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Civil LITIGATION

NLRB ruling expands definition of 'joint employer'

For the past three decades, the National Labor Relations Board has enforced a certain definition of "joint employer" when it came to determining obligations under the National Labor Relations Act (the Act). This definition resulted in finding an employment relationship between an entity and workers whom it does not directly employ if the entity shared or co-determined matters governing the workers' essential terms and conditions of employment and if the entity exercised direct and immediate control over those terms and conditions. In other words, even if the entity had the power to make such decisions, it would not be considered a joint employer unless it actually exercised that power.

By ALINA NADIR
Daily Record Columnist

A recent NLRB case has done away with the requirement that an entity actually exercise its power over the workers before a joint employer status can be found. In *Browning-Ferris Industries of California*, 362 NLRB No. 186 (Aug. 27, 2015), Browning-Ferris Industries (BFI), the "user company," operated a recycling facility and contracted with Leadpoint Business Services, the "supplier company," to staff that facility.

The company's contract provided that Leadpoint was the sole employer of its personnel and also specifically provided that there was no employment relationship between BFI and Leadpoint's personnel. After the performance of the contract ensued, a union requested to represent some of Leadpoint's employees, and in its petition, the union claimed that BFI was a joint employer. A union election was held, and initially, a NLRB regional director found that BFI was not a joint employer.

The NLRB, in August 2015, reversed the regional director's finding. In *Browning-Ferris*, the NLRB claimed that its finding was necessary given the "diversity of workplace arrangements in today's economy," and quoted the United States Supreme Court from another context, stating that the NLRB has a "responsibility to adapt the Act to the changing patterns of industrial life." To the NRLB, that meant drastically changing the joint employer definition.

While the previous standard found no joint employment relationship where the user company exerted no direct control over supplier company's terms and conditions of employment, the NLRB now finds such a relationship when the user company "reserves a contractual right to set a specific term or condition of employment for a supplier employer's works," because that company "retains the ultimate authority to ensure that the term in question is administered in accordance with its preferences."

Even if a user company contracts with a staffing agency and reserves the right to terminate the agency's employees, yet never actually exercises that right or acts in any way to affect the agency's employees' terms and conditions of employment, the user company can still be a joint employer when it comes to collective bargaining and unfair labor practices.

So, what does *Browning-Ferris* mean for employers? While *Browning-Ferris* deals with a staffing agency situation, this decision will affect other types of businesses as well. Depending upon a user company's or franchise owner's relationship with related entities, this decision creates a big change in who is considered an employer during collective bargaining and unfair labor practice charges. Even if a user company has little to no oversight or involvement in the supplier company, it could still be on the hook for any charges brought against the supplier.

In March, the NLRB indicated its intention to consider franchise owners a joint employer, if possible, after it decided McDonald's is a joint employer with its franchisees while adjudicating multiple unfair labor practice charges. *Browning-Ferris* reinforces that March decision. In its decision, the NLRB stated that a primary purposes of the Act is to "promote the peaceful settlement of industrial disputes," however many critics of *Browning-Ferris* argue the decision will do exactly the opposite.

Now, in addition to the often lengthy processes of collective

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bargaining and litigating unfair labor practice charges, the parties will have to fight about who exactly is considered an "employer" before a dispute can be resolved. And as this decision is still new, conflicts may arise when determining the necessary parties to the negotiation and approval of a collective bargaining agreement. This can take the form of costly and lengthy litigation to find every possible "employer."

Browning-Ferris will likely also lead to increased liability for companies that have little to no practical control over how a subcontractor or franchisee is conducting itself in terms of labor practices and breaches of collective bargaining agreements. The dissenting NLRB members argue that *Browning-Ferris* will have the exact opposite of its stated intent of peaceful settlement of disputes; it will likely lead to more conflict, more uncertainty, and more litigation. They warned that the decision "will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have … and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing."

Browning-Ferris makes the staffing agency model much more risky, and it could lead to companies cutting ties with staffing agencies or subcontractors in favor of hiring employees directly. By doing so, an employer has much more control over its potential liability, but places the viability of staffing agencies, subcontractors, and franchise arrangements at risk.

There are questions about just how far this new definition of joint employment will go. For example, will federal courts adopt this new definition and extend liability for unpaid wages and violations of Title VII, the ADA, etc., to every possible employer under the NLRB's standard? If so, employers with franchisees or subcontractors will face a future full of litigation for events over which they had no realistic control.

There is the chance that *Browning-Ferris* will be appealed, but as of yet, no appeal has been filed. Until then, employers will have to be prepared for the possibility that they are on the hook for their subcontractor's actions.

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