LEGAL UPDATES PUBLISHED: SEPTEMBER 1, 2015

NLRB Broadens Definition of 'Joint Employer'

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On August 27, 2015, the National Labor Relations Board (NLRB) issued a 3-2 decision that "refined" its standard for determining joint-employer status. In doing so, the NLRB dramatically changed its course on the issue and potentially qualified countless employers as joint employers. The decision leaves open the questions of how the NLRB will apply the revised standard to specific employers and what employers must do to prepare for the change.

The Revised Standard

The decision, known as *Browning-Ferris Industries of California*, examined the joint-employer standard in the face of modern workplace and economic circumstances. Most notably, more than 2.87 million U.S. workers are employed through temporary agencies, a fact the previous joint-employer standard failed to take into account, the NLRB said. To address this, the NLRB substantially expanded the joint-employer standard it said had "narrowed" over the years.

The revised standard now requires two elements joint-employer status:

The employer is an employer within the meaning under the common law.

The employer shares or codetermines matters governing the essential terms and conditions of employment.

Essential terms and conditions of employment include hiring, firing, discipline, setting wages and hours, setting number of workers needed, controlling scheduling, seniority, overtime, supervision and direction. The most significant change is that the revised standard considers whether the purported employer has indirect control, in a limited and routine manner, over the terms and conditions of employment. (The prior standard required direct

and immediate control.) The revised standard even considers whether the employer has reserved the authority to exercise control.

What is yet to be seen is how the NLRB will apply this new standard—i.e., the significance or how much control will suffice. Additionally, it is predicted that the courts, plaintiffs' attorneys and other government agencies (particularly the Department of Labor) may attempt to carry the new standard in some form to matters outside the National Labor Relations Act (NLRA) context.

What This Means to You

The revised standard could bring countless employers and franchisors into the realm of joint-employer status for NLRB purposes. Franchisors and employers that use temporary employment agencies should be keenly aware of the potential for being involved in the labor matters of their temporary staffing agencies and/or franchisees, as well as future attempts at unionization. In particular, the NLRB's general counsel has identified computer systems of franchisors with real-time central review or control over staffing and similar issues as one area of concern in this analysis.

Now is the time for companies to review relationships with temporary services agencies and/or for franchisors to review the extent of control or the right to control any aspects of the employment relationship of franchisees with their employees.

For more information on these issues, please contact Terry Potter, Michaelle Baumert or Stephen Cockerham in our Labor & Employment practice group.