You're Not the Boss of Me – The NLRB May Disagree

Insights
8.28.15

With a few key strokes, the NLRB yesterday, in a 3-2 decision down party lines, wiped away years of precedent and re-wrote, or, in its words "refined," the definition of a joint employer. In a ruling that will, if upheld through inevitable appeals, significantly impact the franchise, outsourcing and many other industries, the NLRB decided a California company, Browning-Ferris Industries, was a joint employer of workers hired by a staffing firm. In reaching this conclusion, the NLRB jettisoned existing precedent which generally required an entity to exercise actual control over a worker to be deemed a joint employer. Now, under the new or "refined" standard, an entity may be deemed a joint employer if it has reserved the right to control the terms and conditions of a worker's employment, even if it does not actually exercise such control. The NLRB attempted to justify this change by claiming the old standard, requiring an entity to exercise actual control over a worker, was outdated and "out of step with changing economic circumstances."

Not surprisingly, the business community has quickly decried the *Browning-Ferris* decision as a politically driven ruling that will negatively impact a wide array of industries including the franchise industry. While it is yet to be seen whether the decision will have the dire consequences people in the business community are predicting, many believe the decision will force companies built on a franchise or staffing agency model to directly negotiate with unions; the bargaining unit, for example, likely will no longer be limited to the employees of only a particular franchisee. Likewise, the NLRB, using this expanded definition of a joint employer relationship, is actively seeking to hold franchisors responsible for alleged unfair labor practices that took place at the location of what was

franchisors responsible for alleged unfair labor practices that took place at the location of what was previously understood to be an independently owned franchisee. What is unclear is whether the new definition of a joint employment relationship, assuming it is not reversed on appeal, will be limited to issues before the NLRB or if other governmental agencies will move to adopt a similar and broader definition of a joint employment relationship notwithstanding the fact that the NLRB's decision is limited to the meaning of a joint employment relationship under the National Labor Relations Act.

In addition to the outcry from the business community, some Congressional leaders have already made it clear they will quickly introduce legislation aimed at overturning the *Browning-Ferris* decision. For example, Senator Lamar Alexandra, in announcing his intention to introduce this type of legislation, issued the following statement denouncing the NLRB's decision: "The board's decision will greatly reduce any incentive for a corporation to sell franchises or parcel out business to subcontractors, suppliers or subsidiaries, and so may knock the ladder out from under millions of small business owners, some of whom have never been subject to NLRB jurisdiction before." While it is questionable that this type of legislation will actually be passed in the current political environment, Senator Alexandra's scathing statement reinforces the view of many, namely that the *Browning-Ferris* decision is part of a larger and fierce battle between business, organized labor and lower wage workers. Only time will tell if the *Browning-Ferris* decision will stand and result in the broad based and negative consequences predicted by many in the business community.