Labor Board Reverses and Tightens Joint Employer Doctrine

by Grant S. Gibeau - Wednesday, January 10, 2018

Continuing their recent trend, the National Labor Relations Board (NLRB) reversed the Obama-era expansion of joint employment and has returned to their long-standing test for joint employment status.

In *Browning-Ferris Industries of California, Inc. (2015)* (*"BFI"*) the NLRB ruled that they 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.*

This relaxed standard caused major labor relations headaches for numerous employers and their contractors. For example, if a non-union company retained a contractor with a unionized workforce, their mutual control over the contractor's workers might lead the hiring company to be liable for rights the contractor's employees possessed under their collective bargaining agreement.

This standard was widely criticized for giving insufficient guidance on when a joint employer relationship would or would not be created, especially since the NLRB had discretion to give "dispositive weight" to an employer's control over "any essential term and condition of employment in finding a joint-employer relationship."

Bye-Bye, BFI

In *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.* the NLRB ruled that the *BFI* doctrine abandoned a longstanding test that provided certainty and predictability, replacing it with a "vague and ill-defined standard." They further noted that the *BFI* doctrine dragged "third parties into collective bargaining," and was "much more likely to thwart labor peace than advance it." They therefore returned to the previous test to determine joint employer status, namely:

> *joint employer status will be found when the alleged joint employer entities have actually exercised joint control over essential employment terms in a direct and immediate manner.*

As a result, joint employer status would will no longer arise from control that is "limited and routine," such as when a supervisor tells another employer's employees what work to perform or where and when to perform it.

Dissent Not Happy With Abrupt Change of Course

Two members of the 5-person NLRB dissented in the decision, effectively arguing that the majority had inappropriately decided to overrule precedent. Specifically, the dissent noted that the case could be decided without reaching the joint employer issue, that the finding was irrelevant to the case's outcome, and that no party asked them to reconsider the *BFI* doctrine.

The dissent further complained that the majority's decision failed to invite legal briefs on the issue and never opened the question for public comments, making the decision irresponsible, rushed, and contrary to the NLRB's obligation to engage in "reasoned decision making."

Bottom Line

This decision will have far reaching impact for employers, especially those who utilize temporary staffing agencies, which were the types of relationships that the NLRB tended to point to as joint employment. However, for all other employers, the return to pre-*BFI* precedent will provide a more balanced and predictable assessment regarding whether or not a joint employment relationship exists.
