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D.C. Circuit Case Could Redefine Employment Relationship Among Joint Employers

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The U.S. Court of Appeals for the District of Columbia will soon decide whether the National Labor Relations Board (NLRB) has adopted the correct standard for determining that two business entities are joint employers for purposes of the National Labor Relations Act (NLRA). The Board has clarified that the correct test is whether two entities "share or codetermine those matters governing the essential terms and conditions of employment" and requires consideration of the "various ways" in which joint employers may "share" or "codetermine" those terms and conditions. (See *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and International Brotherhood of Teamsters Local 350*, 362 NLRB No. 186, at p. 15 (Aug. 27, 2015).)

Because the Equal Employment Opportunity Commission (EEOC) has filed a brief in the D.C. Circuit supporting the standard articulated by the NLRB, arguing that the standard is correct because it is the same one the EEOC uses to answer the same question under the anti-discrimination statutes, the court of appeals decision could have ramifications for all labor and employment discrimination statutes. The essence of the test embraced by the NLRB and advocated by the EEOC is that, in deciding whether two entities jointly control the terms and conditions of employment, the agencies and courts should consider all relevant factors, as none is dispositive, and unexercised authority is as relevant as actually exercised authority in this determination.

The standard the NLRB is defending in this petition for review filed by Browning-Ferris and Leadpoint in the D.C. Circuit is identical to the standard it first adopted in the early 1980s in another Browning-Ferris case, *NLRB v. Browning Ferris Industries of Pennsylvania, Inc.*, 691 F2d 1117 (3d Cir. 1982), enfg. 259 NLRB 148 (1981). Although the Board has recited the same standard over the years, additional requirements have crept into the Board's analysis, and those requirements have led to markedly different results.

A review of the facts and standards applied in this case will illuminate the significance of the Board's decision to embrace its original standard and to strip the analysis of the extra requirements it concluded have no basis in the Third Circuit decision, the common law, or the text or policies of the NLRA. (See *Browning-Ferris*, 362 NLRB No. 186, at p. 1.)

Why Does a Joint-Employer Test Matter?

The number of amici who have filed briefs in the D.C. Circuit gives a fair indication of the importance and practical impact of the application of the different standards used to determine joint-employer status.

The EEOC, as noted, has supported the Board's decision, and the Chamber of Commerce has also filed a brief supporting the Board. Microsoft Corporation, the National Association of Manufacturers, the National Federation of Independent Business, the Associated Builders and Contractors of America, the American Hospital Association, and the American Hotel & Lodging Association are among the many

parties who have joined various briefs filed by amici supporting the employers and the now-discarded narrower standard, giving some insight into the types of industries with the greatest interest in the proper resolution of the employer question.

The increasing reliance on contingent workers in a variety of industries makes the adoption and application of the proper test of joint-employment status crucial to the protection of the contractual and statutory rights of such workers.

Case Background

This case arose out of a dispute over the Teamsters Union's efforts to represent workers supplied by Leadpoint to BFI. BFI owns and operates the Newby Island recycling facility and solely employs 60 employees, including loader, equipment and forklift operators who move materials to the facility; these employees are part of a separate bargaining unit represented by the Union. BFI contracts with Leadpoint to supply approximately 240 workers who work inside the recycling facility as sorters, screen cleaners and housekeepers. It is these Leadpoint employees the Union sought to represent.

The relationship between BFI and Leadpoint is governed by a temporary labor services agreement that states Leadpoint is the sole employer of the workers it supplies to BFI and provides that nothing in the agreement shall be construed as creating an employment relationship between BFI and the workers Leadpoint supplies. The following are some of the parameters surrounding the BFI and Leadpoint relationship.

- BFI and Leadpoint both have supervisors and lead workers at the facility.
- Leadpoint recruits, interviews, tests, selects and hires workers for BFI but does so in accordance with various BFI specifications.
- Leadpoint disciplines, evaluates and terminates workers assigned to BFI, but BFI has the authority to reject or terminate any worker for any or no reason.
- BFI compensates Leadpoint for the supplied workers' wages and Leadpoint determines the pay rates but cannot pay its workers more than BFI's employees are paid for similar tasks without BFI's permission.
- BFI sets the schedule and working hours.
- BFI determines which streams of materials will operate each day and dictates how many Leadpoint laborers will be assigned to each station.
- Leadpoint and BFI both provide training and counseling to the Leadpoint workers.

