National Labor Relations Board Issues Controversial Decision Regarding Who is A Joint Employer

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One of the most fundamental concepts under federal labor law is identifying who is the employer. Under the National Labor Relations Act, "the employer" has a duty to bargain with the union representing its employees, is bound by the collective bargaining agreement, and may be the target of strikes or picketing. In contrast, third parties who have commercial relationships with the employer generally do not have the same obligations and may not be subjected to picketing or other economic coercion based on their dealings with the employer.

Yesterday, in *Browning-Ferris Industries* ("BFI"), a majority of the National Labor Relations Board upended this basic dichotomy between the employer and third-parties with whom the employer does business by changing the test regarding when two or more entities may be considered joint employers under federal labor law. While the majority insisted that its decision merely restated the Board's longstanding test for joint employment, a scathing dissent criticized the majority's decision as fundamentally altering business relationships, such as those of user-supplier, contractor-subcontractor, and franchisor-franchisor.

Background

In *BFI*, a union sought to represent sorters, screen cleaners and housekeepers at BFI's Newby Island recycling facilities. The employees were employed by a company called Leadpoint Business Services, and BFI and Leadpoint were parties to a temporary labor services agreement, under which Leadpoint supplied the workers. In its petition to represent the workers, the union alleged that BFI was a joint employer.

The Regional Director found that BFI was not a joint employer because it did not share or codetermine with Leadpoint the essential terms and conditions of employment. According to the Regional Director, Leadpoint set employee pay and benefits, had sole control over hiring and firing decisions, and had sole control over employees' daily work. The union requested review of the decision to the full Board, arguing either that BFI was a joint employer under existing Board law or that the Board should adopt a broader standard.

The Majority Decision

The majority reversed the decision of the Regional Director, concluding that BFI was in fact a joint employer of the employees. In its decision, the majority restated the existing test for joint employment: that two or more entities are joint employers if they share and codetermine matters governing essential terms and conditions of employment. It explained that the initial inquiry is whether a common law employment relationship exists, meaning whether the alleged joint employer has the right to control the employees' work, and, if so, then the inquiry turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.

However, the majority went on to state that, unlike the old test, the Board would no longer require that an alleged joint employer actually exercise control over terms and conditions of employment. So long as the alleged joint employer has reserved for itself some authority over these issues, then the test is met.

In applying the test to the facts of the case, the majority concluded that BFI was a joint employer. Although BFI did not involve itself in Leadpoint's day-to-day-hiring process, their agreement imposed certain hiring standards on Leadpoint. As to supervision and direction of the work, the majority concluded that BFI communicates to Leadpoint specific speed and productivity standards, which have a direct impact on employee work performance. As to wages, the parties' agreement is a cost-plus arrangement, meaning that BFI pays Leadpoint for labor costs plus a percentage markup.

The Dissent

While the majority claimed that its decision was a return to existing precedent, the dissent argued that the decision "removes all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint employer finding." In its view, the majority's application of the test to BFI's and Leadpoint's business arrangement shows that indirect control – such as such as a customer giving feedback to a service provider or a contractual requirement that a service provider comply with certain requirements – would be probative of joint employer status under the new test.

According to the dissent, no bargaining table will be big enough to seat all of the entities that will be potential joint employers under the new test. The dissent thus argued that a host of business relationships would now be subject to the Act under a joint employer theory.

What's Next?

If the decision in *BFI* is as sweeping as the dissent suggests, many businesses could become embroiled in the labor disputes of entities with whom they have commercial relationships. For example, most franchisors set certain standards relating to the franchise but do not involve themselves in the employment matters of its franchisees. *BFI* suggests that this distinction is no longer meaningful if the standards have an impact on terms and conditions of the franchisee's employees. Similarly, business entities that utilize subcontractors are at risk of being joint employers. While the majority insists that the dissent is wrong in its criticism, there can be little doubt that the decision will engender instability and uncertainty as unions attempt to draw in an employers' business partners as "joint employers."

We anticipate that *BFI* will lead to significant court challenges, as well as efforts to amend the Act to abrogate the decision.

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