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The National Labor Relations Board Establishes New Joint Employer Test

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On August 27, 2015, the National Labor Relations Board (NLRB) in *Browning-Ferris Industries, Inc.*, 362 NLRB No. 186 (2015), abandoned its 30 year approach to evaluating whether two separate and independent entities are joint employers of a particular workforce in the misguided belief that the existing standard did not adequately protect the collective bargaining rights of employees in the current economic environment with its increased utilization of franchises and contingent workforces. Unfortunately, the NLRB's new "economic realities" test will make it far more difficult for businesses to determine whether their chosen business model will be subject to joint employer liability.

Under the NLRB's old test, *Laerco Transportation*, 269 NLRB 324 (1984), separate and distinct entities were only found to be joint employers when they shared or co-determined a workforce's essential terms and conditions of employment (namely, hiring, firing, discipline and supervision), through the exercise of direct and immediate control. Retaining the authority to act was not enough, nor could exercise of the control be of a routine nature. This test enabled employers to avoid joint liability by avoiding exercising direct control over their franchisee's employees or their contingent workforce such as having the actual employer of the contingent workforce do the hiring and firing.

Under the NLRB's new test there is no such certainty. The NLRB may find two entities to be joint employers of a particular entity's workforce if "they are both employers within the meaning of common law, and they share or co-determine matters governing the essential terms and conditions of employment."

In evaluating the exercise of control, the NLRB signaled that it was broadening its understanding of how an entity might "share control over the terms and conditions of employment or co-determine them." No longer will the NLRB require that joint employers exercise immediate and direct control over the other entity's employees' terms and conditions of employment. Joint employer status may be found if the entity exercises control through an intermediary or reserves the right to exercise such control, and even over discrete terms and conditions of employment. Moreover, the NLRB suggested that bargaining might be required even where the putative joint employer shares, co-determines or reserves control over a limited number of terms and conditions.

In defining the "essential terms and conditions of employment," the NLRB noted this would include matters relating to the employment relationship such as "hiring, firing, discipline, supervision, direction, wages, hours, the number of workers to be supplied" and "controlling scheduling, seniority, overtime, assigning work and the manner and method of work performance."

The new test will saddle many businesses with significant additional liability as a result of a joint employer finding. Businesses that previously were not considered joint employers may now face joint collective bargaining obligations with the representatives of workforces over which they exercise little if any practical control. These businesses will also run an increased risk of being struck, picketed or having to defend themselves in NLRB proceedings arising from this newly found employment relationship. This will prove costly, time consuming and complicate business operations as the newly found joint employer will need to reach agreements with not just the union but their franchisee or the entity supplying the contingent workforce.

This decision will likely have its greatest impact on the franchise industry, including restaurants and any business that utilizes a contingent workforce such as skilled nursing homes, operators of commercial and residential buildings that contract out janitorial, housekeeping and landscaping services.

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