

## New NLRB Joint Employers Test – Why It Matters For OSHA

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The **National Labor Relations Board (NLRB)** last week issued its [decision in \*Browning Ferris Industries\*](#) (pdf) adopting new standards for determining when a company will be held to be the joint employer of another company's employees, whether they are leased, temporaries or providing services under their primary employer's contracts with customers.

While the **Occupational Safety and Health Act's** definition of "employer" is not identical to the definition in the National Labor Relations Act, there can be no doubt that the NLRB's *Browning Ferris* decision is likely to influence OSHA's approach to inspections and citations involving temporary or contract employees.

When OSHA's temporary employee initiative was announced in 2013, Assistant Secretary of Labor for Occupational Safety and Health, Dr. David Michaels, declared that "Temporary staffing agencies and host employers share control over the employee, and are therefore jointly responsible for temp employee's safety and health. It is essential that both employers comply with all relevant OSHA requirements." Although inspections under the temporary employee initiative sometimes result in citations being issued to both the host employer and the staffing agency, more often than not, only the host employer is cited because it is perceived as having a greater ability to control or prevent the temporary employee's exposure to a hazard. Should OSHA adopt the reasoning of the *Browning Ferris* decision, this trend will surely change, significantly increasing staffing agencies' exposure to OSHA citations even when the staffing agency had no control over the workplace or awareness of the hazard.

Similarly, contractors will face increased exposure to OSHA citations should OSHA follow *Browning Ferris*. Under the agency's multi-employer worksite citation policy, OSHA may cite an employer for hazards that other employers' employees were exposed to when OSHA finds that the employer controlled the hazard, created the hazard, or was responsible for correcting the hazard. Applying the reasoning of *Browning Ferris* to this policy could considerably expand the number of employers cited, treating multiple contractors as controlling employers regardless whether they had any real control over the hazards at the worksite.

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