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Enlarging the Bargaining Table: The NLRB Sets Aside 30 Years of Precedent for a Broader Joint-Employer Standard

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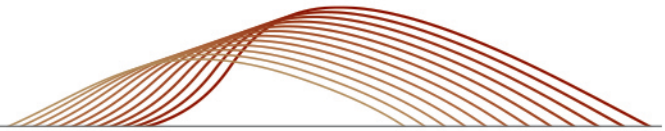
For more than 30 years, the National Labor Relations Board has uniformly applied the same standard for determining when two putatively separate companies are sufficiently interrelated to be considered "joint employers." On August 27, 2015, however, the Board split along partisan lines to jettison that decades-old standard and replace it with one that is significantly more expansive and notably more difficult to apply. *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015).

The new test shifts focus from a putative joint employer's actual exercise of direct or immediate control over third-party workers to the bare reservation of the right to do so, or so-called indirect control. Candidly acknowledging that its purpose in articulating the new standard was to facilitate the unionization of the workplace and improve union leverage at the bargaining table, the Board's majority decision noted that "[o]ne of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." In doing so, however, the NLRB articulated an amorphous joint-employer test, thereby injecting uncertainty and risk into a vast range of contractual business relationships that have come to dominate today's economy.

A vociferous dissent outlined the reach of the majority's opinion. In seeking to foster "collective bargaining where[ever] it could be productive," the dissent complained, the majority had articulated a test "with no limiting principle"—one that "removes all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding." The majority, the dissent argued, was using the joint-employer doctrine as a lever to adjust a perceived "bargaining inequality" rather than administering the NLRA as written. This approach, the dissent said, "reflects a desire to ensure that third parties that have 'deep pockets' . . . become participants in existing or new bargaining relationships, and that they will also be directly exposed to strikes, boycotts, and other economic weapons, based on the most limited and indirect signs of potential control."

Background

Brown-Ferris Industries ("BFI") owns a recycling plant in Northern California. BFI employs approximately 60 individuals at the plant who are responsible for work outside the facility; they move



the mixed and recyclable materials and prepare them for work inside the plant. These employees form an existing bargaining unit represented by the International Brotherhood of Teamsters (the "Union").

Other critical work at the plant occurs inside. Inside the facility, a labor force of approximately 240 workers fulfills three principal roles: sorters, who sort the materials into separate commodities (which are then sold to other businesses); screen cleaners, who clean the screens on the sorting equipment; and housekeepers, who clean the facility. Rather than hire its own employees to perform these "inside" tasks, BFI contracts with a staffing firm, Leadpoint Business Services ("Leadpoint"), to supply the labor.

The Union petitioned to also represent the Leadpoint employees and bargain with BFI on behalf of these workers, on the ground that BFI was a joint employer of these employees with Leadpoint, which BFI denied. The Regional Director found that Leadpoint was the sole employer of its own employees. The Union challenged that conclusion before the Board and urged the Board to reconsider its longstanding standard for evaluating joint-employer relationships.

The Board Steps Back from 30 Years of Precedent

To have a duty to bargain with a union under the NLRA, an entity must qualify as the statutory employer of the subject employees. In determining whether an employer-employee relationship exists, the Board has long followed the common-law agency test of control. Typically, the Board would look to determine whether one company effectively controlled the day-to-day labor relations functions of the other, and was less concerned about a theoretical-but-unexercised ability that one company might have to control the other or indirectly influence the wages, hours, and working conditions of the other.

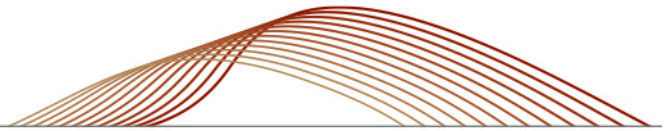
In its opinion, the Board rejected this longstanding test and claimed to be "return[ing] to the traditional test used by the Board" to evaluate control, as articulated in *Greyhound Corp*., 153 NLRB 1488 (1965), which requires only the *ability* of one company to control, or even indirectly influence, the operations of another.

In doing so, the majority reversed a line of decisions stretching back more than 30 years on the grounds that they wrongfully narrowed the circumstances in which a joint-employment relationship can be found. The new test—or, according to the Board, the restored test—was specifically intended by the Board to expand the circumstances in which one company can be held responsible or liable for the conduct of another.

The vigorous dissent disagreed with what it called the majority's selective misreading of precedent. The dissent argued that even the long-superseded case law on which the majority claims to have relied required proof of direct and immediate control. Further, the dissent disputed the majority's characterization of the more recent Board cases as an abrupt and wholly unsupported change in Board precedent, as the Board had uniformly applied that standard for more than 30 years with no criticism from the courts.

The Board "Return[s] to the Traditional Test" Requiring Only Reserved or Indirect Control to Find Joint-Employer Status

The Board's new (or resurrected) standard has two parts. Step one is to determine whether, applying the Restatement (Second) of Agency's test, there is a common-law employment relationship between the alleged joint employer and the subject employees.[1] This sort of relationship is "necessary, but not



sufficient, to find joint-employer status." If there is such a relationship, step two is to inquire whether the putative joint employer possesses sufficient control over the employees' essential terms and conditions of employment to permit "meaningful collective bargaining," a nebulous "sufficiency" standard for which the Board provided little definition, married to a policy driven goal: to maximize "meaningful" bargaining.

