Westlaw Journal
EMPLOYMENT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 30, ISSUE 8 / NOVEMBER 10, 2015

EXPERT ANALYSIS

Labor Law Gone Wild: NLRB's Joint-Employer Decision May Help Unions and Hurt Business

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The National Labor Relations Board, once described as the "Rip Van Winkle of federal agencies" because it was perceived to be in sleep mode, is unquestionably now wide-awake. And in a recent surprising decision overruling longstanding precedent, the board again demonstrated that the labor movement is the primary beneficiary of its efforts.

To employers who follow labor law develop-ments, the board's continuing nod to unions has become all too predictable. In many cases, its pro-union decisions have created actual or potential legal exposure for many employers.

Regardless of whether you are an employer, an employee or a union advocate, the takeaway from the board's efforts to make labor laws relevant in today's workplace is clear: The labor relations rules of engagement have changed in a significant way. Those who do not take steps to understand and proactively deal with the new normal are the ones truly asleep, and they may not like what they find when they awaken.

The board is the federal agency charged with administering the nation's key labor law: the National Labor Relations Act. The board's internal politics and its interpretation of the law have the potential to affect nearly every American business, regardless of whether or not they employ union-represented employees.

Since President Barack Obama announced in 2008 that "[i]t's time we had a President who didn't choke saying the word 'union,'" many in the business community have perceived the board as intent on helping unions regain their footing after decades of declining membership.

That help has come in the form of numerous changes to the process through which unions gain the right to represent workers: the union-organizing process. The result is that today, the process of union-organizing is easier and the climate better than it has been in a very long time. And it continues to improve, as a recent board decision provides labor with a new tool that should yield greater success in its quest for members.

JOINED AT THE HIP?

On Aug. 27, the NLRB handed down its long-awaited decision in *Browning-Ferris Industries of California Inc. and FPR-II LLC and Sanitary Truck Drivers and Helpers Local 350*, No. 32-RC-109684, 2015 WL 5047768. In that decision, the board revised the standard for determining when nominally separate employers constitute joint employers, such that they may share exposure to union organizing, collective bargaining obligations, labor disputes and unfair labor practice liability.

For years, the board considered two entities to be joint employers if they exercised "direct and significant control" over the same employees such that they shared or co-determined matters

governing the essential terms and conditions of employment. The board considered factors such as the right to hire, supervise, discipline and fire employees.

Under that analysis, the board evaluated whether an employer merely retained the right to exercise its authority in these areas via, for example, a commercial contract between the parties, or whether it actually exercised authority to act directly regarding employees. If the employer did not actually and directly exercise its authority, the board was far less likely to conclude that a joint employer relationship existed.

In *Browning-Ferris*, the board opined that cases over the past three decades have strayed from the core principles set forth in the past — and concluded that it was time to refocus. It then decided that just having *the ability* to control terms and conditions of employment of another employer's workers — whether that ability was exercised or not — could be enough to establish a joint employer relationship.

Further, the list of terms and conditions of work subject to the board's joint employer analysis expanded significantly. It now includes terms dealing with staffing levels, scheduling, the assignment of work, and the manner in which work is to be performed.

The NRLB concluded that just having the ability to control terms and conditions of employment of another employer's workers could be enough to establish a joint employer relationship.

Thus, if Company A contracts with Company B for services and requires in its commercial contract that the employees who will render the services possess minimum training standards, or if Company A mandates that Company B's employees abide by Company A's anti-discrimination or harassment policy while rendering services on its premises — very customary (and prudent) terms in commercial relationships — the parties could be waltzing themselves toward a finding of joint employer status.

Of course, the need to abate workplace harassment and safety hazards must be balanced against this consideration. For example, the Occupational Safety and Health Administration is currently aggressively pursuing its temporary worker initiative, focusing investigations on providers and users of temporary labor to ensure adequate safety training is provided. Similarly, the Equal Employment Opportunity Commission anticipates corrective action by both employers if sexual harassment occurs between employees of different employers working at the same work site.

The *Browning-Ferris* decision creates significant legal and practical issues for any company in any industry that enters into contracts with onsite vendors, hires outside contractors, subcontracts work or contracts for services conditioned upon the other party's agreement to conduct its business a certain way.

The ruling could affect businesses that employ a contingent workforce, businesses that subcontract a portion of their work to others, businesses that insure or invest in other businesses, and/or businesses that hire other companies for any purpose that involves employee interaction.

