HUNTON& WILLIAMS

Client Alert

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NLRB Decision Produces "Sea Change in Labor Relations and Business Relationships"

In a ruling that redefines the concept of employment in the United States, the National Labor Relations Board yesterday issued its much-anticipated decision in *Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery*, 362 NLRB No. 186 (2015). The decision rewrites and drastically expands the definition of who is a "joint employer" under the National Labor Relations Act. The business community has been bracing for this decision for several months, and now that it has been released, the Board's new standard is likely to create a host of labor relations problems for employers going forward.

Background

The Board's decision arises out of a petition by the Teamsters Union to represent a group of employees of Leadpoint, a subcontractor doing work in a recycling facility operated by Browning-Ferris Industries. The Union claimed that Browning-Ferris was the joint employer of Leadpoint's employees. The NLRB's Regional Director ruled Browning Ferris was not a joint employer with Leadpoint because it did not hire, discipline, evaluate or terminate the Leadpoint employees working on site. The Union appealed to the full NLRB and argued the Board's joint employer standard should be revisited and expanded. The Board solicited amicus briefs. Following scores of submissions from organized labor, the employer community and the Board's own General Counsel (who advocated for a change in the standard that would cover arrangements such as the one between Browning-Ferris and Leadpoint), the Board issued yesterday's decision.

Majority Rewrites the Rules

Before yesterday, the standard used by the Board to determine whether a joint employer relationship existed focused on whether the putative joint employer *actually exercised* control over workers that was direct and immediate, and not "limited and routine." For at least the past 30 years, the Board has consistently held that entities that only *possess* the authority to influence the employment terms of another firm's employees, but which do not actually exercise it, are not joint employers. That ended yesterday. The Board rejected its old precedent as unnecessarily narrow, and held that to determine whether a potential joint employment relationship exists, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If such a relationship exists, the analysis turns to whether the potential joint employer *possesses* sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining, even if it never exercises that control. Critical to both inquiries is the existence, extent, and object of the potential joint employer's control.

To evaluate the allocation and exercise of control in the workplace, the Board will consider factors such as the ways in which joint employers may share control over terms and conditions of employment or codetermine them. Essential terms and conditions include things such as: wages, hours, hiring, firing, discipline, supervision, scheduling, dictating the number of workers to be supplied, assigning work, and determining the manner and method of work performance. Exercise of control over any one of these factors (not all, or even some of them) could now open the door for a joint employer finding.

Even more troubling, the Board held that it will no longer require that a joint employer actually exercise control at all. In other words, an employer that merely has the potential to influence the factors described above will

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now be found a joint employer. In making this ruling, the Board expressly overruled decades of decisions that held that the control had to actually be exercised.

Scathing Dissent from Members Miscimarra and Johnson

In a 28-page dissent, Members Harry Johnson and Philip Miscimarra excoriated the majority for “rewrit[ing] the decades-old test for determining who the ‘employer’ is.” They noted that the new test “will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have,” and predicted “a sea change in labor relations and business relationships.” Admonishing the majority that “the Board is not Congress,” the dissenters lamented the Board majority’s abandonment of its duty to enforce the Act in a manner that fosters industrial and labor relations stability: “We owe a greater duty to the public than to launch some massive ship of new design into unsettled waters and tell the nervous passengers only that ‘we’ll see how it floats.’”

Potential Impact Is Staggering

Despite the *Browning-Ferris* majority’s claim to have merely “put the Board’s joint-employer standard on a clearer and stronger analytical foundation,” the Board’s new standard could work unprecedented changes in the way business is conducted in the United States. The extension of the standard to entities that merely possess authority to control employment terms of other entities has limitless potential application. As the dissenters aptly noted, the new test will impact “user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor and contractor-consumer business relationships” alike.

Indeed, it is difficult to determine the practical limits under this new standard. For example, a commercial building owner that requires its janitorial subcontractor to provide a certain number of cleaners per staff, and to clean to a certain sanitary standard, may now be a joint employer of the janitors. Similarly, the private equity firm that owns the janitorial company may also be the janitors’ joint employer if it controls the company’s board of directors, dictates changes in its benefit plans and other employee policies, and decides whether the firm should pursue certain business opportunities.

This hypothetical provokes many more disturbing questions. If a union successfully organized the janitors, the Board might now require all three entities – janitorial contractor, building owner and private equity firm – to participate in bargaining. As far-fetched as this seems, it is clearly the Board’s intent – after all, the majority noted its decision was primarily an effort to “encourag[e] the practice and procedure of collective bargaining.” The obviously divergent interests of these three entities suggests it will be much more difficult for employers to engage in effective collective bargaining under the new rules.

The Board’s new standard might also allow unions interested in organizing the cleaning company to picket the building owner *and* the private equity firm without incurring secondary boycott liability under the Act. If they are all joint employers of the janitors, they are all arguably “primary” employers under the Act.

Perhaps the most sinister effect of the Board’s new standard is that it might also now prohibit the building owner from terminating its contract with the janitorial contractor because, for example, a union is interested in organizing the janitors. Indeed, if the building and the cleaner are now joint employers, termination of their commercial contract for union considerations may constitute discrimination against “employees” by the building owner under the Act. Similarly (and unbelievably), a decision by the private equity firm to *sell* the cleaning contractor altogether because unionization has made it unprofitable could be an unfair labor practice. In other words, the most fundamental aspect of American capitalism – the decision to go into business with another or not – may now be subject to Board regulation. The possibilities are as staggering as they are disturbing.

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Employers Face a Brave New World of Labor Relations

The full impact of *Browning-Ferris* may not be known for several years, but it is clear that without congressional intervention (or a successful challenge in the courts), businesses that have long premised their operations on the economic advantages of flexible business arrangements face potentially untenable obstacles to continuing those relationships. Hunton & Williams' labor team will be following up in the coming days and weeks with more in-depth analysis of the Board's new joint employer test and best practices advice targeted to particular business sectors. One thing, however, is clear now: *Browning-Ferris* presents the American business community with perhaps its most formidable labor-related challenge in decades.

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