Labor and Employment Alert: It's All About Control: NLRB Expands Key Joint Employer Rule

Related Attorneys

Nelson D. Cary

Related Services

Labor and Employment

Labor Relations

CLIENT ALERT | 8.28.2015

The NLRB dealt a blow to employers yesterday, releasing its long-awaited decision in *Browning-Ferris Industries*. In a 3-2 decision (pdf), the NLRB rolled back nearly 30 years of case law to "restate" its joint employer standard. The result: a far more expansive test that is centered firmly on the question of control -- even indirect or potential control -- over a work force.

At issue in the case was a Browning-Ferris Industries (BFI) waste recycling plant. BFI hired a staffing agency—Leadpoint Business Services—to provide some of the workers for the facility. The dispute arose when the Teamsters attempted to unionize the plant, arguing that BFI was the joint employer of Leadpoint's workers. The NLRB sided with the union.

In doing so, the NLRB announced that it will find two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law and they share or codetermine the essential terms and conditions of employment, which include, but are not limited to, wages, hiring, firing, discipline, scheduling, or assigning work.

This test was first announced about 30 years ago. The NLRB majority claimed, however, that this standard has been impermissibly and inexplicably narrowed over the years to exclusively focus on an employer's *actual* exercise of control instead of the contractual *right* of an employer to control essential terms and conditions of employment. Therefore, while claiming to simply "restate" and "reaffirm" the existing test, the NLRB overruled the decisions it claimed had improperly narrowed the test.

The effect is to make the *potential* to control employees of another employer just as probative of joint employer status as the *actual* exercise of control over those employees. The NLRB will also consider whether the alleged joint employer possesses sufficient control over the working conditions of the primary employer's employees to permit meaningful collective bargaining.

Applying its test here, the NLRB noted that the contract with Leadpoint gave BFI the right to approve pay raises, effectively limit Leadpoint employee hourly pay rates, veto hiring decisions, set criteria for hiring, "discontinue" the use of a Leadpoint worker at the plant, and dictate operations within its facility. Moreover, the NLRB found that BFI actually exercised some of these powers:

- A BFI manager reported Leadpoint employees' misconduct to Leadpoint and requested their immediate dismissal;
- BFI determined how fast its operation ran, which lead to significant impacts on Leadpoint's employees' hours and working conditions; and
- BFI's managers had sometimes communicated "detailed work directions" to Leadpoint employees or assigned them tasks that took precedence over work Leadpoint assigned.

This combination of direct and indirect control was sufficient to make BFI a joint employer with Leadpoint. But, as the dissent pointed out, the NLRB's test does not require that ***both*** actual ***and*** potential control exist. Joint employer status can apparently exist under the majority's test ***without*** any actual control or exercise of contractually reserved rights.

In addition to making this point, the lengthy and scathing dissent criticized the scope of the new rule, noting that "no bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority's new standards." The dissent further noted that these new, unpredictable, and ambiguous standards "will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships," leaving employees, unions, and employers with no certainty or predictability about the application of the standard.

The importance of this decision to the labor professional cannot be understated. Temporary staffing arrangements, subcontracting agreements, or other contractual relationships that involve the provision of labor from one employer to another should be reviewed to assess the degree of risk posed under the NLRB's "restated" test. Contact your Vorys lawyer to discuss further in the event that any of these issues affect your business.