As to each, the consequences of a joint employer finding could include, but are not limited to:

- A seat at the table: Because joint employers share in each other's collective bargaining obligations, the union or non-union status of business partners takes on much greater significance. Contracting with a business partner that employs union-represented employees could result in both employers' mandatory participation in the bargaining process in the wake of a joint employer finding. Contracting with a business partner that does *not* employ union-represented workers may or may not insulate a company, depending upon the likelihood of an organizing drive directed at the business partner's employees, and/or its preparedness to lawfully campaign against any resulting organizing drive. And in a post-*Browning Ferris* world, a joint employer likely can no longer terminate its contract partner due to a concern over union organizing. Cases in which the board has found it lawful for an employer to simply cut ties to avoid the headaches and exposure of union organizing directed at a business partner do not apply to or protect joint employers.

- Increased scrutiny: Getting caught up in litigation on the joint employer issue would likely entail the collection and analysis of a significant amount of information about both companies. In the course of that process, and regardless of the representational status of

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its workforce, an employer may have to divulge business and employee information. That information would then become subject to greater scrutiny by the board, or perhaps by a union interested in organizing workers of the alleged joint employer.

- Labor disruptions: Because companies that are joint employers are both considered "primary" for labor dispute purposes, the law's prohibition against picketing neutral employers would offer no relief to union demonstrations triggered by one of the joint employers but directed at both. Thus, a general contractor or franchisor that is a joint employer with a subcontractor or franchisee would be open to picketing at its locations. The potential disruption that often accompanies such job actions could be crippling, such as where a general contractor's or franchisor's own union-represented employees engage in sympathy strike activity, effectively shutting down operations.

These are but a few brief examples of how the *Browning-Ferris* decision could suck into its gravitational pull all sorts of business relationships that were previously untouched by the joint employer doctrine.

The decision is likely to spawn new and creative organizing and litigation tactics, as unions probe to see just how good life has now become (assuming, of course, that the courts do not override the board's decision). At the same time (and largely for the same reason), the new joint employer standard will generate litigation before the board and then in court. Businesses will first litigate to avoid a joint employer finding and then potentially sue each other under contracts that address issues of liability and indemnity.

To deal with the board's latest boost to unions, employers who wish to avoid labor relations issues must, at a minimum, understand:

- The red-flag issues that could invite a joint employer challenge.
- How to structure relationships to minimize risks.
- How to develop contingencies to deal with potential joint employer findings.

Businesses should evaluate their existing commercial relationships to ascertain the degree of risk attendant to any given relationship. Is the type of relationship a hot button issue for the labor movement, such as the use of temporary employees or the franchisor/franchisee model? Regardless of whether the relationship is a perceived lightning rod for union issues, what is the overall labor relations climate of each business partner?

If labor and employee relations are bad for one partner, the risk of union organizing, labor disputes and unfair labor practice liability increases for the other. Therefore, the risks as a joint employer increase. By the same token, to remain an attractive business partner and a minimal joint employer risk, employers should also evaluate their own exposure to employee dissatisfaction, organizing, labor disputes and unfair labor practice liability.

By being able to demonstrate that they have done so in a systematic and thorough fashion, employers can hold themselves out as safe business partners — at least insofar as the joint employer issue is concerned.

Employers should also review existing commercial agreements to determine whether any indicia of direct or indirect control are present, such that evidence sufficient for the board to find joint employer status may already exist.

In *Browning-Ferris*, the board found such control to exist in contract clauses enabling one employer to, among other things, dictate staffing levels, work schedules and training prerequisites. If contract clauses like these exist — and they likely do — amendments should be considered to decrease the likelihood of a successful joint employer challenge. Such amendments should also attempt to preserve — to the extent possible — the quality control, reputation management, goodwill and security that is every company's objective in negotiating protective contract language.

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In addition, employers should strategize in advance what their position will be if a joint employer allegation is made, as it relates to both the union making the allegation and the alleged joint employer. For example, if a joint employer finding requires participation in union negotiations, who will be the chief spokesperson at the bargaining table, who will draft and respond to bargaining proposals and information requests, and what will the parties do in the event an agreement cannot be reached? What arrangements can and should be made at the outset of the joint employer relationship to memorialize these concerns, apportion costs and responsibilities, and minimize legal exposure?

Finally, employers must follow developments in this area of law, as even the board acknowledged in *Browning-Ferris* that it will only be through future litigation that the joint employer doctrine continues to develop. Thus, an employer's approach to the joint employer dilemma will continue to evolve. Stay tuned, and stay awake.

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