The Board's decision reversed the NLRB Regional Director's earlier finding that Leadpoint Business Services, Inc. was the sole employer of the workers it supplied to Browning-Ferris Industries of California, Inc. at the recycling plant.

As a result, the ballots from a union vote conducted in April 2014 will now be counted, and, should the union prevail, both Leadpoint and Browning-Ferris Industries will be obligated to recognize and bargain with the union.

Meaning for Employers

A finding of joint employer status likely carries with it three principal labor law implications:

1. *Representation proceedings*: when a union seeks to organize workers, both employers will be parties to the representation proceedings, and if the workers choose union representation, then both employers will be obligated to recognize and negotiate with the union.
2. *Collective bargaining agreements*: the non-union company can be subject to the terms of an existing collective bargaining agreement.
3. *Liability for unfair labor practices*: joint employers are each responsible for the conduct of the other, such that one party to the joint employer relationship can be deemed liable for the other employer's failure to bargain or acts of discrimination in violation of the NLRA.

Browning-Ferris Industries of California, Inc. expands the universe of business relationships which may give rise to joint employment status. The Republican members, in dissent, noted that the new joint employer test will apply to a wide range of arrangements that companies use to structure their affairs, including user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, creditor-debtor, and consumer-contractor business relationships.

Under the new standard, actual and direct control of terms and conditions of employment is no longer the only path to joint employer status. Instead, indirect control of terms and conditions of employment, or a reserved contractual right to control terms and conditions of employment, may be enough. Thus, employers who rely on contract workers and temporaries should review their relationships with the entities which supply them with workers and services, and assess the amount of control over terms and conditions of employment which those arrangements provide to them. That assessment should begin with review of the written contracts between the two entities, with an eye towards identifying any reserved (even if unexercised) authority to control terms and conditions of employment. Finally, while this decision doesn't squarely address the franchise model which is currently under review by the NLRB in cases against McDonald's, there are enough similarities between the contractor-subcontractor relationship and the franchisor-franchisee relationship that this decision could be a harbinger of how the Board will rule in the McDonald's cases.

If you have questions about how this new ruling by the NLRB will affect your business, please contact any of the Labor & Employment lawyers at Calfee, or your regular Calfee contact.