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EMPLOYER LAW BLOG

NLRB Revises Joint Employer Test

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On August 27, 2015, the National Labor Relations Board issued a long-anticipated decision in the case of *Browning-Ferris Industries of California, Inc.* By a three-to-two vote the Board reconsidered its test for when employers are considered joint employers, thus triggering bargaining obligations for an employer which may not be the direct employer of a bargaining unit.

The Board overruled prior cases and held that the test for joint employment would be "restated." That was the Board's way of casting its decision as one that was not new but rather returned to a former test used by the Board. The restated test allows the Board to find that two or more entities may be joint employers of a single work force if they are both employers under the common law definition of an employer and if they share or co-determine matters governing the essential terms and conditions of employment.

The Board further stated that in evaluating the allocation and exercise of control in the workplace, it would consider various ways in which joint employers might share control over terms and conditions of employment or co-determine them.

The Board rejected its prior precedent under which joint employers would have to possess not only the authority to control employees terms and conditions of employment but must also have exercised that authority directly, immediately, and not in a limited or routine manner. The Board made clear that the right to control is the focus versus the actual exercise of control.

In the case itself, Browning-Ferris Industries ("BFI") maintained a recycling facility at which a company called Leadpoint Business Services provided sorters, screen cleaners, and housekeepers. The Teamsters sought to represent those employees and alleged they were joint employees of BFI and Leadpoint. The Regional Director of the NLRB held that the employees were not joint employees but were solely the employees of Leadpoint. The NLRB reversed the decision of the Regional Director holding that Leadpoint and BFI are joint employers, because under the labor services agreement between BFI and Leadpoint, BFI possessed significant control over the employees hired by Leadpoint, including the right to require Leadpoint to terminate employees unsatisfactory to BFI. The Board further held that BFI exercised control over the processes that shaped the daily work activities of the employees, especially because BFI determined the speed of streams and specific productivity standards for sorting recyclables. Further, the Board determined that BFI assigned specific tasks that were required to be completed, where workers were positioned, and oversaw the employees' work performance. BFI also specified the number of workers, the shifts, and overtime determinations. Finally the Board determined that BFI played a significant role in the establishment of the wages for the employees, because it prevented Leadpoint from paying its employees more than BFI employees were paid performing comparable work.

Thus, the Board found that BFI's role in sharing and co-determining terms and conditions of employment was sufficient to establish joint employer status under the restated test.

All of the implications of this decision, of course, cannot be determined and have not been ascertained at this time. The major concern of management agrees with the dissent by two of the members of the Board that an ambiguous standard has now been substituted for one that provided predictability. Management representatives view this decision as a setback for employers who have become the subject of the NLRB's increasingly aggressive agenda in favor of organized labor.

The employment team of Sandberg Phoenix and von Gontard P.C. can help employers address, work through, and litigate these and other issues as the Labor Board continues to change precedent.