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NLRB Joint Employer Case Will Be Heard by Federal Appeals Court on March 9

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Oral argument on Browning-Ferris Industries of California, Inc.'s appeal seeking to overturn the National Labor Relations Board's landmark joint employer decision, *Browning-Ferris Industries of California, Inc*., 362 NLRB No. 186 (Aug. 27, 2015), has been scheduled for March 9, 2017, by the U.S. Court of Appeals for the District of Columbia Circuit.

The *Browning-Ferris* decision established a new, union-friendly standard for determining joint employer status under the NLRA. (For details, see Labor Board Sets New Standard for Determining Joint Employer Status.)

Under the Board's former standard, a joint employer relationship existed only where "two separate entities share or codetermine those matters governing the essential terms and conditions of employment." In particular, an employer had to "meaningfully affect[] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."
In *Browning-Ferris*, the Board transformed the joint employer standard into a test that, in relevant part, considers whether the potential joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining. "Control" under the new standard is defined much broader than under the old one; it can be direct, indirect, or even a reserved right, whether or not that right is ever exercised. Applying this new standard, the Board found BFI was a joint employer with temporary service agency Leadpointe of the employees BFI subcontracted for, and certified the Teamsters as the bargaining representative of the petitioned-for unit.

The composition of the Court of Appeals three-judge panel will be announced days prior to the date of oral argument, by February 9, 2017, on the Court's website (www.cadc.uscourts.gov). Stay tuned for further updates on the NLRB's new joint employer standard and for an analysis of the oral argument.

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