

## Employer Attacks NLRB's New Joint Employer Standard on All Fronts in Court Brief

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Browning-Ferris Industries of California, Inc. took its first shot at convincing the U.S. Court of Appeals for the District of Columbia Circuit to reject the National Labor Relations Board's new joint employer standard and vacate two decisions that obligate the company to bargain with the Teamsters as a joint employer of temporary employees assigned to its facility.

The battle began in July 2013, when the Teamsters petitioned to represent a bargaining unit of sorters, housekeepers, and screen cleaners that were assigned to a Browning-Ferris facility by staffing agency Leadpoint. In the petition, the Teamsters alleged that Browning-Ferris and Leadpoint were joint employers; however, after an evidentiary hearing, an NLRB Regional Director determined that Leadpoint was the sole employer of these employees. The Board granted the union's request for review and, reversing, adopted a new joint employer standard.

Under the former joint employer standard, which had been in place since 1984, a putative joint employer needed to exercise direct and immediate control over the essential terms and conditions of employment of the employees in question. However, under the Board's new *Browning-Ferris* standard, indirect control or even an unexercised right to control also are probative of joint employer status and may be determinative.

Following the Board's August 27, 2015, decision, an election was held and the Teamsters were certified as the bargaining representative for the petitioned-for unit. After Browning-Ferris refused to bargain with the Teamsters in order to pursue review of the new joint employer standard, on January 12, 2016, the Board issued its Decision and Order finding that Browning-Ferris was a joint employer of the employees and requiring it to recognize and bargain with the Teamsters. On January 20, 2016, Browning-Ferris filed a timely petition for review in the appeals court.

In its opening brief, Browning-Ferris argued the Board's new joint employer standard is defective and unenforceable because: (1) it is contrary to the employment relationships recognized by Congress in the 1947 Taft-Hartley amendments to the NLRA; (2) it relies upon the kind of assessment of "economic realities" prohibited in the Taft-Hartley amendments; (3) it fails to promote stable collective bargaining relationships; and (4) it is arbitrary and capricious because it overturns decades

of settled law and imposes a standard so broad and unconstitutionally vague that parties cannot arrange their affairs to achieve predictable legal outcomes. Browning-Ferris also argued that it is not a joint employer of Leadpoint employees under either the old joint employer standard or the new, and that, even if the new joint employer standard survived judicial scrutiny, it was inherently inequitable to apply the new test retroactively.

The waste and recycling company didn't pull any punches in its opening submission. The company voiced indignance and frustration with the "[v]irtually boundless scope of the Board's new joint-employer test." It also expressed concern the new standard will adversely affect a panoply of bargaining obligations. Moreover, Browning-Ferris took care to point out that, while the Board claimed the new joint employer standard would not address a broad range of relationships (meaning it would apply to some business relationships but not others), the Board is not permitted to do that – to apply a different joint employer standard to some business relationships and not to others.

Briefing will continue through July 28.

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