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Recent Developments in the NLRB's Joint and Single Employer Doctrines

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Highlights of recent developments relevant to all employers.

The National Labor Relations Board (NLRB or Board) is poised to return to a Republican majority, which likely will result in a change in labor law philosophy. This post covers recent developments in the Board's joint employer and single employer doctrines relevant to all employers, but especially for

- employers that contract with other businesses that have employees who are represented by a union or may be the subject of an organizing campaign;
- unionized companies that subcontract; and
- parent companies that have subsidiaries with union-represented workforces.

DC Circuit Grills Attorneys at Oral Argument in *Browning-Ferris*

On March 9, 2017, the US Court of Appeals for the District of Columbia Circuit heard oral arguments in *Browning-Ferris Industries of California, Inc. v. NLRB*.[1] The key issue in this appeal is the validity of the Board's new test for determining whether an entity is considered a "joint employer." If deemed a joint employer, an entity has joint liability and obligations with respect to union representation, collective bargaining, and any striking or picketing.

Previously, an entity needed to exert sufficient ***actual direct control*** over the essential employment conditions of another entity's employees in order to be deemed a "joint employer" under Board law. However, in *Browning-Ferris Industries*,[2] the Board greatly expanded its 30-year-long joint employer standard to find that an entity could be a joint employer based on ***indirect and unexercised control***. Given the greater liability and obligations of a joint employer, this newly expanded joint employer test has serious ramifications for the specification, performance, and termination of any contracts made with other entities possessing their own employee complement—such as service contracts, subcontracts, franchise agreements, staffing contracts, and asset sales/purchase agreements.

In the original Board proceeding, a union filed an election petition seeking to represent employees of Leadpoint, a staffing services agency, who worked at a recycling facility operated by Browning-Ferris Industries (BFI). Although BFI did not exercise direct control over Leadpoint's employees, and BFI staffed the recycling facility with both direct BFI employees and Leadpoint employees, the union's election petition named BFI as a joint employer. Following established Board precedent, the Regional Director declined to find that BFI was a joint employer of the Leadpoint employees. Yet, when deciding the case on appeal, the NLRB decided to rewrite its prior joint employer standard and found BFI to be a joint employer of Leadpoint employees based on BFI's indirect and unexercised control over these individuals. BFI refused to bargain and appealed the NLRB's decision to the DC Circuit. The case will be decided by a three-judge panel of Judge Patricia A. Millett, Judge Robert L. Wilkins, and Judge A. Raymond Randolph.

Oral argument in the DC Circuit focused on the definitions and contours of "indirect" and "unexercised" control and whether these forms of control should be given any weight in evaluating joint employer status. BFI's attorney argued that the "center of gravity" of a joint employer relationship is whether an entity has "active control" of the employees in question. However, Judge Millett challenged the logic and application of BFI's argument through various hypotheticals and rhetorical questions. For example, Judge Millett questioned whether the fact that Leadpoint never sought to exceed a wage cap contained in the BFI-Leadpoint contract truly demonstrated unexercised control by BFI, or whether it instead showed that Leadpoint simply heeded the restrictions articulated in the contract.

Judge Millett also challenged BFI's characterization of reserved control as a "factor" that could be considered in the joint employer test but lacked any legal determinative force; Judge Millett noted that as a "factor," reserved control must have influence. Judge Millett further expressed skepticism regarding BFI's position that directives given to Leadpoint's supervisors relating to Leadpoint's employees (such as where to stand and how to work most efficiently) cannot be considered as a type of indirect control under the common law, simply because BFI "launder[ed]" these commands through Leadpoint.

The NLRB also faced tough questions relating to its position that indirect and reserved control should be considered in a joint employer analysis. For example, the Board's attorney struggled to distinguish between when a customer's communications regarding its preferences amounted to (1) relaying the customer's satisfaction with an end product (which the Board admitted did not amount to indirect control or suggest joint employer status), or (2) dictating how an employee should do his or her job (which the Board viewed as indirect control, exposing the customer to joint employer status).

Judge Millett also expressed her concern regarding the practical implications of the Board's inclusion of "indirect" control in its joint employer analysis, as she noted that the Board failed to state how it would apply its new joint employer standard to collective bargaining. Specifically, the Board's failure to grapple with collective bargaining left unanswered questions regarding when an entity may be exercising indirect control, or when an entity may have reserved but unexercised rights to control certain terms, and thus how the Board would determine what terms the entity would be required to bargain over. Notably, Judge Millett asked whether BFI could terminate its contract with Leadpoint at will, or whether—as a joint employer—BFI would need to bargain before any such contract termination. The Union noted that it would likely demand bargaining of any joint employer in that circumstance.

The case was taken under submission, and it will likely take the panel months to issue a final ruling.

Dispute Over the (Pre-*BFI*) Joint Employer Doctrine in *HealthBridge*

The NLRB's prior (pre-*Browning-Ferris*) joint employer test was also recently applied in *HealthBridge Management, LLC*,[3] with the majority and dissent reaching starkly different conclusions. This case was litigated before the issuance of *Browning-Ferris* in 2015, and the Board majority found it unnecessary to determine whether *Browning-Ferris* was retroactively applicable, as it found that the respondents were joint employers even under the prior, more restrictive, test.

