CLIENT ALERT: How Your Company Could Be Responsible for the Actions and Employees of Another Company

Under the National Labor Relations Act (NLRA), employers have certain duties to their employees, as well as to the unions that represent those employees. Employers are prohibited by law from engaging in a variety of "unfair labor practices" as defined in the NLRA. But who is "the employer?" Well, it's just the company that hires, fires and pays the employees, right? Wrong, says the National Labor Relations Board. Any other entity that could – not does, but could – even indirectly control some terms and conditions of the employees' work life may also be an employer. The two, together, may be "joint employers."

The case (*Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186) arose at a Browning-Ferris Industries (BFI) subsidiary in California. BFI owned and operated a recycling plant. It leased workers from another company, Leadpoint, to sort the material on its recycling line. Although Leadpoint alone hired, fired, disciplined and paid these employees, and had its own supervisory and human resources staff on-site, BFI did have the right to decide the speed at which its sorting line would move and the hours it would operate. The Teamsters Union filed a petition to represent the sorting personnel. The union said that not only Leadpoint but also BFI should have to come to the bargaining table as "joint employers" if the Union won the election. The election was conducted in the spring of 2014. The Board issued its decision August 27, 2015. (The Board this spring greatly reduced the time employers have for communicating with employees before a union election, but not the time for issuing its own decisions.)

For decades, the Board has said that in certain, narrow circumstances, an employee who has only one job still may have more than one employer. It depended on whether the second company actually exercised immediate and direct control over the workers. Here, the Teamsters Union said that because the sorters who worked for Leadpoint and were directed by its supervisors were also subject to some indirect control by BFI, even though it was neither immediate nor direct, the two companies should be found to be "joint

employers.” In the past, the Board always would have rejected this argument and ruled that because the control BFI actually exercised was only limited and routine control, it was not a joint employer with Leadpoint. But no more.

The Board has now cast out that long-established legal precedent and found that even though BFI did not exercise immediate or direct control, because it exercised some, and potentially might be able to exercise more, it was a joint employer.

The same control issue can arise with a general contractor and a subcontractor, or a parent and a subsidiary company, or a franchisor and its franchisee – any arrangement where two entities have, or potentially could have, at least some control over the workers’ terms and conditions of employment.

This decision hugely broadens the situations in which an organization can be found to have committed an unfair labor practice in violation of the NLRA. If Leadpoint’s employee handbook contains a provision that the NLRB finds could be misunderstood by an employee to limit his or her rights, BFI is responsible for that unfair labor practice also. If a Leadpoint supervisor makes a comment that an employee finds offensive, the Board can now find BFI liable for that. Further, if the Teamsters don’t get the contract they want and call a strike, they can now picket and try to shut down not just the BFI plant where Leadpoint has employees working, but every BFI facility.

If your organization partners with any other in the course of running your business, whether to manufacture or service “your” products or “theirs,” whether to provide “your” services or “theirs,” you will want to consider the implications of the *Browning-Ferris* case.

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