A New World for Joint Employers

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A recent trend in labor and employment law is the increase in entities found responsible as employers and the simultaneous expansion of the definition of employees. This is manifesting itself through a new test for joint employer status, potentially impacting franchisors in particular, as well as through restrictions on the use of independent contractors, which likely will have significant implications for the "on-demand" economy. (See "Restrictions on Use of Independent Contractors.")

Upending years of precedent, the August 2015 ruling by the National Labor Relations Board (NLRB) in *Browning-Ferris Industries of California, Inc.* vastly expanded the definition of a "joint employer" under the National Labor Relations Act (NLRA). Previously, joint employment required an actual exercise of direct and immediate control over workers. Following *Browning-Ferris*, joint employment may exist where an entity has indirect control over the workers, or even where the entity has the right to control the workers but does not exercise that right. *Browning-Ferris* makes it significantly more likely that businesses engaging contractors or staffing agencies to supply workers will be considered joint employers under the NLRA and therefore potentially responsible for unfair labor practices and collective bargaining obligations regarding employees of a separate employer. Moreover, the NLRB's ruling may have far-reaching effects beyond the unionized workplace as the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC) also consider the joint employer standard in light of *Browning-Ferris*.

Browning-Ferris involved the relationship a Browning-Ferris Industries (BFI) recycling plant had with staffing agency employees (sorters, housekeepers and screen cleaners) that it subcontracted from Leadpoint Business Services. The case arose when the International Brotherhood of Teamsters, Local 350, which was the certified representative of a unit of BFI employees, petitioned to represent the Leadpoint employees, naming both Leadpoint and BFI as joint employers. Under the NLRB's pre-*Browning-Ferris* joint employer standard, which was applied for three decades, a business was a joint employer only if it affected employment relationship matters such as hiring, firing, discipline and supervision. The essential element in this analysis was whether a putative joint employer had direct and immediate control over employment matters. Applying this standard, the NLRB regional director found Leadpoint was the sole employer and directed an election because, among other things, BFI had no direct control over the employees' recruitment, hiring, discipline or termination, and BFI did not directly supervise the employees or set their pay rates.

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On review, the NLRB's three-member majority, citing "changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships," decided to restate the NLRB's legal standard for joint employer determinations. The NLRB announced that the joint employer inquiry should not be limited to "directly and immediately" exercised control. Instead, a putative joint employer may be liable if it "reserve[s] authority to control terms and conditions of employment," regardless

of whether such control is exercised. The NLRB also stated that direct control and "control exercised indirectly — such as through an intermediary — may establish joint-employer status." Under this new standard, the NLRB found that BFI was a joint employer with Leadpoint because, among other factors, the parties' contract allowed BFI to reject any worker that Leadpoint referred to its facility; BFI managers provided Leadpoint employees with work direction; BFI specified the number of workers that it required, set the timing of work shifts and decided when overtime would be necessary; and under the parties' contract, Leadpoint was barred from paying its employees more than any BFI employee performing the same work. The NLRB recognized that the parties' "cost-plus" contract, through which BFI reimbursed Leadpoint for labor costs plus a certain percentage markup, did not establish joint employer status alone. However, the NLRB stated that it could support a joint employer finding when it coupled the contract with the ceiling on Leadpoint pay.

Businesses in every industry sector are potentially affected by the *Browning-Ferris* ruling, including those that previously structured their business arrangements with the understanding that absent direct control, the entity would not be a joint employer under the NLRA. As the two-member dissent in *Browning-Ferris* cautioned, "the number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited." The dissent listed several examples, including any company that negotiates specific quality or product requirements with contractors; any company that grants access to its facilities for a contractor to perform services there and then regulates the contractor's access to the property; and businesses that dictate times, manner and some methods of performance of contractors.

Browning-Ferris left franchisors with great uncertainty as to how the NLRB's new joint employer test applies to franchising. After all, the very basis of franchising is required adherence to franchisor standards. However, NLRB Chairman Mark Gaston Pearce and Member Philip A. Miscimarra recently stated that the application of joint employer liability on the franchise system is an issue that still has to be considered by the NLRB. In *McDonald's USA LLC*, the franchisor for the McDonald's franchise system is currently battling the NLRB about whether it is a joint employer of its franchisees' employees. The decision on that question is hotly anticipated.

The NLRB's expanded concept of a joint employer may be adopted by other government agencies. The Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act and the Age Discrimination in Employment Act all have been interpreted to impose joint employer liability. Those statutes, however, have required the exercise of direct control over employees' day-to-day activities for joint employer liability to attach. The NLRB's new *Browning-Ferris* standard may influence the agencies charged with their enforcement, particularly the EEOC and the DOL's Wage and Hour Division (WHD). In fact, the EEOC filed an *amicus* brief in *Browning-Ferris* in which it recognized that the "[NLRB's] joint employer standard influences judicial interpretation of Title VII" and advocated that the NLRB adopt a joint employer standard that is "flexible enough to encompass a broad range of evolving workplace relationships and realities." In addition, the WHD recently issued an administrator's interpretation describing its broad "economic realities" test to determine how to distinguish employees from independent contractors, which reflects a similarly sweeping view of what counts as an employment relationship. If a company is found to be a joint employer with a contractor that has misclassified employees as independent contractors, it also is possible that the company may be liable for the wage and hour liabilities resulting from the contractor's misclassifications.

Federal appellate courts and the U.S. Supreme Court likely will eventually review *Browning-Ferris* and any similar decisions by other government agencies. Moreover, on September 9, 2015, congressional Republicans introduced the Protecting Local Business Opportunity Act seeking to overturn the *Browning-Ferris* decision. Therefore, it may take years for the true long-term impact of *Browning-Ferris* to become apparent. That said, the immediate impact is significant. A thorough review of contracts and arrangements with contractors, staffing agencies and franchisees is a prudent step in reducing the chance that apparently separate businesses will be treated as joint employers.