Former NLRB Member Reemphasizes Confusion Created by Browning-Ferris Decision

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Successful businesses expand. Sometimes they even franchise themselves, offering opportunities for other small businesses to take root. The National Labor Relations Board ("NLRB") decision has expanded liability for small businesses by changing the standard for when they should be considered "joint employers" – that is, just one large business instead of many small ones. In the *Browning-Ferris Industries* decision, the NLRB threw out the test utilized by the Board for decades to determine joint-employment status. This move has sweeping implications for companies across all industries.

It's no secret that there is a political agenda behind the *Browning-Ferris* rule: under it, employees of large franchises can unionize more easily, and various labor and employment-related liabilities can be connected from franchise to franchise. This vastly expands the potential liabilities of new franchisees and may discourage them from entering the market.

Small business owners and members of Congress reacted angrily to what they saw as the latest in a series of overreaching moves by the NLRB.

In an interview with *Law360*, former NLRB member Harry I. Johnson III criticized the Board for failing to provide specifics to guide companies on how to structure their workforce under the Board's new test. Johnson pointed out the problem created by the Board's "amorphous concepts" under the new test of "indirect" and "potential" control. Johnson also noted that the Board failed to give any indication of where the "tipping point" occurs. How much "control" must an entity possess before it becomes an "employer" under the Board's new test?

Adding to the confusion is the fact that a different test will be applied in non-NLRB cases. This means that there may be inconsistent findings of "joint-employer" status depending on which agency or court decides the matter.

The new NLRB test for joint-employer status

The Board created a new two-step inquiry for determining whether "two or more statutory employers are joint-employers of the same statutory employee":

- First, the Board will examine "whether there is a common-law employment relationship with the employees in question."
- Second, if the first step is satisfied, the Board will examine "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment."

The Board found that the right to control, "*either directly or indirectly, whether actually exercised or*

not," will be considered in making this determination. In other words, the Board will no longer require that an "employer" actually exercise its authority to control the employees' terms and conditions of employment. From now on, "reserved authority" to control terms and conditions of employment, *even if not exercised*, or if exercised indirectly (such as through an intermediary), is relevant to the Board's joint-employer analysis.

What does this mean for businesses?

Browning-Ferris has immediate implications for companies that use contractors, staffing firms, subcontracting arrangements, or continent employees. Carefully constructed workforce arrangements, which were specifically designed to avoid findings of joint-employer status, may be insufficient under the Board's new test.

To reduce or eliminate the possibility of being tagged with an NLRB charge alleging joint-employer status, companies should reexamine their relationships with workforce service providers. Companies may need to renegotiate or redefine the terms of engagement with these providers in order to avoid being a "joint-employer."

In reexamining these arrangements, companies need to ask:

- Do we have a say in the hiring, firing, discipline, supervision, and direction of the supplied workers?
- Do we have a say in the wages, hours, or number of workers to be supplied?
- Do we control scheduling, seniority, or overtime?
- Do we assign work and determine the manner and method of work performance?

Reducing the amount of control possessed in each of these categories (whether or not it is actually exercised) is now necessary to avoid liability as a joint-employer under the Board's new test.

While this undertaking may be burdensome, the risks associated with a finding of joint-employer status are even more burdensome. Joint-employers face exposure to charges of unfair labor practices, including potential liability for labor violations committed by the "direct" employer. It may also mean you have to deal with union recognition, and may have to participate in collective bargaining or be forced to supply information relevant to bargaining, including wage and benefit data for your employees. Additionally, if a joint-employer wishes to terminate an existing labor-services agreement, it may be required to engage in "effects bargaining" with the union that represents the workers who are employed by the workforce service provider.

Potential Split Results for New York Employers

Another concern arising out of the *Browning-Ferris* decision is that companies are now exposed to split results: they may be a "joint-employer" under the Board's new test, but not a "joint employer" under the standard used in a New York civil litigation.

In most civil litigation in New York, in order to sufficiently allege "joint employer" status, a plaintiff must demonstrate that the company exercised control over the individual's employment. This includes an examination of whether the company *exercised* control in the hiring, firing, discipline, pay, or supervision of the individual.

If a plaintiff does not demonstrate facts showing that the putative employer exercised control, the

company will not be considered a “joint employer.” For example, a temporary employment agency that exercises no control over the individual’s responsibilities or duties while the individual is on assignment will not be considered the employer of the placed employees.

This is a striking contrast from the NLRB’s new test, where a company need not actually exercise control in order to be a “joint employer.” Companies should balance the risks of being labeled a “joint employer” (in either a civil litigation or a Board matter) against the amount of control (either reserved or exercised) needed to manage their workforce.