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The NLRB's Browning-Ferris "Joint Employer" Test is Subjected to Court Scrutiny

The National Labor Relations Board's definition of what constitutes a "joint employer," as expanded in the 2015 case Browning-Ferris Industries of California Inc., faced intense scrutiny during oral argument of an appeal of that decision this past Thursday before the D.C. Circuit Court of Appeals. Being deemed a "joint employer" has been of particular concern for separate unrelated businesses linked for business purposes to a common group of employees where one only operates on a union basis, since such a determination renders the non-union entity bound to the relevant collective bargaining agreement. No decision on the appeal has been issued at this time; however, the comments from the bench during oral argument may signal a potential retreat from the Brown-Ferris ruling. A decision from the court will likely take several months.

In Browning-Ferris, the NLRB decided to go beyond the narrow 30 year old traditional test used in prior cases when determining whether a company qualifies as a "joint employer." Under a new and widened standard, a business could be deemed a joint employer if it merely exerts "indirect control" over a contractor or reserves for itself the ability to exert such control. The previous standard required a business to exert "direct and immediate" control over terms and conditions of employment in order to be considered a joint employer.

The NLRB used its revised standard to determine that Browning-Ferris, a waste management company, was a joint employer of recycling workers provided by a staffing agency, Leadpoint Business Services Inc.

The tone of the questioning from the three-judge panel was striking. For example, during oral argument, Judge Patricia Millett stated that the NLRB "dropped the ball" with its ruling. Judge Millet pointed out that the NLRB failed to clearly state how much weight it would give to the indirect or reserved control factors when it makes joint employer determinations and failed to provide a clear understanding of what indirect control means. It is unclear whether the reaction from the bench will lead to a return to prior law or to greater clarity regarding how the new test should be utilized.

Interestingly, the U.S. Equal Employment Opportunity Commission has voiced its support in favor of the NLRB's new interpretation, saying it comports with its own longstanding approach in determining joint employment in discrimination cases.

The case is Browning-Ferris Industries of California Inc. v. National Labor Relations Board et al., case numbers 16-1028, 16-1063 and 16-1064, in the U.S. Court of Appeals for the District of Columbia Circuit.

We will continue to keep you apprised of any further developments on the issue. Of course, if you have any questions, please feel free to contact P&A's Labor and Employment Law Department.

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