BURR ALERT

Who's The Boss? The NLRB Clarified Joint Employment (Again)

By Meryl Cowan March 2020

As our clients know, the National Labor Relations Board ("NLRB") does not only regulate unionized workforces. The Board's rulemaking and legal decisions affect all workplaces: both unionized and non-union.

Just in time for all of us to "spring forward," on February 26, 2020, the NLRB issued its final rule on the much debated joint-employer standard. The announcement of this final rule arrives after more than five months of notice and comment rulemaking. It goes into effect on April 27, 2020.

The trend is clear: the "new" Board is bringing the "old" Board back: 2020, meet 2010. For the past eight plus years, the "old" Board (with a Democratic majority under former President Barack Obama) issued labor-friendly decisions affecting *all* employers, with an unprecedented impact on non-union workplaces. Now, it appears that the "new" Board is returning to neutrality.

How did we get here?

You might recall our 2015 Labor & Employment E-Note updating you on the NLRB's decision in the representation case styled *Browning-Ferris Industries of California, Inc. v. Sanitary Truck Drivers & Helpers Local 350, International Brotherhood of Teamsters*, No. 32-RC-109684 (NLRB August, 27, 2015). There, the Board held that Browning-Ferris Industries (BFI) was the "joint employer" of third-party Leadpoint Business Services, LLC's (Leadpoint) contingent, or "temp," workers for purposes of determining which employer or employers bore a bargaining obligation to a union in the event the union obtained a majority of support. The 2015 decision created a sea change in how joint employment was determined. Specifically, under the NLRB's 2015 standard, "two or more entities are joint employers of a single workforce if (1) they are both employers within the meaning of the common law [i.e., they both control or have the potential to control working conditions or wages]; and (2) they share or 2 codetermine those matters governing the essential terms and conditions of employment." Most importantly, an entity such as BFI need only "possess the authority" to "control" working conditions of the other's employees – not actually exercise it.

Why was this decision so controversial? First, as the Board noted in the decision, this change potentially impacted the jobs of 5.7 million contingent workers, 8.1 million franchisee workers, and thousands of business relationships. Second, it represented a step toward the unions' dream of inclusion of temps and customer employees in the same bargaining unit. Third, multiple employers (e.g. host employers and temporary employers) were not clear on what their legal responsibilities were. Being a "joint employer" could create legal liability for their co-employers' decisions, and even create affirmative obligations on each employer.

So, where are we now?

The 2020 joint employment standard establishes that an employer "may be considered a joint employer of a separate employer's employees only if the two employers **share or codetermine** the employees' essential terms and conditions of employment." (emphasis added). Notably, this standard completely eliminates the mere "possession" element from 2015. It clarifies that to be a joint employer, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees. What's more, it provides helpful definitions for key terms, including what are considered "essential terms and conditions of employment," and what does, and what does not, constitute "direct and immediate control." The final rule also establishes that control exercised on a sporadic, isolated, or de minimis basis is not "substantial."

The inquiry still remains highly fact-specific, so caution going forward is necessary. Have you evaluated your temp and franchise relationships?

To discuss this further, please contact:

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