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NLRB Drastically Changes Joint Employment Test

Recently, the National Labor Relations Board (“Board”) dramatically changed the labor landscape by issuing a decision that will result in more joint employment relationships under the National Labor Relations Act. Under the new standard, a company is a joint-employer if it exercises “indirect control” over working conditions or has “reserved authority” to assert control. In a decision involving a Browning Ferris Industries recycling facility, the Board swept aside decades of legal precedent, which required that a putative joint employer *actually exercise control* over terms and conditions of employment, as opposed to merely having the option to exercise that control.

In Browning Ferris Industries, the Teamsters sought to represent employees of Leadpoint Business Services (“Leadpoint”) who worked at Browning-Ferris Industries of California, Inc.’s (“BFI”) Newby Island Recyclery. BFI owns and operates the recycling facility and employs approximately 60 employees, who work outside the facility preparing materials to be sorted inside the recycling facility. Inside the facility, BFI contracts with Leadpoint for workers to manually sort the materials on conveyor belts, clean and clear jams, and clean the facility. The Teamsters currently represent BFI’s employees, and now seek to represent the approximately 240 Leadpoint employees.

Leadpoint employees work at the Newby Island Recyclery as part of a Labor Services Agreement with BFI, which explicitly provides that Leadpoint is the sole employer of its employees. The Agreement gives Leadpoint the authority to determine the terms and conditions of its employees’ employment, while also allowing BFI some general reservations. For example:

- Leadpoint is solely responsible for hiring its employees, but the employees must have the appropriate qualifications for the position and meet BFI’s standards.
- Leadpoint is solely responsible for disciplining and evaluating its employees, although BFI reserves authority to reject

Leadpoint employees at any time.

- Leadpoint is responsible for scheduling its employees, but BFI sets the facility's hours and controls the operations of the facilities.

Following Board precedent, the Regional Director of the Board's Oakland office determined that BFI was not a joint-employer, because it did not "share or codetermine [with Leadpoint] those matters governing the essential terms and conditions of employment."

In a 3-2 decision split along political party lines, the Board disagreed and implemented a new standard establishing that two employers are joint employers of a single workforce if they (1) are both employers within the meaning of common law and (2) "share or codetermine those matters governing the essential terms and conditions of employment." Under the new standard, the Board will no longer require that a joint employer actually *exercise* the authority to control employees' terms and conditions of employment.

This decision follows the current Board trend to extend collective bargaining rights in cases involving employees of franchisees, independent contractors, and now temporary workers.

As the dissent in *Browning Ferris Industries* point out, this decision raises more questions than it answers. But it appears to have dramatic consequences for employers who use temporary agencies and those who utilize subcontractors. Employers who may be deemed joint employers will face joint liability for labor law violations, be brought into labor disputes with the direct employer and the labor organization, and may be forced to participate in collective bargaining negotiations between a temporary service and its employees. Whether an employer is considered a joint employer is a case-by-case factual inquiry; however, those employers that use contingent workers employed by another entity or staffing agency should review their employment policies and practices, and their staffing agreements, in light of this significant change in the law.

Please contact [Raymond Neusch](#), [Anne McNab](#), or any member of the [Labor & Employment](#) Practice Group for further information about this matter.

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