PUBLICATION

NLRB Decision on Joint Employer Standards Results in a Major Change in Business Relationships

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On, August 27, 2015, the National Labor Relations Board (NLRB) in a 3-2 decision gutted more than 30 years of legal precedent when it changed the joint employer standard in business relationships. *See Browning-Ferris Industries of California, Inc., dba BFI Newby Island Recyclery*, 362 NLRB 186. Under this decision contractors and subcontractors, franchisors and franchisees, employers and staffing companies (and others) may all be deemed to be joint employers and each subject to collective bargaining obligations and unfair labor practice liability under the National Labor Relations Act. This change in the law, along with the new quickie union election rule, which itself was a similar usurpation of longstanding law by the NLRB, will change the way employers large and small do business.[1] This decision is a part of an overall strategy of the current administration to change the business model to favor employees and unions.[2]

Under longstanding precedent, the NLRB may find that two or more employers are joint employers of the same employees if they share or codetermine those matters governing the essential terms and conditions of employment. The initial inquiry is whether there is a common-law employment relationship with the employees in question. If this exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. Central to both of these inquiries is the existence, extent and object of the putative joint employer's control. The NLRB will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority. Nor will the NLRB require that an employer's control must be exercised directly and immediately. "If otherwise sufficient, control exercised indirectly such as through an intermediary, may establish a joint employer status."

In this case the NLRB found that BFI and Leadpoint Business Services were joint employers of the sorters, screen cleaners and housekeepers whom the union petitioned to represent. Some of the facts the NLRB credited to support its decision are as follows: BFI owned and operated the Newby Islands recycling facility where it solely employed about 60 employees, including loader operators, equipment operators, forklift operators and spotters. Most of these employees worked outside the facility where they moved materials and prepared them to be sorted inside the facility. These employees were already part of an existing bargaining unit that was represented by the union. The interior of the facility housed conveyer belts where the material was automatically sorted when it passed through screens. BFI had contracted with Leadpoint to provide workers who manually sorted the materials (sorters), cleaned the screens on the sorting equipment and cleared jams (screen cleaners), and cleaned the facility (housekeepers). The union sought to represent approximately 240 of these Leadpoint employees and hold BFI responsible for them under the National Labor Relations Act. The relationship between BFI and Leadpoint was governed by a temporary labor services agreement (Agreement). Both BFI and Leadpoint had separate supervisors respecting their employees, and Leadpoint had a human resources professional on site. The NLRB in large part used the Agreement to determine what "control" BFI had over Leadpoint employees. For example, the Agreement required Leadpoint to assure that prospective employees had the appropriate qualifications and training to be consistent with all applicable laws and instructions from BFI to perform their assigned duties. Additionally, the Agreement required Leadpoint to make reasonable efforts not to hire workers who were previously employed by BFI and deemed ineligible for rehire. The Agreement required Leadpoint to insure that prospective employees pass a urinalysis drug test. It also granted BFI authority to reject any personnel for any or no reason. Concerning

Leadpoint's employee wages, BFI per the Agreement specified a percentage markup based on whether the work was performed during regular hours or overtime. Leadpoint could not pay a wage rate in excess of the pay for full time employees of BFI who performed similar tasks. BFI established a facility schedule where it operated three shifts on weekdays. Although Leadpoint alone scheduled which employees worked on each shift, it had no input on the shift schedules. BFI determined which conveyors would run each day and provided Leadpoint with a headcount of workers needed. BFI also "dictated" the number of Leadpoint labors to be assigned to each material stream. The Agreement mandated that Leadpoint require its employees to comply with BFI's safety policy, procedures and training requirements. Thus, the NLRB reached its decision of joint employership in large measure based on the terms of the written Agreement between Leadpoint and BFI. This Agreement is typical of the way contractors, franchisors, staffing companies and other businesses throughout the country operate.

Changing the test of who the employer is in a business relationship has huge implications. The NLRB rewrites the law and liberalizes the standard that makes "two separate and independent entities a joint employer of certain employees." According to the dissent, "This change will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity…."

If this decision stands, all employers should review all relationships and contracts with third parties and discuss them with their labor counsel for labor law compliance and strategy. For insight on the next best steps to take, contact your regular Baker Donelson attorney or any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Tallahassee, Florida; Atlanta, Georgia; Baton Rouge and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.

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[1] The quickie election rule, which went into effect on April 19, 2015, significantly hinders employers' ability to defeat union organizing. See https://www.federalregister.gov/articles/2014/12/15/2014-28777/representation-case-procedures.

[2] It has implemented the quickie election rule; advocated a 70% increase in the minimum wage; imposed new restrictions and requirements on government contractors, including a much higher minimum wage in government contracts; proposed increasing the salary level of certain white collar employees to remain exempt from overtime by more than 50%; adopted a liberal definition of "employee" in an employer independent contractor relationship; is considering implementing (through OSHA) a similar change in the joint-employment relationship between franchisors and franchisees pertaining to workplace safety; and has issued though the NLRB numerous far-reaching decisions affecting non-union employers.