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Decoding NLRB's New Joint Employer Standard

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The ***National Labor Relations Board (NLRB)*** made major changes to the concept of joint employers in 2015, culminating in what many felt was a head spinning decision in August, known as *Browning-Ferris*, setting a new standard for determining if two entities are joint employers. That NLRB decision stepped beyond a review of one business's *actual* exercise of direct control over another business's employees to consider the mere *possession of authority* to control the essential terms and conditions of employment of another business's employees. In its first application of this new standard, the NLRB recently determined a construction contractor was not a joint employer with a staffing agency, and in doing so, it offered a first step toward understanding how the Board is likely to apply its new joint employer principles.

Under this new standard, the NLRB now says that two or more entities will be considered joint employers of a single work force if: (1) There is a common-law employment relationship with the employees in question, and (2) The putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. The Board's new test does not consider whether the putative joint employer actually exercises any sufficient control over employees' terms and conditions of employment; the mere fact that the putative joint employer could exercise such control is enough in the Board's eyes to establish a joint employment relationship.

The recent case first applying this standard involves a construction contractor that utilizes employees of a staffing company providing temporary construction labor. The union representing employees of the contractor argued that the two entities were joint employers.

Analyzing the control the contractor could exercise over the staffing agency employees, the Board found that agency was under no obligation to accede to any contractor requests for specific employees, notwithstanding the contractor's ability to make such requests. The Board also noted that it was the general contractor at construction sites that had the ability to send staffing agency employees home, not the contractor at issue in the case. Moreover, the instances where staffing agency employees were actually sent home were due to safety violations on the worksite, as opposed to where the putative joint employer had the contractual ability to reject any staffing agency personnel or discontinue the use of any staffing agency personnel for "any reason."

The Board also considered the control the contractor could exercise over the wages of staffing agency employees and concluded that the employees had broad abilities to individually negotiate

wages with the staffing agency based upon job performance and other factors. The Board reached this conclusion despite the implied ability of the contractor to set wages by setting the amount it paid the staffing agency. It also assessed the level of daily supervision of employees by the contractor and determined that the staffing agency made most of the substantive decisions surrounding the terms and conditions of employment, while the contractor merely provided instructions about the day-to-day tasks at hand. By contrast, the Board's earlier decision in which it set forth the new joint employer standard involved direct and near-constant oversight of the employees.

Finally, in contrast with the Board's original decision setting forth the new standard and its conclusion that the putative joint employer in that case held ultimate control over bargainable issues such as break times, safety, the speed of work and the productivity of employees, which allowed for meaningful collective bargaining as a joint employer; in the more recent decision the contractor had little such control and therefore could not meaningfully participate in collective bargaining. The schedule of the staffing agency employees was set by the general contractor — not the alleged joint employer contractor — a third-party contractor oversaw workplace safety, and the agreement between the contractor and the staffing agency assigned control of breaks and productivity to lead staffing agency employees.

While the practical implications of the new joint employer status standard remains far from settled, at a minimum, the NLRB's most recent decision offers some guidance for employers about specific practices that will help preclude any finding of joint employer status. Employers are encouraged to stay in communication with legal counsel to ensure that, as this area of labor law evolves, policies and procedures are in place to help avoid this developing pitfall.

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