The regional director of the NLRB evaluated the respective roles of BFI and Leadpoint in managing the Leadpoint workers and concluded that BFI was not a joint employer because it did not have a "level of control that is sufficiently direct or immediate" to warrant a finding of joint control. In conducting that analysis, the regional director applied the NLRB standard as articulated in *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984). In the decisions in *TLI* and *Laerco* and other cases, the Board had imposed additional requirements so that the test focused not only on whether a joint employer possessed the authority to control employee's terms and conditions of employment, but also whether it exercised that authority, and whether its exercise was direct, immediate, and not "limited and routine."

The NLRB's "New" Standard

The distinction between the possession of authority and the actual exercise of that authority made all the difference in this case. While the regional director concluded that BFI did not exercise direct or immediate control over the Leadpoint workers, the Board concluded that BFI had enough control over hiring, firing, discipline, wages and daily supervision of work, even if not always exercised directly, to qualify as a joint employer of the Leadpoint employees.

After the Board rendered its decision, Leadpoint workers voted to join the union. BFI refused to

bargain with them, and the Board ruled its refusal was an unfair labor practice. Notably, the guiding rationale for the Board's approach was to craft a standard that would permit productive collective bargaining in situations where otherwise negotiable terms and conditions of employment are under the control of more than one statutory employer. The Board was careful to note that its standard does not govern the joint-employer determination under other statutes. (See 362 NLRB No. 186, at p. 20 n.118.)

The EEOC's Endorsement of the NLRB's Joint-Employer Test

In its briefs as amicus curiae before the Board and in the D.C. Circuit, the EEOC argued in support of the Board's standard, contending that because Title VII is based on the NLRA statutes – and both statutes define employer in the same way – the EEOC's standard is relevant in assessing the validity of the NLRB's standard. (See EEOC Br. at 6-8.)

As the EEOC brief pointed out, the EEOC has consistently applied a multifactor test based on common law agency principles to determine whether an entity should be viewed as a joint employer. Under the EEOC's test, the agency and courts look to whether an entity has the right to control terms and conditions of employment and whether it exercises direct or indirect control over those terms. In short, the EEOC defines "joint employer" to mean "two or more employers that are unrelated or that are not sufficiently related to qualify as an integrated enterprise, but that each exercise sufficient control of an individual to qualify as his/her employer." (See *Threshold Issues, Covered Parties, Special Issues Regarding Multiple Entities: Joint Employers*, EEOC Compliance Man. § 2-III(B)(1)(a)(iii)(b), 2009 WL 2966755.) The EEOC examines the totality of the circumstances and views no one factor as dispositive. (See EEOC Br. at 8-12.)

The EEOC's mandate to investigate charges of discrimination in the workplace means that it has a different reason than the NLRB has for considering whether an entity is a joint employer. While the NLRB is concerned with the efficiencies of collective bargaining, the EEOC invokes this test only if there are facts to suggest that an entity knew or should have known of discrimination by another entity and failed to take corrective action within its control, or otherwise participated in the discriminatory conduct of another entity. (See EEOC Br. at 6, n.2 citing EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997), 1997 WL 33159161, at *11.)

For example, the EEOC recently settled a racial harassment and retaliation case against Skanska USA Building in which it successfully argued that Skanska, a building contractor, could be held liable for the harassment of African-American buck-hoist operators who worked for one of Skanska's subcontractors. Before reaching a settlement with Skanska, the EEOC persuaded the Sixth Circuit that Skanska exercised sufficient supervisory control and control over day-to-day activities of the operators to be considered their joint employer. (See *EEOC v. Skanska USA Bldg., Inc.*, 550 F. App'x 253 (6th Cir. 2013).)

Conclusion

The question of whether an employment relationship exists has become increasingly important in the current world of contingent work forces. While there might appear to be a fine line between possessing and exercising control over terms and conditions of employment, the distinction can determine the outcome of many cases.

If the D.C. Circuit affirms the Board's return to its original approach to this question, employers need to be aware that recitations in labor agreements that one entity does not intend to create an employment relationship with the employees of another likely will not be sufficient to preclude union

petitions for representation of groups of workers or to shield such employers from potential liability in discrimination suits.