SEBRIS BUSTO JAMES Employment Law Note October 2015

NLRB's New Joint-Employer Standard Will Have Major Consequences for Employers that Use Workers Provided by a Third Party

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On August 27th, the National Labor Relations Board (Board) announced a controversial change to its joint-employer standard, which is applied to determine when two separate businesses are required to jointly bargain with a union and when they may be held jointly liable for unfair labor practices. The new standard, adopted by a 3-2 majority in *Browning-Ferris Idus. of Calif., Inc.*, 362 N.L.R.B. No. 186, will undoubtedly create uncertainty while businesses attempt to apply the new test and determine whether they might be joint employers of another's workers.

Background. Browning-Ferris (BF) owned a recycling facility and employed 60 employees represented by the Teamsters. BF also had a labor services agreement with Leadpoint, under which Leadpoint provided almost 250 additional workers to BF. BF and Leadpoint maintained separate HR departments, and the agreement provided that Leadpoint would recruit and hire its own personnel. BF managers testified that they were not involved with the hiring process. However, the agreement required Leadpoint to use certain minimum criteria in hiring, prevented Leadpoint from hiring workers who were ineligible for rehire at BF, and gave BF the right to demand that personnel "meet or exceed [BF's] own [hiring] standard." Moreover, workers were required to get a BF representative's signature on their timecards, or BF could refuse to pay Leadpoint for that worker's time.

BF determined working hours (including break times and overtime) and determined the specific workstations Leadpoint's workers should staff each day. Leadpoint had no ability to change the hours of operation. BF set the speed of conveyor belts from which the workers sorted recyclables, which directly affected the difficulty of the work.

The agreement gave Leadpoint sole responsibility for disciplining, evaluating, and terminating workers, but BF retained the right to "reject any Personnel and . . . discontinue the use of any personnel for any or no reason." BF managers testified that they were never involved in discipline or termination decisions directly. On several occasions, though, BF managers complained to Leadpoint about a worker's conduct and requested the worker's termination. In each instance, Leadpoint conducted its own brief investigation and quickly terminated the employee. Leadpoint's workers testified that, on occasion, BF supervisors would give them direct feedback on their performance and sometimes held meetings with Leadpoint's workers. BF supervisors also monitored the workers' performance, gave feedback to Leadpoint, and expected Leadpoint to then address those concerns with the workers.

The Teamsters sought to represent Leadpoint's workers, and the Board's Regional Director found that BF was not a joint employer under the old standard. The Regional Director found that BF did not actually control Leadpoint's workers and only interacted directly with them on a few occasions.

Old Standard. Under the former 30-year-old joint-employment standard, the Board considered whether the potential joint employer *actually* controlled the shared employees' terms and conditions of employment. Where a business had the right to control another's employees but did not exercise that right, it was not a joint employer. Similarly, if the business only indirectly controlled the terms and conditions of employment through the supplier company, it was not a joint employer.

Because "contingent" workers have become a significant segment of the workforce (the Board noted that contingent workers accounted for 4.1 percent of the workforce in 2005) the Board expressed concerned that the old standard prevented these workers from exercising their rights under the National Labor Relations Act because labor-supply companies often yield control of many terms and conditions of employment to their customers (i.e., the potential joint employer). If a customer did not meet the Board's prior definition of a joint employer, it had no duty to bargain, and workers had no means of negotiating certain terms and conditions of employment with the party that in fact controlled them.

New Standard. The Board adopted a two-part test as the new standard. The Board will first consider whether a putative joint employer "share[s] or codetermine[s] those matters governing the essential terms and conditions of employment." If so, the Board will then consider whether "the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."

According to the Board, the first inquiry should be firmly rooted in the common-law test of employment, which focuses on an employer's *right* to control the employee's conduct. Thus, as long as an employer has the *right* to control terms and conditions of employment, it may be a joint employer even if it never exercises that right. In addition, the Board reversed precedent that had found indirect control insufficient to confer joint-employer status. Now, a union may present evidence that a business exercised control indirectly through intermediaries.

Where a business meets the common-law definition of an employer, the Board stated that it would find joint-employer status only where doing so would permit meaningful bargaining. It is currently unclear whether this will limit application of the joint-employer doctrine, but the Board did note that a joint employer will only have a duty to bargain over terms and conditions that it has the right to control.

Applying the new test, the Board found that BF was a joint employer because it retained control over many essential terms and conditions and did in fact exercise its control indirectly through Leadpoint.

Take Home. The new standard represents a significant departure from the Board's established 30-year-old standard. It will require many businesses to bargain with workers they do not directly employ. As the dissent noted, the new standard might impact many types of business relationships, including user-supplier, contractor-subcontractor, franchisor-franchisee, lessor-lessee, creditor-debtor, and others. Businesses should begin assessing whether the new standard might affect their relationships and take steps to prepare for the possible impact of this sweeping change. In addition, businesses should consider the new standard's impact on future business relationships before entering into agreements to use contingent workers. As always, if you have any questions about the impact of the Board's decision on your business, please do not hesitate to contact us.