

One Minute Memo®



Another Potential “Hook” For Entities Doing Business with Federal Contractors: The NLRB’s *Browning-Ferris* Decision

By Annette Tyman and Meredith Bailey

The new and expansive standard for joint-employer status adopted by the National Labor Relations Board (NLRB) last week has significant implications that extend beyond employer liability for collective bargaining obligations or unfair labor practices under the National Labor Relations Act. [As discussed here](#), the Board’s *Browning-Ferris* decision sets the stage for other federal agencies to expand enforcement efforts by asserting jurisdiction over entities that not only exercise control over another entity’s workforce, but also to those that have a direct or indirect “right to control” the workforce of another entity.

The Office of Federal Contract and Compliance Programs (OFCCP), which has pursued an aggressive enforcement agenda under the Obama Administration, could apply the standards in the *Browning-Ferris* decision to bolster its reach over organizations that provide services or supplies to federal contractors, even if the entity itself holds no contracts with the federal government. Federal contractors can have hundreds, sometimes thousands, of relationships with subcontractors, suppliers, and vendors. Post-*Browning-Ferris*, these entities may find themselves at increased risk of being classified as a “single entity” with a federal contractor and, in turn, on the hook for onerous affirmative action requirements.

The OFCCP’s “Single Entity” Test

A business or organization without government contracts may still be covered under laws enforced by the OFCCP based on an integrated relationship or “single entity” status with a government contractor. The OFCCP uses a five-factor test for determining whether such a relationship exists. The test requires the OFCCP to consider whether:

- the entities have common ownership;
- the entities have common directors and/or officers;
- **one entity has de facto day-to-day control over the other through policies, management or supervision of the entity’s operations;**
- **the personnel policies of the entities emanate from a common or centralized source; and**

- **the operations of the entities are dependent on each other, e.g., services are provided principally for the benefit of one entity by another and/or both entities share management, offices, or other services.**

In particular, the NLRB's ruling in *Browning-Ferris* could signal changes in how the OFCCP interprets and analyzes the last three factors listed above. While OFCCP guidance states that an organization need not meet all five factors to be considered a single entity with a covered federal contractor, the OFCCP recognizes that "centralized control over labor relations and personnel functions" is the most important factor when considering single-entity status. Accordingly, separate entities may now find themselves caught up in a single-entity relationship given the shift in labor relations policy under *Browning-Ferris*. Moreover, the OFCCP may enforce a more liberal interpretation of "day-to-day control" of operations to include entities that have a direct or indirect "right to control" the workforce of a separate organization.

Extending OFCCP Requirements to Temporary Employees

For federal contractors, there has been much uncertainty as to whether federal contracting obligations attach to temporary workforces and alternative staffing models. If the OFCCP follows the Board's reasoning in *Browning-Ferris*, the agency may find that its previous standards failed to keep pace with changes to the American workforce, including the fact that more than 2.8 million workers are now employed through temporary agencies.

Indeed, if the OFCCP uses the *Browning-Ferris* decision as further support to flex its jurisdictional arm, the following business relationships, among others, may hold special significance for federal contractors and their vendors and suppliers:

- Any federal contractor that regularly uses contractors, such as a cleaning or janitorial services, maintenance services, caterers, or a management company to staff and operate its business;
- Any federal contractor that outsources some of the non-core work integral to its business model, such as a manufacturer that contracts with a trucking company for shipping; and
- Any federal contractor that uses a staffing agency to obtain additional or temporary help.

Implications for Companies Doing Business with Federal Contractors

As noted, the *Browning-Ferris* decision may have far reaching implications for companies doing business with federal contractors. Such a result would involve complex, burdensome and costly measures to come into compliance with the OFCCP's regulations.

In addition to non-discrimination obligations, companies found to be a "single entity" with a federal contractor would also be subject to burdensome data collection, reporting and auditing requirements, including development of an affirmative action program. Among other requirements, covered contractors are required to collect, maintain, and self-audit applicant data by gender, race, ethnicity, disability and veteran status. They must administer certain self-identification forms to applicants pre-offer and post-offer and administer a disability self-identification survey to its workforce. There are mandatory job posting requirements, affirmative action notices that must be distributed, and training requirements. Federal contractors must also engage in targeted outreach and efforts designed to employ women, minorities, individuals with disabilities and protected veterans.

Perhaps coincidentally, the OFCCP's site describing its single entity test, has been down since the *Browning-Ferris* decision was released. We will keep you updated as further developments related to *Browning-Ferris* and its impact on the federal contracting community unfold.

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