HealthBridge involved six skilled-nursing centers in Connecticut and their management company, HealthBridge Management, LLC, which jointly employed the centers' employees. From 2006–2009, all six centers contracted with Healthcare Services Group (HSG) to supervise their unionized housekeeping and laundry departments. In February 2009, HealthBridge and three centers (collectively, "Respondents") subcontracted to HSG all managerial and payroll responsibilities for the housekeeping and laundry departments in those three centers. Under their 2004–2011 collective bargaining agreements (CBAs), Respondents were required to ensure that any subcontractors retained all covered employees and maintained all terms and conditions of employment under the CBA. Respondents fully complied with this obligation; the only significant changes experienced by affected employees were that they were transferred to HSG's payroll, and they punched in on separate time clocks installed by HSG. These three centers ended their "full service" agreements with HSG in May 2010, and most of the housekeeping employees at these three centers were required to apply for "rehire" at their respective centers, without seniority.

The Board majority of NLRB Members Mark Gatson Pearce and Lauren McFerran stated that, under the pre-*Browning-Ferris* joint employer analysis, it would "focus on whether the Respondents share[d], or codetermine[d], those matters governing [the bargaining units'] essential terms and conditions of employment" during the term of the subcontracts, and whether the Respondents' exercise of such control was "direct and immediate.'"[4] The majority focused on Respondents' ***compliance with their CBAs*** in requiring HSG to retain all housekeeping employees and continue all terms and conditions of employment ***as dispositive of Respondents' joint employer status***.

Although the majority conceded that Respondents did not supervise day-to-day work of housekeeping employees, it found that this did not preclude a joint employer finding, given Respondents' "dominant role" in controlling the terms and conditions of employment (by requiring that HSG comply with the existing CBAs). Here, the majority noted that day-to-day supervision carried less weight given that HSG had already been supervising housekeeping employees before the full service agreements**.**

Acting Chairman Philip Miscimarra strongly disagreed with the majority's analysis by criticizing the majority's

- "unwillingness to accept the long-established legal effect of sub-contracting on the subcontracting entity's employer status";
- foundation of its analysis, which presumed that the housekeeping employees remained Respondents' employees during the subcontracting period; and
- failure to acknowledge that the housekeeping employees were aware that they were employed by HSG, based on their transfer to HSG's payroll and HSG's requirement that they complete new-hire paperwork.

Additionally, Acting Chairman Miscimarra noted that the majority's analysis penalized Respondents for complying with the relevant CBAs:

> [U]nder my colleagues' analysis, whenever an employer enters into a collective-bargaining agreement that conditions the subcontracting of bargaining-unit work on a potential subcontractor's willingness (i) to retain the employees who currently perform the subcontracted function, and (ii) to continue the terms and conditions of employment required under the collective-bargaining agreement, whenever that employer subcontracts unit work and fulfils its duties under its collective-bargaining agreement, *it remains the employer of employees it no longer employs*.[5]

The upshot of this case is important to all unionized employers that may seek to subcontract work performed by bargaining unit employees. Specifically, the current Board considers the subcontracting employer's mere compliance with a successorship clause in its CBA as a major factor in the joint employer analysis, even under the pre-*BFI* joint employer test. Employers should be aware of this development and consider the implications of this case before making a decision to subcontract any bargaining unit work.

Fifth Circuit Upholds Board's Finding that Company and Wholly Owned Subsidiary Qualify as a Single Employer

In *Aluminum Corporation of America v. NLRB*, [6] the Fifth Circuit upheld the NLRB's finding that a corporation and its wholly owned subsidiary were a "single employer," which violated the National Labor Relations Act (NLRA) by (1) denying employees of the parent company access to facilities of the subsidiary for handbilling, and (2) engaging in unlawful surveillance of handbillers.

To determine whether multiple entities are a single employer under the NLRA, the Board looks at four factors:

1. Common ownership
2. Interrelation of operations
3. Common management
4. Centralized control of labor relations

None of these factors is controlling, and not all factors must be present, although the last factor is of particular importance.

Here, there was no dispute that Alcoa and its subsidiary, TRACO, shared common ownership, and that they did not share common day-to-day management, but were managed completely separately. The Board ultimately found—and the Fifth Circuit agreed—that the two entities were also substantially interrelated, as they held themselves out to the public as being a single entity. TRACO fell within Alcoa's brand name umbrella, and although the companies used intercompany accounting for labor relations charges generally, TRACO was not charged for the discrete labor advice received from

Alcoa relating to the handbilling situation, which amounted to a few short conversations.

The Fifth Circuit provided tepid support for this last point, noting that intercompany accounting and TRACO's non-payment for the advice Alcoa provided in connection with this case "serves as ***some*** evidence that Alcoa and TRACO have interrelated operations."[7] The Fifth Circuit also agreed with the Board that Alcoa exercised centralized control over labor relations, as Alcoa provided TRACO with labor relations training and materials, and TRACO adopted Alcoa's labor relations policy as its own. Importantly, the Fifth Circuit relied heavily on the use of Alcoa's in-house legal counsel and labor relations director to advise TRACO as a determinative factor.

Thus, corporate entities should be extremely careful when providing legal and labor relations advice across a family of companies, as "free" advice—no matter how limited—can fuse separate entities into a single employer under current Board law.

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[1] D.C. Cir. Case No. 16-1028.

[2] 362 NLRB No. 186 (Aug. 27, 2015).

[3] 365 NLRB No. 37 (Feb. 22, 2017)

[4] (*HealthBridge*, slip op. at 8.)

[5] *HealthBridge*, slip op. at 32 (emphasis in original).

[6] 849 F.3d 250 (5th Cir. Feb. 22, 2017)

[7] *Id.* (emphasis added).

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