



nlrp broadens its standard for determining joint employer status

MSK Client Alert

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The National Labor Relations Board recently broadened its standard for determining joint employer status under the National Labor Relations Act. In *Browning-Ferris Industries of California* ("BFI"), the Board considered whether BFI and Leadpoint Business Services ("Leadpoint") are joint employers of the Leadpoint workers who sorted, cleaned and performed housekeeping duties for BFI at its recycling facility. Leadpoint is a staffing agency which provided its employees to work at BFI's facility. This case arose from a union election petition filed by Teamsters Local 350 naming BFI and Leadpoint as joint employers.

Before this decision, the standard for determining whether an entity was a joint employer was based on whether the entities "share or codetermine those matters governing the essential terms and conditions of employment," i.e., an actual control test. In *Browning-Ferris* however, the Board expanded this long-established principle to find that two or more entities will be considered joint employers of a workforce if (1) they are both common law employers; and (2) they have authority to share or codetermine those matters governing the essential terms and conditions of employment, whether or not that authority has been exercised, i.e., a reserved control test. Central to both of these new inquiries is the extent of the putative joint employer's potential control over the workforce.

In evaluating whether an employer has sufficient control over a workforce to qualify as a joint employer, the Board stated that it will no longer require that a joint employer actually exercise its authority to control the employees' terms and conditions of employment. The Board found that its previous view of joint-employer status, which required that a putative joint employer's control be exercised, and that exercise must be direct and immediate, purportedly had weak legal support despite its longevity. The Board will now consider, among other factors, whether an employer has exercised control over the terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so even if that authority has not been used. Under

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the new and broader standard, any right to control, whether or not that right has been exercised, will be probative of joint-employer status.

The NLRB claimed that its broader standard is designed "to better effectuate the purpose of the Act in the current economic landscape." The Board noted that more than 2.87 million of the nation's workers were employed through temporary agencies in August 2014, and concluded that its previous narrower joint employer standard failed to keep pace with changes in the workplace and current economic circumstances.

In applying its broadened standard to the Browning-Ferris facts, the Board found that BFI was a joint employer with Leadpoint, the company that supplied its employees to work at BFI. In finding that BFI was a joint employer, the Board relied on indirect and direct control that BFI possessed over essential terms and conditions of employment of Leadpoint's employees, as well as BFI's reserved authority to control such terms and conditions.