THE NATIONAL LABOR RELATIONS BOARD ISSUES PIVOTAL DECISION REDEFINING JOINT EMPLOYERS

Labor & Employment Alert
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On August 27, 2015, the National Labor Relations Board issued its long-anticipated decision revising the standard for determining joint-employer status under the National Labor Relations Act. As a result of the NLRB's decision, companies that rely upon contract labor, such as workers provided by a staffing agency or subcontractor, are increasingly likely to be found to be "employers" of such workers and, therefore, exposed to bargaining obligations and unfair labor practice charge risks involving those workers.

In *Browning-Ferris, Industries of California, Inc.*, a sharply divided NLRB reversed a regional director's finding that Browning-Ferris Industries (BFI) was not a joint employer of certain workers at its Newby Island recycling facility. The workers at issue were directly employed by another firm that had sole control in (1) setting employee pay and providing benefits; (2) recruiting, hiring, counseling, disciplining, and terminating employees; and (3) supervising through onsite managers and leads. However, the NLRB considered both companies' direct and indirect control over the workers. The NLRB noted that BFI had reserved the right to set procedures for hiring, to request that the firm's workers be dismissed, and to maintain productivity standards for work, and effectively set a wage ceiling at no more than a comparable BFI employee's pay. Thus, even though the other firm controlled much of the day-to-day activity of the workers, the NRLB found that BFI "shared or codetermined those matters governing the essential terms and conditions of employment," and it was therefore, the joint employer of the workers.

Under the NRLB's ruling in *Browning-Ferris*, two or more entities are "joint employers" of workers for purposes of the National Labor Relations Act if they (1) are both common law employers of the workers, and (2) share or codetermine those matters governing the essential terms and conditions of the workers' employment. The NLRB's holding represents a significant departure from its former standard, where the NLRB had required two entities to both *possess* the authority to control the terms and conditions of employees and *exercise* that authority directly, immediately, and not in a limited and routine manner. Now, the NLRB will examine whether an entity has potential or "reserved authority," regardless of whether it is exercised, before determining whether that entity is an employer for NLRA

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purposes.

The NLRB's decision is a blow for many businesses that rely upon contract labor through staffing agencies and subcontracting arrangements. The NLRB is expected to apply its newly broadened test for joint employment in pending cases involving fast food workers at franchise restaurants. For example, in another case pending before the NLRB, McDonald's Corporation has argued that it is not responsible for alleged labor violations of its franchisees.

While the decision is likely to be appealed, employers that have business relationships with staffing agencies, subcontractors, franchisees, distributors, and other similar businesses should analyze whether they might be joint employers of such other entity's employees. This may include reevaluating existing agreements and restructuring operations to ensure complete separation in employment decisions, considering indemnification clauses, and reviewing wage provisions. And where joint employment status does exist under the new test, employers should consider vulnerability to unfair labor practice charges and union organizing campaigns.

Please contact any of our labor and employment attorneys if you would like to discuss the implications of this case in greater detail.