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Appellate Challenge of NLRB's New Joint Employer Standard Moves Forward

Oral Argument Expected This Week

The National Labor Relations Board's adoption of a new standard for determining when two separate entities can be considered joint employers under the National Labor Relations Act will be the issue before the U.S. Court of Appeals D.C. Circuit. Oral argument in *Browning-Ferris Industries of California, Inc.*, 362 NLRB 186, is scheduled for Thursday, March 9.

At issue is the validity of the Board's decision to adopt a new standard for determining joint employer status for collective bargaining purposes. Before *Browning-Ferris*, the NLRB evaluated whether alleged joint employers shared the ability to control or co-determined essential terms and conditions of employment. Under this former standard, the putative joint employer must have direct and immediate control over the terms and conditions of employment of another company's employees.

In *Browning-Ferris*, the Board adopted a new standard that begins with an inquiry into whether a common-law employment relationship exists, but it expands the concept of control. The new standard no longer requires direct and immediate control. Indirect control may suffice (use of intermediary firms or contractual provisions that grant the putative joint employer a right to control). Moreover, the indirect control need not be exercised. A right to control, even though never exercised, may be sufficient to establish a joint employer relationship.

The difference in results based on the standard applied is stark. Under the new standard, Browning-Ferris was labeled a joint employer alongside a staffing firm despite not directly controlling the employees at issue in a meaningful manner. Indeed, Browning-Ferris did not play a role in recruiting or retention

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and it did not set pay rates, benefits or scheduling. However, there was, among other things, a contractual provision that restricted relative pay rates and required employees to comply with Browning-Ferris' on-site safety standards.

The Board justified the shift as a means to update the standard to account for changing economic circumstances and to encourage collective bargaining. This change is not without controversy. The Board itself was split 3-2 on the issue and, since it was published, has been widely opposed by numerous industries including franchisors, insurers, banks, lenders and contractors.

Check back for updates on the argument and decision from BB&K's Labor & Employment practice group, which provides comprehensive guidance to franchise owners to help them minimize the risk of employment issues. For more information about this matter and how it may relate to your organization or business, contact the authors of this Legal Alert listed at right in the Labor & Employment practice group, or your BB&K attorney.

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