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Management Alert

How Will *Browning-Ferris* Change the Test for Joint-Employer Status for Union and Non-Union Employers?

By Richard L. Alfred, Marshall B. Babson, Joshua L. Ditelberg, Bradford L. Livingston, Stuart Newman, and Karla E. Sanchez

In a ruling that will affect most business relationships and extends far beyond either labor law or the concept of employment generally, the National Labor Relations Board ("NLRB" or "Board") issued a much awaited decision today, *Browning-Ferris Industries of California* ("*Browning-Ferris*"), 362 NLRB No. 186 (August 27, 2015), *found here*, that expansively broadened the definition of who is a joint employer -- an otherwise unrelated entity that does not hire, fire, supervise or determine the wages and benefits of another employer's employees but that nevertheless bears responsibilities to those employees under the National Labor Relations Act ("NLRA" or the "Act").

Under the Board's newly expanded test, a 3-2 majority (Chairman Mark Gaston Pearce and Members Kent Hirozawa and Lauren McFerran) held two or more otherwise unrelated employers may be found to be a joint employer of the same employees under the NLRA "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." Affecting both unionized and non-union companies (and even entities that have no employees of their own) alike, the decision has broad implications for other employment laws and government agencies such as the Department of Labor, EEOC and OSHA.

Case Background

This case arose after the International Brotherhood of Teamsters, Local 350 (the "Union") filed a representation petition seeking to represent sorters, housekeepers and screen cleaners employed by Leadpoint, a subcontractor performing sorting, screen cleaning, and housekeeping work. The Union's petition claimed that Browning-Ferris, a waste and recycling services company, was a joint employer with Leadpoint because it contracted with Leadpoint to obtain temporary labor to sort materials, clean the screens on the sorting equipment, and otherwise clean the recyclery.

After a hearing, the Regional Director for NLRB Region 32 issued a decision and direction of election holding that -- under established law and agency principles -- Leadpoint was the sole employer because, among other things, it alone recruited, hired, counseled, disciplined, reviewed, evaluated, and terminated its employees. As a result, an election was held to determine whether Leadpoint's employees wanted to be represented by the Union. The ballots, however, were impounded

after the election because the Union filed a request for review of the Regional Director's decision that Browning-Ferris and Leadpoint were not joint employers. The Board granted the petition for review on April 30, 2014, and issued its decision today.

The Board's Established Joint-Employer Doctrine

Until today, the Board's joint employer doctrine has comported with the law of agency: a putative employer was found to be a joint employer if there was a showing that the putative employer "meaningfully affect[ed] matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction." Laerco, 269 NLRB 324, 325 (1987). Thus, two or more entities were joint employers if they "share[d] or codetermine[d] those matters governing the essential terms and conditions of employment." Id. No single fact was dispositive in determining control over employees' terms and conditions of employment. Rather, the question of joint employer status needed to be assessed based on the "totality of the facts of the particular case." *Southern California Gas Co.*, 302 NLRB 456, 461 (1991).

The Board's Holding

In today's decision, the three Member Board majority opined that it "decided to restate the Board's legal standard for joint-employer determinations and make clear how that standard is to be applied going forward." The majority's new test purports to "return to the traditional test used by the Board … 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. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may 'share' control over terms and conditions of employment or 'codetermine' them [.]"

Importantly, however, the Board "will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a 'limited and routine' manner. Accordingly, we overrule *Laerco*, *TLI*, *A&M Property*, *and Airborne Express, supra*, and other Board decisions, to the extent that they are inconsistent with our decision today. 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."

In dissent, Board Members Philip Miscimarra and Harry Johnson found the majority decision to be contrary to Congressional intent, common law understandings of co-employment relationships, and Board and court precedent. Perhaps most significantly, the dissent argues that the majority opinion impermissibly resurrects an "economic realities" test specifically rejected by Congress in enacting the 1947 Taft-Hartley amendments to the NLRA. Moreover, in practical terms, the dissent believes that the majority's new test is "impermissibly vague and overbroad and will have substantial adverse consequences" to employers, putative contractors, and employees alike.

Implications of the NLRB's Ruling

The NLRB's decision vastly expands the types and number of entities that can be held responsible for unfair labor practice violations and who may be held to have collective bargaining obligations regarding employees of a totally separate, independent employer. Notwithstanding what the Board claims to be accomplishing, in actuality it is recasting the joint employer test from one based upon a close reading of actual relationships between the alleged joint employers; and, instead, considering what their relationship ***might*** be expanded to encompass. Then, based upon that speculation, the Board's decision bootstraps such possible relationships into a concrete joint employer finding.

