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How to Escape Joint-Employer Status under the NLRA with Concrete Evidence

4 tips to help mitigate joint-employer risks in construction

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By now, the employer community is well aware of the wide-ranging implications of *Browning-Ferris Industries of California, Inc.* , 362 N.L.R.B. No. 186 (2015) (*Browning-Ferris*)—a decision that upended decades of National Labor Relations Board (NLRB) precedent and dramatically expanded the definition of "joint employer" under the National Labor Relations Act (NLRA). On August 16, 2016, in *Retro Environmental, Inc./Green JobWorks, LLC*, 364 N.L.R.B. No. 70, 2016 WL 4376615 (August 16, 2016) (*Retro*), the NLRB applied the full weight of *Browning-Ferris* and concluded that Retro Environmental and Green JobWorks are "joint employers" under the NLRA. The NLRB also made it more difficult for employers to prove that they have ceased their joint-employer relationship. *Retro* is the latest in a line of NLRB decisions, issued since *Browning-Ferris*, which emphasize the need for employers to scrutinize their third-party business relationships for joint-employer risk.

Green JobWorks is a temporary staffing company that provides demolition and asbestos abatement labor to construction firms. One of its clients was Retro Environmental, a construction company that also works in the demolition and asbestos abatement space. In 2015, Retro Environmental began work at two Washington, D.C.-area schools. Green JobWorks supplied laborers for the work. By June 2015, approximately 33 Green JobWorks laborers were working at least one day at these schools. The companies had worked together for at least 5 years, with Green JobWorks providing labor on at least 10 Retro Environmental projects. The companies originally operated under a lease-of-services agreement. When the agreement expired, the companies continued to honor the terms of agreement.

Under the parties' original agreement, Retro Environmental ordered temporary labor from Green JobWorks as the need arose. Green JobWorks recruited and hired the laborers, prescreened and drug tested the applicants, provided safety training, ensured asbestos abatement laborers had the appropriate certifications, had the laborers examined by a doctor, performed background checks on the laborers, administered safety and general knowledge exams to applicants, and provided employees with the necessary personal protective equipment. Green JobWorks also maintained a database of employees, assigned employees to sites, set the pay scale and issued paychecks. Green JobWorks supervisors visited the sites periodically to ensure the laborers were showing up for work and to handle concerns

regarding the employees. Green JobWorks was also responsible for disciplining and terminating employees.

For its part, Retro Environmental determined the course of work, supervised the work, directed the day-to-day activities of the laborers, determined the hours worked, tracked the employees' hours, and provided the necessary demolition and abatement equipment. Although Green JobWorks did the hiring and firing, Retro Environmental could request a replacement laborer if it was dissatisfied with an employee's performance.

The union petitioned to represent a unit of full- and part-time laborers, including demolition and asbestos abatement workers, retained by Retro Environmental from Green JobWorks. The regional director did not reach the issue of whether the companies were joint employers, though the director did opine that the evidence presented a "colorable claim of a joint employer relationship." Instead, the regional director dismissed the petition based on a finding that "Retro and Green JobWorks met their burden of establishing an imminent cessation of operations." The regional director's decision was based on the fact that the school projects on which the companies were working were close to being completed, that there was no evidence that Retro Environment planned to use Green JobWorks' laborers in the future, that Retro Environmental used labor-leasing companies other than Green JobWorks, and that the formal agreement between the companies had expired.

The NLRB reversed, finding Retro Environmental and Green JobWorks to be joint employers under *Browning-Ferris* and that the companies failed to prove the cessation of their joint operations was both imminent and definite. Answering a question many have asked since *Browning-Ferris*, the NLRB explained that joint-employer status can turn on whether the companies "possess the authority" to control the employees, not whether the companies actually "exercise the authority to control [the] employees' terms and conditions of employment … " According to the NLRB , "[A] joint employer relationship may be established by showing that the putative joint employer has the authority over essential terms such as hiring, firing, discipline, supervision, [or] direction, as well as wages and hours." In other words, *Retro* confirmed what many believed to be the case since the *Browning-Ferris* decision: employers can be joint-employers merely by possessing, but not necessarily exercising, control over the employment terms of another firm's employees.

The type of relationship Retro Environmental and Green JobWorks had is very common in the construction industry. General and trade contractors rarely employ individuals with expertise in every facet of construction and frequently call upon third-party specialists to complete discrete portions of the work. And when they do, the companies often split the employer responsibilities along the lines similar to the way Retro Environmental and Green JobWorks split their responsibilities. Under the *Browning-Ferris* and *Retro* decisions, it is hard to imagine how two companies, each vested with specific employer responsibilities, will not be considered joint employers by the current NLRB.

To make matters worse, *Retro* illustrates that proving that a joint-employer relationship has ended will now be tougher. Indeed, short of concrete evidence that cessation is imminent, employers will be hard-pressed to prove they are no longer working together. Indeed, the NLRB concluded that, although the school projects were coming to a close and there was no evidence that their relationship was set to continue, "Retro and Green JobWorks w[ould] continue to operate in the geographic area. Retro w[ould] continue to perform demolition and asbestos abatement services and Green JobWorks w[ould] continue to provide laborers to perform these services." The fact that the school projects were "scheduled to end shortly d[id] not outweigh th[ese] considerations." So, essentially, the NLRB theorized that the companies could work together again in the future. This conclusion is particularly troubling. Employers who lease labor often do so from companies that occupy the same geographic space. It would make little sense to contract with a labor-leasing company outside the area, because, for example, the cost per laborer would increase due to travel and housing expenses.

The takeaway, with respect to cessation of joint operations, is this: evidence that cessation is "conditional or tentative" will not suffice. There must be "concrete evidence" to show that the companies intend to discontinue (or have discontinued) their relationship in order to prove they are operating individually going forward. Unfortunately for Retro Environmental and Green JobWorks, the NLRB found no such evidence. To the contrary, the NLRB placed great weight on the fact that the companies had continued to work together despite the fact that their written agreement had expired: "Given the evidence of a successful working relationship over time … we find that the Employers have failed to meet their burden of proving that a cessation of their joint operations is imminent and definite."

NLRB member Philip A. Miscimarra dissented. Miscimarra saw the evidence as establishing that the companies would continue "individual operations," and concluded that the prospect that they would continue to work together jointly was "entirely speculative." Miscimarra took the majority to task regarding their assumption that, even if the companies did choose to continue to work together in the future, the companies would work together under the same terms spelled out in the expired written agreement: "Although the Employers may have handled the [school projects] in a manner 'essentially consistent' with their expired agreement, they were not bound to do so, and there is no guarantee that they will do so in the future."

So, what can employers, particularly in the construction industry, learn from Retro?

1. It is now clear that the NLRB is going to find that companies that share responsibilities affecting the terms of one or the other's employees are joint employers under the NLRA.

2. The course of conduct matters. Even in the absence of a written agreement, if there is evidence that the companies have a track record of working together under a certain set of parameters, the NLRB is likely to find that the companies have not met their burden of showing a cessation of joint operations is imminent. A potential way to avoid continuing joint-employer liability could be to enter into formal written agreements on a project-by-project basis and include language that indicates the relationship will terminate upon completion of the project.

3. Corporate executives should refrain from making public statements about whether a particular relationship will continue.

4. Finally, and perhaps most importantly, employers must audit their third-party business relationships for potential joint-employer risk and seek to mitigate those risks where operationally and practically feasible.

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