Labor Board Overrules Unworkable Joint-Employer Test

CRUCIAL VICTORY FOR EMPLOYERS HALTS LABOR'S MOMENTUM

Insights
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The newly constituted National Labor Relations Board announced that a troublesome joint-employer test adopted in 2015 would be immediately scrapped, instead reaffirming its prior reasonable standard for determining joint-employer status. Starting at once, the Board will follow the traditional common law principles requiring a finding of direct and immediate control in order to find that two entities are joint employers.

This decision, which helps to once again bring balance to the legal landscape, is welcome news for employers helps stem the troubling trend that had been pervading recent Board decisions. It should help to limit unwarranted unionization efforts and reduce unfounded unfair labor practice claims, not to mention the potential impact it could have on many other areas of the law that involve an analysis of joint employment principles (*Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*).

Facts Of The Case
Brandt Construction performs large-scale construction projects based out of Milan, Illinois, employing about 140 workers. Hy-Brand is a small, 10-employee construction outfit that erects steel warehouses and other structures, headquartered in Iowa. The two companies are interconnected in various ways, with the same president, vice-president, secretary, treasurer, and owners. Management exercised joint control over essential employment terms of workers from both companies; the control was direct and immediate, not limited and routine.

In 2015, after several workers went on strike over alleged unsafe working conditions and perceived substandard wages and benefits, management terminated their employment. They brought unfair labor practice charges against both entities on a joint employment theory. The Administrative Law Judge found the entities to be joint employers by applying the *Browning-Ferris* standard.

That standard had its origins in a California recycling facility – Browning-Ferris Industries, or BFI – that employed unionized workers. BFI contracted with Leadpoint Business Services, a non-union staffing company, to provide additional workers at the plant. Although the contract between the two separate businesses provided that the staffing company was the sole employer of the temporary workers, BFI maintained the *right* to control several terms and conditions of employment.

In July 2013, a union filed a petition seeking a representation election for a bargaining unit comprised of approximately 240 Leadpoint workers, claiming that BFI and the staffing company were joint employers of the employees in question. BFI objected to this characterization, noting that Leadpoint controlled its own employees' wages, benefits, day-to-day supervision, schedules, hiring, and discipline. While BFI admitted that it had the contractual right to control certain of these aspects, it demonstrated that it did not exercise this right on a regular basis or in any meaningful way. However, this seemingly significant factor became irrelevant for the Board's purposes.

Obama-Era NLRB Renounced Existing Joint-Employer Test

For the previous 30 years, the NLRB 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 this standard, the exercise of such control must have been direct, immediate, and not limited and routine.

However, the Board renounced this joint-employer test in a controversial August 2015 ruling against BFI, eliminating the requirement that the employer actually exercise control. Instead, the NLRB decided that businesses need only retain the contractual right to control to be considered a joint employer – 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) would be sufficient to find joint employment.

New Board Rejects Obama-Era Board Test

Now that the Board is controlled by a majority of Republican appointees, it reversed course and overruled the *Browning-Ferris* standard, returning to the joint employment standard that had existed for 30 years. The bad news for Brandt Construction and Hy-Brand is that the NLRB said that the two entities were joint employers under even an employer-friendly standard. The good news for employers everywhere is that the decision reverts to a more balanced standard that raises the bar for finding the existence of joint employment back to a reasonable level.

The December 14 decision announces that, in all future and pending cases, two or more entities will be deemed joint employers under the National Labor Relations Act (NLRA) only if there is proof that one entity has *exercised* control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so *directly and immediately* (rather than indirectly) in a manner that is not limited and routine.

Accordingly, under the resorted pre–*Browning Ferris* standard, proof of indirect control, contractually reserved control that has never been exercised, or control that is limited and routine will not be sufficient to establish a joint-employer relationship. The Board majority, which voted 3-2 to scrap the 2015 standard, concluded that the reinstated standard adheres to the common law and is supported by the NLRA's policy of promoting stability and predictability in bargaining relationships.

This decision is welcome news for employers. It should spare businesses from unwarranted claims of unfair labor practices, preventing workers and unions from bringing such claims against companies using a broad joint-employer theory.

What Does This Mean For Employers?
This case provides welcome clarity and relief for employers who provide third-party contracting services. You can continue to structure your relationships with indirect, contractual control over working conditions without running a serious risk of being deemed a joint employer for purposes of risking unionization, collective bargaining, and the defense of unfair labor practice charges. Still, this decision serves as an important reminder that care should be taken to ensure these service provider contracts are drafted in such a way to avoid joint employer status.

Moreover, this decision could end up being used to help sort out the legal question of joint employment in other areas of the law. Time will tell how courts and agencies treat this decision, but there is reason for hope now that a more balanced standard is now law of the land. This decision may be appealed in federal court, so it is possible we may have not heard the last on this matter. However, for the time being, employers can rest easy knowing that order has been restored when applying this crucial legal test.

For more information, contact any member of our Labor Relations Practice Group or your regular Fisher & Phillips attorney.

This Legal Alert provides an overview of a specific federal 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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