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Labor & Employment Alert
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National Labor Relations Board Expands Definition of Joint Employer under the National Labor Relations Act

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In a decision issued August 27, 2015, the National Labor Relations Board (the "Board") expanded the definition of "joint employer" under the National Labor Relations Act (the "Act"), broadening the number of parties potentially subject to bargaining and fair labor practice obligations in relation to employees they may not directly employ. In this case, Browning-Ferris Industries of California (the "BFI"), the Board found that the owner and operator of a recycling facility (the "user" employer) was a joint employer with a firm that supplied employees to the facility (the "supplier" employer), despite the fact that only the supplier firm provided compensation to and direct supervision of those employees. This case has potentially broad implications for both user and supplier employers.

In this case, Leadpoint supplied employees to work at the BFI facility. A union filed an election petition for just the Leadpoint employees working at the BFI facility (the BFI employees already had a union) and named Leadpoint as the employer, which is normal – everyone agreed those employees were Leadpoint employees. What was abnormal about this case was that the union also named BFI as a joint employer of the Leadpoint employees, even though under the law in effect at the time, BFI likely would not have been considered a joint employer, as the Board's Regional Director ruled in the first instance.

The Act applies to "employers," but does not define the term "employer." Past precedent has established that parties are "joint employers" if (1) they are both employers within the meaning of the common law; and (2) they share or codetermine those matters governing the essential terms and conditions of employment. For over thirty years, the Board has required that in order to be any kind of "employer" under the Act, the entity must exercise direct and immediate control over the essential terms and conditions of employment. The joint-employer inquiry has always been a highly fact-dependent analysis, and this has not changed under the new standard.

What has changed, however, under the Browning-Ferris decision, is that direct and immediate control are no longer required. Specifically, the Board stated that "[r]eserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employer inquiry," and as such, joint-employer status will "no longer require that a joint employer… exercise that authority." Additionally, the Board stated, "[i]f otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint-employer status."

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BFI and Leadpoint were parties to an agreement ("Agreement") that outlined the precise nature of their relationship with regard to Leadpoint employees working at BFI's facility. The Board found BFI to be a joint employer with Leadpoint because the following factors were present:

- *Hiring, Firing, and Discipline* – Although Leadpoint conducted all day-to-day hiring tasks, the Agreement imposed restrictions on Leadpoint when hiring, firing, and/or, disciplining, including, among others, prohibiting Leadpoint from hiring former BFI employees.

- *Supervision, Direction of Work, and Hours* – BFI controlled shift timing, staffing levels, overtime, and employee positions, and oversaw all employee performance, usually by communicating to a Leadpoint supervisor as an intermediary. BFI also had unilateral control over the speed of the conveyor belts which move recycled products for employee inspection.

- *Wages* – Under the Agreement, Leadpoint determined pay rates and administered payroll, except that the rates could not be more than those of BFI employees doing comparable work. The Agreement also required BFI to reimburse Leadpoint for labor costs plus a mark-up (also referred to as a "cost-plus" arrangement).

The new standard raises the question of whether arrangements such as employee leasing, franchising, and subcontracting, will now turn "user" employers into joint employers under existing contractual arrangements. This could have far-reaching effects on parties in user/supplier relationships in any number of different industries that exercise some level of control over employee terms and conditions through their contractual arrangements.

What does it mean to be a joint employer? It potentially means, among other things, joint liability for the unfair labor practices of the other entity, collective bargaining obligations for supplied employees, exposure to union secondary boycott activity because both joint employers would be "primary" employers, and possible limitations on user employers being able to terminate their contracts with supplier employers.

The decision could also have a ripple effect into other areas of employment-related liability. Although Browning-Ferris is limited to federal labor law, courts and administrative agencies sometimes look to Board decisions for guidance on how to define "employer" for purposes of other laws, such as those governing workplace discrimination and employee wages. Furthermore, other agencies such as OSHA have recently indicated an interest in reaching business entities that only indirectly benefit from employees subject to regulation.

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Companies in contractual and business relationships in which each party has any level of control over employees should carefully scrutinize the terms of those relationships. These companies should also be prepared for the fact that they may have to choose between either accepting more employment-related liability exposure or giving up some amount of control over the employees upon which they rely.

This client alert was written by Attorneys Lena-Kate Ahern and Geoffrey P. Wermuth. If you have any questions, please contact Geoff or Lena-Kate or the attorney responsible for your account, or call (617) 479-5000.

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