Every industry sector and business is potentially affected by today's decision, including those who -- in reliance on Supreme Court precedent and over 30 years of settled NLRB law -- have structured their business arrangements with the understanding that absent the direct control necessary for a true employer-employee relationship, the entity will not be a joint employer

under the NLRA. For example, today's decision potentially affects, among others, the following:

- Any business that regularly uses contractors, such as a cleaning or janitorial services, maintenance services, caterers, or a management company to staff and operates its business;
- Investors, real estate holding companies and general contractors;
- Any entity 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;
- Any entity that uses a staffing agency to obtain additional or temporary help;
- Any franchisor that contracts with others via franchise agreements; and
- Any entity with a relationship to a subsidiary or other corporate entity.

In addition, the NLRB's decision may be a precursor to the approach taken by other government agencies:

- The NLRB's expanded concept of a "joint employer" parallels recent efforts by the U.S. Department of Labor, Wage and Hour Division (WHD). With a particular focus on franchisors, contractors, and businesses in the restaurant, construction, staffing, agricultural, janitorial and hotel industries, WHD is seeking to hold large companies responsible for wage and hour compliance as to individuals whose services they benefit from--regardless of whether a direct employment relationship exists. Guidance this summer from the WHD on how to distinguish employees from independent contractors reflects a similarly sweeping view of what counts as an employment relationship. The WHD's theory--if the courts accept it--could support a dramatically expanded joint employer doctrine that might require businesses to defend wage and hour claims by individuals whom they have never considered their employees.
- In its amicus brief, the Equal Employment Opportunity Commission (EEOC) urged the Board to abandon its prior standard and adopt the common law agency test used by the EEOC under Title VII. While the EEOC's test is broader than the previous NLRB standard, both tests focus on actual control of the essential terms and conditions of employment. Since the Board has now removed this critical counterweight in favor of a new standard based on "potential" or "unexercised" control over the employment relationship, the EEOC will almost certainly see it as an opportunity to expand its own definition of joint-employment and to take a more aggressive enforcement stance against potential joint employers -- both at the administrative level and in litigation. This would translate to significant expansion of existing and future investigations, including broad and expensive requests for information and potentially even subpoenas for information that is not readily accessible by most employers. It could also mean new EEOC-initiated and class/collective actions against employers that exercise little or no control over their contingent workforce.
- The Office of Federal Contract Compliance Programs (OFCCP) will use the decision to bolster the five-factor "single entity" analysis it uses to exercise jurisdiction over businesses that do not hold federal contracts. Specifically, the NLRB's ruling will have implications for the following factors: 1) whether one entity has de facto day-to-day control over the other through policies, management or supervision of the entity's operations; 2) whether the personnel policies of the entities emanate from a common or centralized source; and 3) whether the operations of the entities are dependent on each other (e.g., services are provided principally for the benefit of one entity by another or the entities share management, offices, or other services).
- We have seen an increase in litigation alleging that various entities are joint employers under ERISA, thereby arguably entitling various excluded individuals to benefits under plans. While language in many benefit plans may address this risk, it is unclear whether this new standard announced in *Browning-Ferris* will change this analysis, or at the very least motivate excluded "employees" to pursue claims for additional benefits in litigation.

Whether in this or another case, the federal appellate courts and the Supreme Court will likely eventually review today's

approach by the NLRB and any eventual similar decisions by other government agencies.

Actions to Take

In response to today's decision, every business should assess the risk of joint employer liability with its suppliers, vendors, contractors, franchisees, service providers or others. There is no single or simple solution to the issue; each relationship will need to be considered in light of -- as the NLRB puts it -- the "industrial realities" to develop the most effective responses. In the meantime, businesses that want to respond proactively and attempt to protect themselves from today's decision, may want to take several steps:

- Review and modify service agreements with third parties;
- Ensure that third parties establish separate terms and conditions of employment, employment policies and employee handbooks;
- Distinguish the work performed by your employees from the work performed by the other entities' employees;
- Where possible, establish payment structures for service providers not based on wage rates and hours of work rendered by non-employees; and
- Consider broad indemnification agreements with third parties.

While each situation will be unique and require a thoughtful analysis of the facts, relationships with third parties and business needs, steps can be taken to reduce the risk of a joint employer determination.

Conclusion

Today's decision has significant implications for the economy and the ways that organizations structure their business operations. 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 them their contractors, subcontractors, franchisees, vendors and other entities who contract with them.

Richard Alfred is partner in Seyfarth's Boston office, *Marshall Babson* is counsel in the firm's New York office, *Joshua Ditelberg* and *Bradford Livingston* are both partners in the firm's Chicago office, *Stuart Newman* is a partner in the firm's Atlanta office, and *Karla Sanchez* in an associate in the firm's Chicago office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Richard Alfred at *ralfred@seyfarth.com*, Marshall Babson at *mbabson@seyfarth.com*, Joshua Ditelberg at *jditelberg@seyfarth.com*, Bradford Livingston at *blivingston@seyfarth.com*, Stuart Newman at *snewman@seyfarth.com*, or Karla Sanchez at *ksanchez@seyfarth.com*.