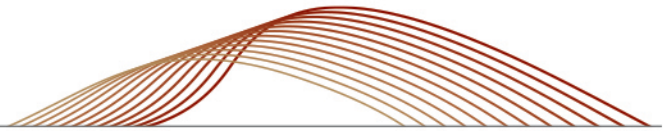
The revolutionary aspect of the new test, however, comes from the majority's decision to remove two limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding. Specifically, under the majority's decision, the NLRB will no longer require proof that a putative joint employer (1) has actually exercised control of the third-party employees with respect to essential terms of employment; or (2) has the power to exercise direct or immediate control. Now, joint-employer status may be established through theoretically-reserved authority to control terms and conditions of employment, even if not exercised—and even control exercised indirectly (such as through an intermediary).

The Board's test also broadens the joint-employment standard by adopting an "inclusive approach in defining 'essential terms and conditions of employment.'" In addition to hiring, firing, discipline, supervision, and direction, the Board stressed that the "controlled" terms of employment that can trigger joint employer status can extend much further, including wages and hours; the number of workers to be supplied; scheduling; seniority; overtime; assigning work and determining the manner and method of work.

The majority also justified its departure from Board precedent on the ground that the Board was "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships," which, it argued, would potentially undermine "the core protections" of the NLRA. Saying that its "primary function and responsibility" is to apply the NLRA in a manner that is consistent with "the complexities of industrial life," the Board reasoned that the increasing trend of procuring employees through staffing and subcontracting arrangements, or contingent employment, demanded that it revisit the joint-employer standard.

Applying its new test to the BFI-Leadpoint relationship, the majority found that BFI did not hire or fire employees, but that it prescribed rules that limited the employees that Leadpoint could hire (*e.g.*, drug testing standards). It also determined that although BFI did not supervise Leadpoint employees, it controlled the pace of work for its own employees, which derivatively impacted the pace of work for Leadpoint employees. The majority found that BFI did not set wages for Leadpoint employees, but that it did prevent Leadpoint from paying its employees more than BFI paid its own. These indirect restrictions on Leadpoint's discretion, the majority held, were enough to result in joint-employer status.

The majority's new joint-employer test poses more questions than it answers, as a long recitation of unanswered hypotheticals provided in the dissent pointed out. Where joint employer status is found, how will the bargaining unit be configured? Who bargains for the joint employer, and how are disagreements about strategy between the two separate companies to be resolved? Does the putatively separate employer have a right to compel arbitration under a collective bargaining agreement between its contractor and its contractors' employees? The NLRA prohibits "secondary" boycotts, but if two companies are joint employers, could a dispute against one be carried to the other without violating that prohibition? If a service contractor works with multiple customers, are the employees at each location in a separate bargaining unit of the contractor and that customer? If a customer agrees to purchase widgets at a fixed price, is the customer a joint employer if the agreed-



upon pricing effectively controls what the employer can pay its production workers? By shifting away from actual and direct control to control that is merely reserved and indirect, the majority has swung the doors wide open to the type of actions, terms, and relationships that can create indirect control under the new test; how wide is a mystery.

Action Plan

The Board's long-awaited decision is just one stage in what will undoubtedly be a long battle over this issue. Either in this case, or in some other case decided soon using this test, a review by one, or likely several, courts of appeals is certain. It also seems likely that the Supreme Court will be asked to weigh in. And there are already efforts underway to undo on Capitol Hill what the Board has done.

In the meantime, it is imperative that companies scrutinize carefully the terms of their contracts and working arrangements with franchisees, staffing agencies, and similar third-party providers—indeed, any "outside" contractor intimately involved in the subject company's operations. Although companies may not believe that they actually exercise control over a third party's employees, they should revisit the language of their service agreements and highlight the areas where they have *reserved* the right to exercise control (*e.g.*, requiring employees undergo and pass drug tests). Even though companies may not believe their management directly supervises or controls a third party's employees, companies should analyze the elements of theoretical control or influence they have over contractor discretion that may indirectly shape the work of the third-party employees (*e.g.*, hours of shifts).

Moreover, the joint-employer test will not focus solely on the contractual rights of the parties; companies need to examine the manner in which its corporate relationships actually work in the field. The decision also promises to remake the relationship between franchisees and franchisors; rethinking those relationships should not await resolution in the courts or on the Hill.

Without any concrete guidance from the Board on what variables or circumstances may or may not result in a finding of control under the new joint-employer test, companies should seek guidance on how they will navigate the complexities of their third-party relationships. A hard look at one's contracts and practices related to third-party employees is worth the effort to assess and minimize exposure under the Board's new standard.

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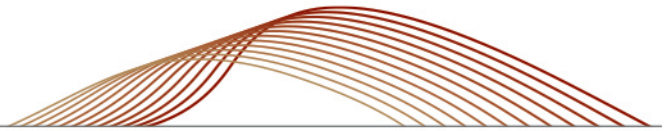

[1] Such a relationship exists where one employs someone "to perform services . . . and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."