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# NLRB Adopts New Joint-Employer Standard

The National Labor Relations Board (NLRB) has articulated a new test for determining when a company is a joint employer under the National Labor Relations Act (NLRA). Under this test, the NLRB may find that two or more companies are joint employers of a group of workers if they "share or codetermine those matters governing the essential terms and conditions of employment." Overruling prior decisions that adopted additional requirements for joint-employer status, the NLRB made clear it will look to whether the "user" company has control over the employment relationship, even if that control is indirect or not exercised.

**Case Background**

Browning-Ferris Industries of California, Inc. (BFI), owned and operated a recycling plant. In addition to staffing the plant with its own employees, BFI contracted with Leadpoint Business Industries (Leadpoint) for workers to sort materials entering the plant on conveyor belts, clean screens and clear jams on the sorting equipment, and clean the facility. According to the temporary labor services agreement between BFI and Leadpoint, these approximately 240 workers were solely Leadpoint employees. However, the agreement permitted BFI to set pre-employment testing standards and procedures for the Leadpoint employees, reject or discontinue the use of any personnel for any or no reason, prevent Leadpoint from paying its employees more than BFI employees performing comparable work, determine which belts would operate each day and how many Leadpoint employees were assigned to each belt, and set productivity standards.

The union representing the BFI employees petitioned to represent the Leadpoint employees working at the BFI plant. After a hearing, the NLRB regional director found that Leadpoint was the subcontracted employees' sole employer. An election was held, but the ballots were impounded pending the union's request for review of the regional director's decision. In April 2014, the NLRB granted the union's request for review. It also solicited amici briefs on whether it should adhere to the current joint-employer standard or, if not, what the standard should be. Labor groups and the NLRB's General Counsel urged the NLRB to adopt a new standard. Employer groups, on the other hand, argued in favor of retaining the current test.

**The Majority's Decision**

A 3-2 NLRB majority adopted a new test under which two or more companies are joint employers of a group of workers if they "share or codetermine those matters governing the essential terms and conditions of employment."

In its analysis, the majority observed that the current joint-employer standard was "ostensibly" based on a 1982 Third Circuit Court of Appeals decision involving Browning-Ferris Industries of Pennsylvania (*Browning-Ferris*), which found that "[t]he 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment." The majority found that although the NLRB had embraced this standard, subsequent decisions narrowed it by imposing additional requirements that were unsupported by the common law or the purpose of the NLRA without acknowledging or overruling prior decisions. Therefore, the majority found

that its broader statement of the joint-employer standard was a reaffirmation of the Third Circuit's standard in *Browning-Ferris* and that its abandonment of the requirements of actual, direct and immediate control was consistent with common-law agency principles.

Applying the new test to BFI, the NLRB concluded that it was a joint employer under the NLRA. In so finding, the NLRB observed that BFI possessed significant control over Leadpoint's hiring and firing of plant workers, that BFI exercised control over the processes that shaped the day-to-day work of the Leadpoint employees, and that BFI played a significant role in determining the Leadpoint employees' wages. Importantly, the NLRB noted that BFI not only reserved the right to control these terms in the agreement, but it had exercised its control both directly and indirectly.

The majority cited the increasing diversity of workplace arrangements in today's economy as reason enough to revisit the current joint-employer standard. However, many of the criticisms and concerns levied against the decision, including by the dissent, assert that the new standard fails to address alternative employment arrangements that properly do not constitute joint-employer relationships. Because the new standard looks at whether an entity has *the potential to exercise control* over the terms and conditions of a worker's employment, even if that control is not used, a company that has entered into an arm's-length contract with an outside employment firm in good faith could still be forced into a labor dispute with the employment firm's employees. There is also a concern that what would previously have been considered unlawful union activity, like secondary strikes, will increase. Given the uncertainty that this new standard introduces, a company that currently contracts out for its workforce or is considering doing so should be prepared for increased scrutiny as to how the terms of its arrangement with the labor-supplying firm gives it control, even if indirect or never exercised, over the contracted-for workers.

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