Client Alert | Employment, Compensation & Benefits

NLRB Adopts Broad Joint Employer Standard

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The federal National Labor Relations Board ("NLRB" or the "Board") has recently adopted a broad standard for assessing joint-employer status under the federal National Labor Relations Act ("NLRA"). The "joint employer" standard is used to determine whether an entity that is not the official employer of an employee or group of employees must nonetheless be considered an employer, comply with various obligations required of the official employer and be subject to liability for failing to comply with such obligations. Joint employment typically arises with respect to employee leasing firms and temporary staffing agencies, but in certain circumstances, joint employer liability may also be imposed on franchisors, controlling equity holders, parent companies, secured lenders and other third-party entities.

As we reported in our November 2014 Client Alert, the General Counsel of the Board had advocated for the Board to broaden the "joint employer" standard applied under the NLRA. The Board has now broadened the standard, but not as broad as the standard advocated by the General Counsel. The General Counsel had suggested that the Board adopt a "totality of the circumstances" approach to the joint employer test that would focus on "industrial realities." The Board declined to adopt the General Counsel's suggested new test "insofar as it might suggest that the applicable inquiry is based on 'industrial realities' rather than the common law." The Board instead stated that "[t]he right to control, in the common law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect." The Board's new standard considers not only an entity's *actual* use of *direct* and *immediate* control over terms and conditions of employment, but also *reserved* authority to control such terms and conditions and any *indirect* control—such as through an intermediary—over such terms and conditions.

Browning-Ferris Industries of California, Inc.

Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery ("BFI"), owns and operates a recycling facility. BFI solely employs approximately 60 employees engaged in tasks primarily outside of the recycling facility. These employees are represented by a labor union (the "Union"). BFI also engages Leadpoint Business Services ("Leadpoint"), an employee staffing agency, to provide approximately 240 of Leadpoint's employees to work inside the recycling facility (the "Leadpoint Employees"). BFI's contract with Leadpoint states, among other things, that "Leadpoint is the sole employer of" the Leadpoint Employees and that "nothing in the Agreement shall be construed as creating an employment relationship between BFI" and the Leadpoint Employees. The Union petitioned the Board to represent the Leadpoint Employees and argued that BFI and Leadpoint jointly employed the Leadpoint Employees.

The Board noted that the standard for determining whether "two or more statutory employers are joint employers of the same statutory employees [is] if they 'share or codetermine those matters governing the essential terms and conditions of employment'" and that "[c]entral" to this inquiry is "the existence, extent and object of the putative joint employer's control." The Board stated that it "will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry." The Board also stated that it will not require that, "a statutory employer's control must be exercised directly and immediately." Instead, if control is otherwise sufficient, "control exercised indirectly—such as through an intermediary—may establish joint-employer status."

The Board noted that the essential terms and conditions that are relevant for determining whether a putative joint employer has exercised or has the right to exercise control include, without limitation, hiring, firing, discipline, supervision, wages and hours, and also include "dictating the number of workers to be supplied; controlling scheduling, seniority and overtime; and assigning work and determining the manner and method of work performance." Applying that standard to the BFI case, the Board noted BFI's "significant" control over who Leadpoint could hire to work at the BFI facility, including requiring that Leadpoint "meet or exceed [BFI's] own standard selection procedures and tests," requiring that Leadpoint have applicants undergo drug tests, proscribing the hiring of workers deemed by BFI to be ineligible and retaining the right to reject any worker. BFI also controlled various processes that shaped the day-to-day work of the Leadpoint Employees, such as the "speed of the streams and specific productivity standards for sorting," "implored workers to work faster and smarter" and counseled them against stopping the streams, assigned the specific tasks to be completed by the Leadpoint Employees, "exercise[d] near-constant oversight of [the Leadpoint Employees'] work performance," specified the number of workers that it required, the timing of shifts and when overtime was necessary, and also required an authorized BFI representative to sign the time records of the Leadpoint Employees. BFI also exercised influence over wages paid by Leadpoint to the Leadpoint Employees, including prohibiting Leadpoint from paying such employees more than BFI pays to its own employees and requiring BFI's approval over pay increases—the Board also noted that BFI and Leadpoint were parties to a cost-plus contract, but stated that "this arrangement, on its own, is not necessarily sufficient to create a joint-employer relationship." The Board found that BFI's role in "sharing and codetermining the terms and conditions of employment establishes that it is a joint employer [of the Leadpoint Employees] with Leadpoint."

