

In a highly-anticipated decision, on August 27, 2015 a divided National Labor Relations Board (NLRB or Board) significantly expanded its definition of "joint employer." The new standard threatens to have substantial implications to employers across a broad spectrum, but most significantly in the franchisor-franchisee and temporary labor context.

In [Browning-Ferris Industries](#), three members of the five-member Board did away with the standard that it had applied for the past 30 years. That standard required that in order to find that two distinct, separate employers are "joint employers" – and thus jointly responsible for each other's labor relations and collective bargaining obligations and liabilities with respect to a jointly-employed workforce – the putative joint employer must not only possess, but also *exercise* authority to immediately and directly control essential terms and conditions of employment of those employees alleged to be jointly employed with the other employer. (Such "essential terms and conditions of employment" include "hiring, firing, discipline, supervision, . . . the number of workers supplied, scheduling, seniority, and overtime," among other things.) Under the NLRB's new standard (which is, in reality, an enhanced return to a standard previously discarded three decades ago), an employer must only possess that authority, regardless of whether it exercises it, thereby permitting a joint employer finding based only on the existence of the *possibility* of an employer asserting *indirect control* over the putatively-jointly employed employees. Under this new standard, the Board will determine control based not only on the contractual agreements between the parties, but also on other evidence of how the parties have structured, and how they manage, their relationship.

The case before the Board involved Browning-Ferris Industries (BFI), which operates a recycling facility in California, and Leadpoint, a temporary labor provider that supplied certain employees to BFI's facility. The contract under which Leadpoint supplied employees to BFI specified that Leadpoint was the temporary employees' sole employer. To that end, Leadpoint handled all discipline of Leadpoint employees, hired and fired them, and determined their wages (with the caveat that certain Leadpoint employee wages could not be higher than similarly-situated BFI employees). BFI did not have the authority to fire Leadpoint employees, though it could prohibit them from continuing to work at BFI facilities.

The International Brotherhood of Teamsters sought to represent BFI employees, as well as the temporary employees provided by Leadpoint who worked at the BFI facility, in the same bargaining unit. The union argued that, despite the facts described above, BFI and Leadpoint jointly employed the Leadpoint employees. BFI argued that it did not jointly employ the Leadpoint-provided employees, as only Leadpoint possessed and exercised the right to directly and immediately control the essential terms and conditions of employment for those employees it supplied to BFI. An NLRB regional director agreed with BFI, applying under the now-rejected joint employer standard, which requires both possession and exercise of direct and immediate control over essential terms and conditions of employment. On appeal, the Board overturned that decision and found BFI and Leadpoint to be joint employers of the Leadpoint-provided employees under its new, broadened standard.

The Board majority cited shifting needs in American companies as justification for its decision. "As the Board's view of what constitutes joint employment under the [National Labor Relations] Act has narrowed, the diversity of workplace arrangements in today's economy has significantly expanded," the Board stated, pointing to shifts toward greater use of temporary workers. The majority's decision explained that its holding returns to what it viewed as a more appropriate definition of joint employer, and emphasized that it views its job as being to foster collective bargaining, which requires an expansive reading of the definition of joint employer.

Articulating the standard going forward, the Board majority explained: "The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may 'share' control over terms and conditions of employment or 'codetermine' them, as the Board and the courts have done in the past."

The two Republican Board members dissented from the majority opinion, accusing the majority of "rewrit[ing] the decades-old test" for identifying a joint employer "in the most sweeping of recent major decisions." "This change will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing," the dissenters wrote.

At the core of relationships affected by the NLRB's decision are agreements between employers who contract with temporary staffing agencies. Also imperiled by the NLRB's ruling are operators of franchise businesses – both franchisors and franchisees. Each business model typically involves a clear understanding – usually explicitly expressed in a staffing contract or franchise agreement – that the labor supplier or the franchisee is the sole employer of the employees at issue, and that it (the supplier or franchisee) retains the sole authority to determine and control the essential terms and conditions of employment of those employees.

Notwithstanding this clear delineation of employer status, it is not uncommon, in either arrangement, for the recipient of the temporary labor services, or the franchisor, to set certain parameters related to the supplied employees or franchisee-employed employees. For example, in the BFI case, BFI reserved the right to instruct Leadpoint that certain Leadpoint employees were not permitted to work at the BFI facility – presumably if BFI had some disciplinary or performance-related reason. Under the now former test, merely possessing this authority to control which Leadpoint employees worked at its facility was not enough. A joint employer finding required that BFI also exercise its authority and, arguably, that its doing so directly and immediately impacted Leadpoint employees' terms and conditions of employment – i.e., it resulted in Leadpoint terminating the employment of the now barred employee. Under the new test, however, BFI's mere possession of the authority to restrict certain Leadpoint employees from working at its facility – whether it exercised that authority or not – was deemed sufficient to permit it to be determined to be a joint employer, with Leadpoint, of the Leadpoint-provided employees, even though, under the BFI-Leadpoint contract, BFI did not have the authority to discipline or fire the Leadpoint employee. Such a result thereby places employers who use the services of supplied labor in the difficult position of reserving certain rights vis-a-vis the supplied employees and thereby risking being deemed a joint employer of them, or foregoing those rights to avoid such a conclusion, ceding potentially important operational flexibilities.

Similarly, under this new, broadened test, franchisors may find themselves to be deemed joint employers of their franchisees' employees. The typical franchise relationship involves a franchisor and franchisee that are separate and unrelated businesses. The parties enter into an agreement whereby the franchisor grants the franchisee the right to operate a business under the franchisee's brand and business model. These agreements typically provide that the franchisee is in control of all aspects of employment for its employees who staff the franchise business. However, most franchise agreements also provide that the franchisor will provide some level of support to franchisee – e.g., training, technology, etc. This makes sense from a business perspective, as franchisors have a vested interest in ensuring that franchisees operate their businesses to certain standards in order to protect the franchisor's brand, which it typically has developed over a long period of time and at great expense.

These sort of brand protection-related provisions frequently include, for example, specifying, either in a franchise agreement or operations manual, how many people must be staffed per shift or how each job is to be performed, etc. Under the Board's new standard, these sort of business-sensible, brand protection-related provisions could be interpreted as actual or potential indirect control over franchisees' employees' essential terms and conditions of employment, and thereby justify a joint employer finding. (These sort of brand protections and operational assistance issues will factor prominently in the much-watched ongoing *McDonald's* litigation involving the NLRB, a number of McDonald's franchisees from across the country, and McDonald's USA, their corporate franchisor, wherein the NLRB has alleged that the corporate franchisor is a joint employer, along with the franchisees, of the franchisees' employees).

Although the specific implications of the NLRB's decision will vary depending on the facts of each case, it almost certainly will lead to more findings of joint employer status by the NLRB and thus greater obligations on the part of those employers who use temporary and other contingent workers, as well as franchisors. Although an appeal is likely, the NLRB's decision is a game-changer, certainly for those relationships, but potentially for more employers, including those that utilize the services of independent contractors. Employers should therefore seek legal advice for more specific information about how this decision may impact their business.

Contacts

Daniel B. Pasternak

T +1 602 528 4187

E daniel.pasternak@quirepb.com

W. Michael Hanna

T +1 216 479 8699

E mike.hanna@quirepb.com

Michael W. Kelly

T +1 415 954 0375

E michael.kelly@quirepb.com

D. Lewis Clark Jr.

T +1 602 528 4065

E lew.clark@quirepb.com

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