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The NLRB expands legal standard for "joint employer" status.

When the NLRB determines that two separate entities constitute a "joint employer," the resulting legal consequences are as follows:

> (1) non-union employees can petition for an NLRB election against both entities that constitute a "joint employer," and if the NLRB certifies the election results in favor of the petitioning union, both entities have a duty to recognize and bargain with the union in good faith for a collective bargaining agreement ("CBA");
>
> (2) both entities that constitute a "joint employer" are necessary parties to any unfair labor practice charge proceedings initiated by either employees or by a union;
>
> (3) if and when a CBA is reached, both entities will be jointly considered the "employer" with potential liability for CBA violations or violations of federal labor laws enforced by the NLRB; and
>
> (4) if and when a CBA is reached containing a grievance and binding arbitration provision, both entities will be jointly subject to a duty to process grievances and submit grievances to binding arbitration in accordance with the applicable CBA terms.

In Browning Ferris Industries of California, Inc., dba BFI Newby Island Recyclery, 362 NLRB No. 186 (August 27, 2015), BFI contracted with Leadpoint staffing agency to assign Leadpoint employees to work inside BFI's recycling facility; the contract between BFI and Leadpoint included the following terms:

- Temporary labor services agreement terminable at-will by either party with 30 days' advance notice.
- Leadpoint is the sole employer of the employees it supplies.
- BFI and Leadpoint have separate supervisors at the facility.
- Separate HR departments.
- Leadpoint recruited, interviewed, tested, selected, and hired employees assigned to work at BFI.
- BFI retained authority to "reject any personnel, and . . . discontinue the use of any personnel for any or no reason."
- Agreed upon wage rate schedule.
- BFI established work schedule of Leadpoint employees assigned to work at BFI.

The NLRB ruled that BFI and Leadpoint were "joint employers" under the NLRA because BFI had direct or indirect control over the workers' essential terms and conditions of employment, and BFI contractually reserved the authority to control those terms/ conditions. In so ruling, the NLRB established a new "joint employer" standard for future cases; two separate entities are now "joint employers" under the NLRA when both of the following are true:

> (1) "they are both employers within the meaning of the common law," and
>
> (2) they "share or codetermine those matters governing the essential terms and conditions of employment."

The NLRB also made clear in *Browning-Ferris* that it will find "joint employer" status when either of the following is true:

> (1) two separate entities directly **or indirectly** exercise authority over workers' terms/ conditions of employment, **or**
>
> (2) one entity contractually reserves authority to control the terms and conditions of employment applicable to workers ostensibly employed by another entity (i.e., even if the entity does not exercise such authority).

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Will Browning-Ferris turn out to be a monstrously overbroad definition of "joint employer" that turns federal labor law on its head to the detriment of all concerned? Only time will tell. However, the following point is clear – the traditional, commonplace arrangement between private sector employers and staffing or "temp" agencies will likely result in a "joint employer" finding by the NLRB. Under Browning-Ferris, both entities are now likely to be considered "joint employers" subject to the legal consequences explained above.

The Browning-Ferris decision has drawn the attention of lawmakers. On September 29, 2015, the U.S. House of Rep. Subcommittee on Health, Employment, Labor, and Pensions, held a legislative hearing on House Bill 3459, the Protecting Local Business Opportunity Act, which, if enacted, would exclude "indirect" or "potential" control over terms and conditions of employment as a basis for finding that two entities are a "joint employer."

For further guidance on this decision and its implications, please contact a member of our Labor and Employment Law Practice Group.

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