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NLRB Again Upends Long-Standing Precedent in Creating Broad New Joint-Employer Standard

August 31, 2015

On August 27, 2015, the National Labor Relations Board issued its highly anticipated decision in *Browning-Ferris Industries of California*. In the 3-2 decision, the Board majority modified the standard for determining whether two employers are joint-employers for purposes of collective bargaining and chose to return to pre-1984 precedent.

The Board held that, in determining whether a joint-employer relationship exists, it will look at whether the two employers "share or codetermine those matters governing the essential terms and conditions of employment" of the employees. While the Board adopted a broad definition of the "essential terms and conditions of employment," the most significant change from existing law is that the Board will no longer require the joint-employers to *actually* "exercise the authority in a direct, immediate and not limited and routine manner." Instead, the mere *presence* of reserved rights to exercise control contained in the agreement between the "user" and "supplier" employers will be sufficient to find joint employer status. As a result, a user employer's hypothetical rights regarding hiring, firing, discipline, supervision, direction, dictating the number of workers to be supplied, controlling scheduling, seniority and overtime, and assigning work and determining the manner and method of work performance, could lead to joint employer status, even if is rarely or never exercised.

The standard utilized by the Board for the past thirty years set forth the test for joint employers (1) required evidence of direct and immediate control over employees, (2) looked at the actual practice of the parties utilizing the control rather than just looking to the terms of the agreement, and (3) required an employer's control to be substantial and not limited and routine. Key to this analysis was the actual practice of the parties in exerting control over the employees.

Applying the new *Brown-Ferris* standard, the Board found that a joint employer relationship existed between the user employer and the supplier employer, relying particularly on the user employer's ability to control shifts and production line speeds, as well as its ability to reject any employees that the supplier employer sent to work at the facility. In addition, they noted that the agreement placed a ceiling on the wages that could be paid under the cost plus contract, required the supplier employer's to abide by the user employer's plant safety rules and the fact that supervisors of the user employer had on occasion instigated investigation which lead to dismissal of employees from the supplier employer company.

In a lengthy dissent, the minority asserted that the majority's new standard was unduly ambiguous and would have dramatic implications for labor relations policy because it provided no certainty or predictability for employers to attempt to determine if they are in a joint-employer relationship with a supplier. The dissent concluded "the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidy, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act. . . . The result is a new test that confuses the definition of a joint employer and will predictably produce broad-based instability in bargaining relationships." By contrast, the majority asserted that its reversion to earlier law was necessary to prevent employers from using artificial arrangement to evade legal responsibilities.

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The effects of the new joint employer test could be amplified when the Board issues its anticipated decision in *Miller & Anderson, Inc.* There, the Board will revisit the question of whether it will conduct elections and certify unions in bargaining units that contain a mix of employees who are solely employed by one employer and employees jointly employed by that employer and second employer, such as a staffing agency. Under *Oakwood Care Center*, such units are prohibited, absent consent by both employers. Should the Board overrule *Oakwood Care Center*, the practical effect would be to enable unions to obtain a single contract covering both "temps" and regular employees, which in turn would make disassociating from a union temp agency far more complicated.

Given the recent focus of federal administrative agencies, including the NLRB, on independent contractors and joint employment, companies that use contract workers should closely examine their existing or prospective agreements with the contract employers to determine whether the agreement, on its face, exposes them to statutory liability, including joint-employer liability under the Board's new standard. For the same reason, companies should also consider whether changes can be made in the agreements and the way they utilize contract works. Please feel free to contact your Miller Canfield attorney if you have any questions about these issues or would like to discuss them in greater detail.

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