NLRB Starts Down The Slippery Slope With Controversial New Joint Employer Ruling

Insights
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In a 3-2 decision, the National Labor Relations Board (NLRB) announced yesterday a broad new standard for determining whether two businesses are "joint employers" for purposes of collective bargaining. *Browning-Ferris Industries of California, Inc.* Under this new standard, joint employment now exists even where one company only has the right to exert indirect or potential control over the terms and conditions of another company's employees.

More troubling, however, is what this decision portends. The NLRB has left the door ajar for the labor movement to continue its aggressive push into more and more workplaces, and unions stand to rush in to fill the vacuum. This decision may one day be looked upon as the beginning of a slippery and dangerous slope for many employers.

Facts Of The Case
Browning-Ferris Industries, or BFI, owns a recycling facility and employs unionized workers. It contracts with a non-union staffing company to provide additional workers at its recycling plant. Although the contract between the two separate businesses provides that the staffing company is the sole employer of the temporary workers, BFI maintained the *right* to control several terms and conditions of employment. While BFI contended that it did not exercise this right on a regular basis or in any meaningful way, this became irrelevant for the Board's purposes.

Out With The Old...
For the past 30 years, the NLRB has held that two companies would only be considered joint employers if they share or codetermine those matters governing the essential terms and conditions of employment. Under this standard, an employer would only be held to be jointly employing workers if they *actually exercised* the right to control. Moreover, under the old standard, the exercise of such control must have been direct, immediate, and not limited and routine.

...And In With The New
The new standard announced in the August 27, 2015 decision eliminates the requirement that the employer actually exercise control. Instead, the business need only retain the contractual right to control – even if it has never exercised it. Further, the Board rejected the direct, immediate, and not limited and routine criteria, holding instead that indirect control (e.g., control through an intermediary) is now sufficient.

How Broad Is It?

The NLRB's new standard includes control over *any* term or condition of employment and is not limited to an exclusive list of factors. Its analysis of the factors at issue demonstrates just how expansive the scope is. BFI played no actual role in hiring or disciplining the staffing company employees, but the NLRB determined it was critical that BFI retained the ability to reject workers assigned to its facility. BFI also did not actually supervise the staffing company workers, but the Board found critical that BFI levied indirect control by setting shift schedules and occasionally assigning tasks through the staffing company managers.

When Will The Other Shoe Drop?

This decision is not as significant for what it stands for so much as what it portends. The Board goes out of its way to emphasize that this decision is limited to these unique facts, and some employers might find comfort that the Board says it does not necessarily apply to other business models, nor does it expressly allow for the inclusion of temporary employees into bargaining units with their regular counterparts. Unfortunately, however, it does not expressly foreclose that possibility, nor does it preclude the agency from extending this doctrine to cover those circumstances going forward.

As we have seen time and time again in past experience with the NLRB, this decision now frees the Agency's 26 Regions to utilize their vast discretion to push the envelope even further. This is especially troubling given that this expected expansion will play out against the backdrop of a "quickie election" rule that is now fully entrenched.

The Board remains predisposed to union interests, and is about to lose one of its two Republican members. We have every reason to believe the other shoe is about to drop, and for that reason alone, employers should monitor these developments carefully.

What This Decision Means For Employers

Given this new decision, any employer that retains the right to impose even indirect control over the working conditions of temporarily placed employees runs a serious risk of being deemed their joint employer – not only for bargaining purposes, but potentially for unfair labor practice liability as well.

It stands to reason that unions will likely attempt to exploit this situation, especially given their declining numbers and the current state of the economy. We expect unions to specifically target temporary employees with promises of "regular" status and all the perceived perks that come with it in an effort to secure their signatures, and ultimately their votes. This tactic could allow unions to gain a toe-hold that may ultimately lead to organizing direct employees.

By the same token, effective deployment of this strategy could preempt employers from revisiting their staffing models on the heels of such organizing activity. By pursuing joint employer status, unions may then assert that any attempt to sever the relationship constitutes unlawful

discrimination.

What Employers Should Do Now

As a result of this decision, employers and temporary service providers alike should scrutinize the parameters within their written service agreements and their underlying practices for reference to right to control. This includes an analysis of pre-employment qualification and hiring standards, assignment and retention of individual temporary employees, shift schedules, workload and pace of work, and wages and benefits.

No doubt that the complete elimination of many of these factors may be impractical in many cases. But to the extent that their presence can be minimized, the parties can at least develop and preserve viable arguments against imposition of joint employer status.

If you have any questions about this decision, or how it may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific NLRB decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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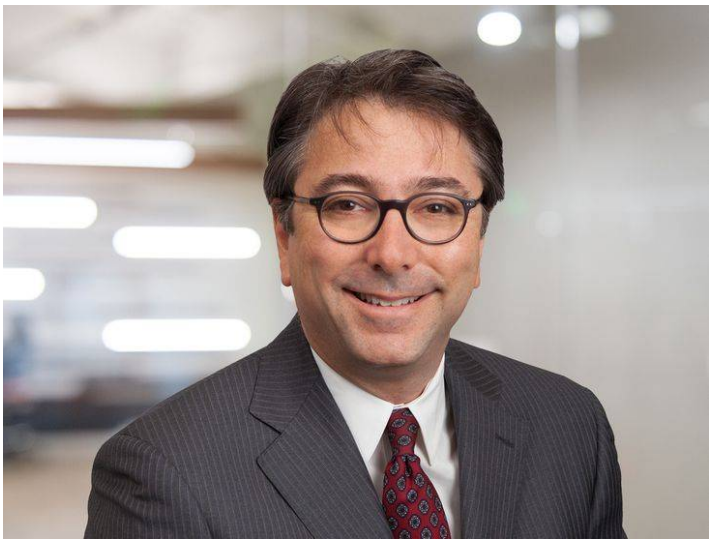

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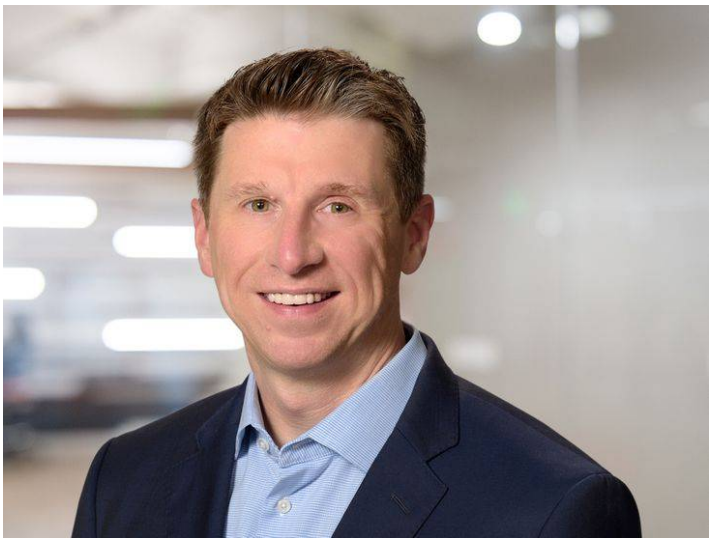

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