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Look for Dramatic Increases in the Number of "Joint Employers" After NLRB's *Browning-Ferris* Decision

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Being declared a "joint employer" under the National Labor Relations Act for purposes of collective bargaining requires a business to be involved in numerous union-related issues such as: union representation issues like organizing campaigns and elections; collective bargaining and the administration of collective bargaining agreements; defense of unfair labor practice allegations; and, being the target of labor disputes and related strikes and picketing. Staffing arrangements whereby companies enter into agreements to outsource or subcontract certain types of work not otherwise performed by its employees typically are not intended by the parties to be "joint employment" relationships. However, the National Labor Relations Board's (the Board) decision in *Browning-Ferris Industries of California, Inc.*, decided August 27, 2015, will subject numerous employers utilizing staffing, subcontracting and franchising arrangements to a panoply of joint employer obligations. Under the Board's new joint employment standard, a company may be considered a joint employer by merely reserving the authority to control limited terms and conditions of employment of a contractor's employees – even if it never actually exercises that control. Moreover, the new standard employs a multi-factored common law analysis of expansively defined "terms and conditions" and ultimately, the Board's determination as to whether designating a company a joint employer "would serve the purposes of the [National Labor Relations] Act" will control.

The facts involved in the recent decision are similar to many on-site staffing arrangements. Browning-Ferris Industries of California, Inc. (BFI) operates a facility to process waste materials for recycling. BFI employs various operators that are part of a bargaining unit. BFI has an agreement with Leadpoint Business Services (Leadpoint), which employs workers within BFI's facility to work on the lines to sort the materials, clean the screens or clear jams, or to clean the facility itself. Leadpoint employs on-site supervisors who schedule employees, oversee the work and coach the line leads. Leadpoint recruits and hires employees that meet BFI's criteria. The agreement also provides that Leadpoint has the sole responsibility to discipline and discharge Leadpoint employees, although BFI reserves the right to "reject" or "discontinue" any employee for any reason.

The NLRB Regional Director found that based upon the "traditional" test, BFI was not a joint employer of the Leadpoint employees. The Regional Director held that BFI does not "share or codetermine . . . the essential terms and conditions of employment."

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The Regional Director found that Leadpoint had sole control over pay, hiring, supervision and scheduling. The Board, in a 3-2 decision, disagreed and noted that the "traditional test" had never been "clearly and comprehensively explained" and that, as a result, the NLRB was in danger of failing its "responsibility to adapt the Act to the changing patterns of industrial life" and a new joint employer test was warranted.

Therefore, the Board held that two or more employers are considered joint employers for collective bargaining if they are both "common law" employers and "share or codetermine those matters governing the essential terms and conditions of employment." Specifically, the Board noted that BFI retained sufficient control over the essential terms and condition of Leadpoint employees' employment – even if BFI did not exercise that control.

The Board's decision applies to current staffing agreements, which may subject unwary employers to joint employer obligations. There are no safe harbors or arrangements that are immune from Board scrutiny. According to the dissenting opinion, the "number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited" and would include:

- insurance companies (because of policy language requiring employees to abide by specific safety and health requirements);
- banks or other lenders that require performance measures to secure or maintain financing;
- franchisors that promote quality control or oversight;
- any business that negotiates specific quality or product requirements with suppliers or contractors; and
- any company employing a contractor to work on-site that restricts or controls access to the property.

As a result of the decision, BFI along with Leadpoint now must bargain with Teamsters, who prevailed in the union election. Senate Bill 2015 recently has been introduced in an attempt to legislatively overturn the Board decision and define joint employers as those that have "actual, direct and immediate" control over an employee's terms and conditions of employment. The Board's decision creates numerous questions regarding current and future representation issues and bargaining relationships for joint employers. Given the uncertainty in this area, businesses should review existing relationships to determine whether a company's (direct or indirect) control over the employees of a staffing agency or contractor would or could lead to a joint employer determination under the Board's decision.

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