

No Joint Employer Liability Found, Despite New NLRB Standard

Labor & Employment Law Update

By Beverly Alfon on November 12, 2015

A couple of months ago, we discussed the National Labor Relations Board's (NLRB) startling decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), in which it determined that a non-union company shared joint employer liability, under the National Labor Relations Act (NLRA), with a labor contractor at one of its recycling plants. The Board held that two or more entities are joint employers if each one possesses sufficient control over employee's essential terms and conditions of employment. Employers were in an uproar over the decision because of the potential exposure it brings to the use of any subcontractor and the fact that it makes it more difficult for an employer to avoid union organization through the subcontracting of work.

In the first reported decision since *Browning-Ferris*, the Regional Director for NLRB Region 5 found that in *Green JobWorks, LLC/ACECO, LLC*, Case No. 05-RC-154596 (Oct. 21, 2015), the union failed to establish a joint employer relationship between a subcontractor and a staffing agency. *So, what made the difference in this case?*

BOTTOM LINE: Unlike the *Browning-Ferris* decision, the Regional Director's decision in *Green JobWorks, LLC* is not binding in other cases and the union has a right to appeal it (and we'll keep you posted). Nonetheless, the decision confirms that the specific terms of the parties' agreement and their conduct under those terms will be scrutinized. As we suggested before, now is the time to take action:

- Analyze all written agreements between your organization and any third party. **A user company's reservation of rights as to contracted employees should be limited and specific. The agreement should clearly indicate that the servicing company maintains exclusive authority to hire, fire, discipline, etc. and the user company reserves no/minimal rights to influence or decide these matters.**
- Carefully evaluate supervisory functions and oversight in practice, training requirements and other day-to-day activities surrounding employee relations (of your own direct employees and 3rd party employees). **Consider requiring on-site "lead workers" from the servicing company so that they are responsible for tracking contracted employee hours, determining breaks**

and removing poor performers.

- Determine whether your current business model needs to be tweaked or modified in light of these developments.

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