Implications of the Browning Decision

Although the *Browning* decision involved the relationship between an employee staffing agency (Leadpoint) and its client (BFI), some have expressed concern that the *Browning* decision signals an end to franchising and other similar relationships that might now be held to create joint employment relationships using the same rationale. The Board itself, however, noted that its decision does not address the following legal relationships: (i) lessor-lessee; (ii) parent-subsidiary; (iii) contractor-subcontractor; (iv) franchisor-franchisee; (v) predecessor-successor; (vi) creditor-debtor; and (vii) contractor-consumer. Relevant to these other categories, the Board also stated in *Browning* that "[it does] not suggest today that a putative employer's bare rights to dictate the results of a contracted service or to control or protect its own property constitute probative indicia of employer status."

With respect to franchising in particular, we note that the Office of the General Counsel of the Board had, prior to the *Browning* decision, issued an Advice Memorandum finding that fast-casual restaurant franchisor Freshii Development, LLC, was not the joint employer of its franchisee's employees even under the expanded joint-employer test that had been proposed by the General Counsel (and therefore, not subject to unfair labor practice allegations for allegedly terminating two employees for attempting to unionize the workforce). The Office of the General Counsel determined there that the franchisor played no role in the franchisee's hiring, firing, disciplining or supervising of employees or in setting their wages, raises or benefits, and also provided no advice about how to deal with the possible union organizing effort. Notably, the Freshii franchisor included in its operations manual suggestions for human resources management, including a sample employee handbook, but did not require its franchisees to implement such suggestions or use the sample employee handbook—and, although the franchisee at issue did implement the suggested employee handbook, other franchisees implemented different employee handbooks. The Office of the General Counsel determined that Freshii was not a joint employer because "there [was] no evidence that [the franchisee] shares or codetermines with Freshii matters governing the essential terms and conditions of employment of [the franchisee's] employees" and that "Freshii's control over [the franchisee's] operations are limited to ensuring a standardized product and customer experience."

Recommendations for Minimizing Joint Employment Risks

Given the NLRB's expanded joint-employer standard and the General Counsel's broad view of joint employment—as seen in the *Browning* decision and complaints previously filed against McDonald's, USA, LLC, as franchisor—companies must be wary about not only exercising control but also reserving authority to exercise control, either directly or indirectly, over the terms and conditions of employment of another entity's employees. Companies that utilize the services of another entity or such other entity's employees (the "Service Recipients" and the "Employers," respectively) should take the following steps, among others:

- Ensure that agreements that the Service Recipients enter into with the Employers (whether the Employers are staffing agencies or other entities) contain statements confirming that the Service Recipients do not have the authority to direct, control or supervise, or otherwise influence, whether directly or indirectly, the terms and conditions of employment, or employment decisions relating to, the Employers' employees, and remove any contrary statements.
- Avoid exercising direct *and* indirect control over the Employers' relationship with its employees—for example, Service Recipients should not dictate or communicate instructions relating to the terms and conditions of the Employers' employees—and let the Employers establish their own employment policies and practices.
- In addition to customary due diligence in mergers and acquisitions, would-be acquirors of Service Recipients should pay special attention to the language of agreements governing the relationship between the Service Recipient and the Employer to see how such agreements address direction and control over the Employer's employees and also should inquire into the authority and level of control that the Service Recipient has exercised, whether directly or indirectly, and whether the Service Recipient otherwise has reserved the right to exercise control over the Employer's employees.

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