

National Labor Relations Board's New Interpretation of 'Joint Employer' A Game Changer

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On August 27, 2015, the U.S. National Labor Relations Board (“NLRB”) released its long awaited decision in *Browning Ferris Industries*, fundamentally altering the analysis used to determine if two or more entities are considered “joint employers” for purposes of union organizing and other aspects of the *National Labour Relations Act*.

In a ground breaking decision with potentially far-reaching ramifications for a wide range of employers including any employer that uses temporary staff, staffing agencies, and members of the construction industry (including general contractors, subs, *etc.*) (collectively “at risk employers”), the NLRB discarded its long-applied joint employer test for one much more likely to result in arm’s length entities being jointly responsible for union obligations.

The Longstanding Test

Until recently, the test applied by the NLRB to determine joint employer status was clear and well understood: two separate business entities would be considered “joint employers” if both exercised direct and immediate control over the terms and conditions of employment of the same workers. This meant both entities had to share the ability to hire, fire, discipline, supervise and direct the employees in question. As a result, businesses were able to structure their relationships to clearly delineate which had (or did not have) ‘direct and immediate’ control over the terms and conditions of employment, and, in the event of a union certification drive, it was possible to identify one business as the legitimate subject of the application.

Along Came Browning Ferris Industries

The NLRB’s decision in *Browning Ferris Industries* has cast this analysis aside in favour of a broader, more contextual analysis, making it more likely at risk employers will be found to be joint employers in the face of union organizing or an NLRB complaint.

The 3-2 ruling by the NLRB followed an initial finding a staffing agency which supplied workers to Browning Ferris Industries (“BFI”) was the sole employer and therefore the only appropriate respondent to a union’s certification application. When the union appealed that finding the NLRB called for input from interested parties into the question ‘*[s]hould the Board adhere to its existing joint employer standard or adopt a new standard?*’

Deciding to adopt a new standard, the NLRB noted the previous joint employer test was “*out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships*”. The NLRB opted to re-articulate the joint employer test as follows:

The Board 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. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may ‘share’ control over terms and conditions of employment or ‘codetermine’ them, as the Board and the courts have done in the past.

In explaining its marked departure from decades of jurisprudence, the NLRB said it wished to make certain the collective bargaining process is meaningful by ensuring parties with direct or indirect control over substantial terms and conditions of employment are present at the bargaining table.

Application to BFI

Applying this new test, the NLRB looked beyond which entity *actually exercised* control over employment terms and conditions, to how much control each entity *could exercise* if it chose to do so.

Against this backdrop, while the staffing agency had authority over wages and which employees were sent on which shifts, BFI had direct control over hours of operation and production standards, and indirect control (through the staffing agency) over when and if to require alcohol testing, which employees were sent to work at the facility, and the maximum wage. Under the prior formulation of the joint employer test, the fact BFI did not have direct control over these latter terms of employment meant the NLRB was not inclined toward a joint employer determination. Under the new test, this indirect control was critical.

The NLRB therefore concluded both BFI and the staffing agency had the ability to control, directly or indirectly, key terms and conditions of employment for the workers seeking union representation.

American Reaction

Criticism of the NLRB’s decision from employer organizations has been swift and pointed, picking up on the dissent, which not only criticized the majority for its sea change interpretation, but also for introducing significant uncertainty into contractual arrangements which had previously be fairly clear and predictable. Under the NLRB’s new standard it is impossible to predict how the NLRB will weigh the various characteristics of the business relationship in deciding whether a joint employer relationship exists. Said the dissent: “Under the majority’s test, the homeowner hiring a plumbing company for bathroom renovations could well have all of that indirect control over a company employee!”

The dissent also correctly points out the new standard has the potential to produce unworkable bargaining relationships particularly where a staffing agency provides employees to a variety of

different clients. In that case, how will the bargaining unit be defined? Site specific? Client specific? Will it be segmented by work done? Must the terms and conditions of employment be the same for each client? Because joint employers will be required to bargain over terms and conditions for which they have control, how will this be determined? Conceivably, a number of clients may control the same terms but at different workplaces. All of these issues could now be up in the air, and have a profound effect on how business is done.

Finally, in the United States and in Canada, an entity is generally free to terminate a business relationship with a contractor for any number of reasons, including that the contractor has become more costly. However, if the entity is now deemed a joint employer with the contractor, the entity may no longer terminate the relationship without potentially violating labour relations legislation if union organizing and/or a union application to represent the employees has been filed.

The Canadian Experience

In Canada it is unusual for two arm's length employers to be considered common or joint employers for purposes of a union certification application. Generally speaking, Canadian labour boards will analyze which entity has actual day to day direction and control over the workers at issue and declare that entity to be the employer for purposes of the application.

However, a result like that in *Browning Ferris Industries* it is not unprecedented in Canada. In 2009, the Ontario Labour Relations Board ("OLRB") issued a similar finding in *Metro Waste Paper Recovery*. In that case, Metro Waste had hired a number of workers through a staffing agency. The OLRB performed its usual 'who is the true employer' analysis by looking at the various factors that represent day to day control over workers, including the:

- party exercising direction and control over employees
- party bearing the burden of remuneration
- party imposing discipline
- party hiring
- party with authority to dismiss
- party perceived to be the employer by employees
- existence of an intention to create the relationship of employer and employee

The OLRB found that an analysis of these and other factors did not clearly identify either Metro Waste or the staffing agency as having greater control over the day to day working conditions of the workers. As such, despite the fact Metro Waste and the staffing agency were separate, arm's length entities, they were held to be joint employers for purposes of the workers at that facility. The union was therefore certified for both organizations which, together, had an obligation to bargain a collective agreement.

Impact of Browning Ferris Industries

The NLRB's decision in *Browning Ferris Industries* has changed the landscape for U.S. employers. Contractual terms which may have previously provided comfort to parties must now be revisited with the understanding the NLRB will look not only at the degree to which control is *actually exercised*,

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but to which it *could be exercised*. It also means that it may be impossible to eliminate the risk of joint liability in every case.

The decision, coupled with recent changes in the NLRB's rules resulting in much shorter timeframes for the holding of a certification vote, is expected to result in increased levels of union organizing in the U.S., as well as greater litigation around the issue of 'who is the employer'. It may also encourage more decisions in Canada like the one in *Metro Waste Paper Recovery*.

How to Minimize Risk

To minimize exposure, every employer should revisit the extent of control over temporary or 'sub' employees necessary to manage its business. The greater the level of control exercised, the greater the risk co-employer status may be imposed.

To the extent control is necessary, be strategic about how it is exercised. For example, providing a client with draft employment agreements and workplace policies increases an employer's risk of co-employer status. However, providing a list of legal or other resources clients can access to ensure appropriate agreements and policies are in place can achieve the same protection without attracting the same level of risk.

Finally, reducing the risk of a workplace complaint in the first place, ultimately reduces the risk of a finding of joint liability. It therefore makes good business sense for every employer to consider how it can support its clients to implement workplace best practices. This includes making available to clients information about workplace employment, labour, human rights and occupational health and safety laws (among others), and introducing clients to strategies to maintain positive employee relations which, in turn, minimizes the risk of unionization. By helping to educate employers and clients about the legal obligations owed to employees, the likelihood of employment-related liability can be greatly reduced.

For more information and for assistance, contact a member of Sherrard Kuzz LLP.

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