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Cross Border Business Law Blog

The NLRB's Broadened Joint-Employer Standard: New Pitfalls for Companies with Cross-Border Relationships

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Companies sometimes hire workers through staffing agencies. Sometimes they participate in joint ventures or have subcontracting relationships. Companies and individuals today enter into a variety of contractual arrangements to reduce costs and maximize available capital, flexibility, talent and efficiency. A typical feature of these arrangements is for one company to use and incorporate the work performed by employees of another company into the products and services it ultimately delivers.This is common in the world of cross-border transactions and relationships, where it makes sense to arrange for another company to perform the work needed due to its expertise, location or cost overhead.

Enter the National Labor Relations Board ("NLRB" or "Board"), whose decision in *Browning-Ferris Industries of California, Inc.,* 362 NLRB No. 186 (August 2015) may change how many of these relationships function. It even raises questions about whether some of these arrangements are now too risky. Under *Browning-Ferris*, the NLRB has shifted the standard for determining whether two companies constitute joint employers under the National Labor Relations Act ("NLRA"). The new joint-employer standard increases the risk that employers could be liable for claims and actions against the entities with whom they contract.

In its decision, the Board first restated that it may find that two or more entities are joint employers of a single work force if they essentially share or codetermine matters that govern the essential terms and conditions of employment of those employees. After restating this general principle, however, the NLRB proceeded to expand the standard for assessing joint-employer status and to overrule legal precedent it had been following for the past 30 years.

The case involved Browning-Ferris Industries, which operates a recycling facility and staffs its operation with about 60 of its own employees and an additional 240 workers contracted through a staffing agency, Leadpoint Business Services. When a local union filed a petition to represent Leadpoint's employees, it argued that Browning-Ferris was a joint employer with Leadpoint, and should, therefore, be required to engage in collective bargaining with the union with respect to the Leadpoint workers.

The Board supported the union's argument, holding that it would no longer require that an employer actually exercise authority over workers' terms and conditions of employment and that *the mere possession of such authority was sufficient* to make an employer a joint employer. Conditions of employment include such issues as hiring, firing, wages, scheduling, discipline, supervision and direction of work. The Board also overturned its prior requirement that a joint employer's control must be exercised directly and immediately. Control exercised *indirectly, through an intermediary, may now suffice* to establish joint-employer status.

Why Does *Browning-Ferris* Matter?

Browning-Ferris does not mean that every employer who uses contract labor will now be found to be a joint employer. In fact, other agencies besides the NLRB apply varying joint-employer standards under particular statutes and regulations, including Title VII of the Civil Rights Act, which addresses issues of discrimination, and the Fair Labor Standards Act, which addresses wage and hour issues. Those agencies and the courts presumably will continue to apply their own standards, and may or may not be influenced by the NLRB decision.

But a company should care about *Browning-Ferris* and its implications for joint-employer status if it contracts with other entities, such as staffing agencies, subcontractors and franchisees, to deliver, develop or manufacture certain of its goods and services or perform functions like those typically performed by the company's employees. Under the new test, if the contract reserves the right of Company A to control or to specify any of the terms or conditions of employment of Company B's employees, then Company A, even if it does not exercise those rights, could be deemed a joint employer of Company B's employees for labor matters.

There are four clearly identifiable consequences of a determination of joint-employer status under the NLRA: (1) the obligation of the joint employer to engage in collective bargaining alongside the primary employer; (2) exposure of the joint employer to joint liability for unfair labor practices and breaches of collective bargaining agreements; (3) removal of the joint employer's insulation from a union's dispute with the primary employer, including what would otherwise constitute secondary strikes, boycotts and picketing; and (4) it will be more difficult for a company to terminate or rebid contracts with clients who have a unionized work force.

The potential applicability of *Browning-Ferris* could arise in a variety of contexts in cross-border transactions, including:

- A company in one jurisdiction ("user") may seek to employ the services of a company in another jurisdiction ("supplier") whose workers are represented by a union. In that case, the non-unionized user company will want to take affirmative steps to avoid joint-employer status with the supplier.

- A company in one jurisdiction may have a franchisor-franchisee relationship with a company in another jurisdiction. In that case, the franchisor will want to structure the relationship to avoid joint-employer status.

- A company in one jurisdiction may have a parent-subsidiary relationship with a company in another jurisdiction. The Board's adoption of the "potential control" standard likely presents additional challenges for the parent to insulate itself from joint-employer status with its subsidiary.

To reduce the possibility of a company's joint-employer status with another company and the consequences that flow from a joint-employer relationship, the company should consider the following practices:

- Avoid contract language that reserves for the company any potential control over the terms and conditions of employment of the other company's employees. Incorporate a disclaimer of such control if the circumstances allow.

- Refrain from exercising actual control over the other company's workers. The NLRB may determine that a company's exercise of actual control is sufficient to confer joint-employer status even if the company has disclaimed a right to do so in the contract.

- Avoid contracting for work that is similar to the duties already performed by the company's employees.

- Require the other company to provide a written agreement stating that it will comply with all federal, state and local labor laws and regulations, specifying in particular those pertaining to labor and employment. If the circumstances allow, require an indemnity clause in which the other company agrees to indemnify for any claims or liabilities arising out of an alleged violation of these laws.

- On paper and in everyday practice, focus on the results to be delivered by the other company, not on the methods or means it utilizes to achieve those results.

- Minimize contact with the other company's non-supervisory employees. Avoid providing direction, materials, training or benefits to these employees. If the other company's workers are represented by a union, do not participate or retain the right to participate in collective bargaining or in administration of the collective bargaining agreement.

Tags: collective bargaining, contract labor, contractual agreements, cross-border transactions, employees, employers, employment, Fair Labor Standards Act, franchisees, joint employers, joint-employer standard, joint-employer status, National Labor Relations Act, National Labor Relations Board, NLRA, NLRB, staffing agencies, subcontractors, Title VII of the Civil Rights Act