

NLRB Expanding Joint Employer Standard?

Labor & Employment Law Update

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Maybe. Organizations representing a variety of business and labor interests accepted the NLRB's invitation to weigh in on whether the board should reconsider its standard for determining when organizations are deemed "joint employers." Teamsters Local 350 requested the NLRB review a decision which found Browning-Ferris and its subcontractor, Leadpoint (which provides employees to the Browning-Ferris facility), were not joint employers because Browning-Ferris did not share immediate and direct control over the terms and conditions of Leadpoint's employees working at its facility. The board accepted review and also invited input from interested *amici* – entities not directly involved in the dispute but which have an interest in the outcome – on two very broad questions: "Should the board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the board's decision in this regard?" By inviting outside input the board signaled it is considering changing its stance on the issue.

A wide variety of organizations including the U.S. Chamber of Commerce, labor unions, the EEOC, and the NLRB's own General Counsel filed briefs in advance of the June 26 deadline. The Chamber lauded stability and predictability in both business relationships and collective bargaining and warned that disrupting 30 years of established precedent would lead to uncertainty and insecurity and have "far-reaching and negative consequences." Groups representing a wide variety of business interests cautioned that expanding the standard would burden companies with bargaining obligations for employees they do not directly control and unfairly expose them to liability for the acts of their suppliers and subcontractors.

The Teamsters and other groups representing the interests of organized labor pointed to an increase in the number of workers hired through staffing agencies and subcontractors and argued that the practice dilutes employees' ability to collectively bargain. "The modern worker," the Teamsters argue, "is awash in a sea of multi-layered and dependent relationships" and "bereft of meaningful resort to the protections and processes of the [National Labor Relations] Act."

General Counsel for the NLRB joined organized labor and pressed for an expansion of the current joint employer standard arguing Congress intended a broad reading of the term "employer." The EEOC urged the board to adopt the more all-encompassing standard it applies which looks to several factors, none

of which is decisive: “who hires and fires, who assigns work, who controls daily activities, who furnishes equipment, where the work is performed, who pays the worker, who provides employee benefits, how the worker is treated for tax purposes and whether the worker and the putative employer believe that they are creating an employer-employee relationship” and omits the NLRB’s “immediate and direct” language.

Any significant change in the NLRB’s approach will have far reaching implications. Amundsen Davis’s labor and employment team will continue to monitor the situation and alert you to any change that could impact your business.

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