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Obama NLRB Redefines "Joint Employer;" General Counsel Approves Electronic Signatures

New Joint-Employer Standard

Consistent with a broader Obama Administration trend of implementing additional regulations and initiatives to increase employers' liability and increase the opportunities for successful union organizing, the National Labor Relations Board (NLRB) on August 27 adopted a new standard for determining joint-employer status. The new definition finds that two or more entities are joint employers of a single workforce if:

1. They are both employers within the meaning of the common law;
2. They share or codetermine those matters governing the essential terms and conditions of employment.[1]

The Board's decision, which was issued on the final day of Republican Member Harry I. Johnson's term, related to the *Browning-Ferris Industries of California, Inc.*, case. In the decision, the Board states:

> "We will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry."

Under the previous decades-old standard, an entity was determined to be joint employer only when it "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[2] In other words, an entity was not considered a joint employer unless it exerted "direct and immediate" control over working conditions for contract employees.

Under the new test, an entity can be considered a joint employer even if it has only indirect control over working conditions or if it has the right to control certain conditions even if it doesn't exercise that right.[3]

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[1] "Board Issues Decision in Browning-Ferris Industries." Press release. National Labor Relations Board. 27 Aug. 2015.

[2] *TII, Inc.*, 271 NLRB 798 (1984).

[3] Scheiber, Noam and Stephanie Strom. "Labor Board Ruling Eases Way for Fast-Food Unions' Efforts." *New York Times*. 27 Aug. 2015.

The 3-2 decision was split on party lines, with Republican Members Johnson and Philip A. Miscimarra dissenting. In their dissent, Johnson and Miscimarra wrote, "The result is a new test that confuses the definition of a joint employer and will predictably produce broad-based instability in bargaining relationships."

The Board majority of three Democrats, however, responded by stating, "Our aim today is to put the board's joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the (National Labor Relations Act), to best serve the federal policy of 'encouraging the practice and procedure of collective bargaining.'"[4]

Employer Impact

The new joint-employer definition could lead to sweeping changes. For instance, if a union wins an election among employees, the union now has the right to bargain not only with the contractor, but with the employer who engaged the contractor even if it does not actively supervise the contractor's employees. Additionally, they will share joint liability for any unfair labor practices committed by either company involving those employees.

Health systems and hospitals that engage contractors for nurses, environmental services, food and nutrition services, lab work, and possibly other services could be considered joint employers under the new standard. No longer can they consider themselves removed from contractors' labor disputes that involve employees who work on their behalf.

This means that if a contractor that is a supplier of nurses to the "user" hospital, like a nurse staffing agency, becomes unionized, a hospital may have to negotiate with the union that represents the staffing agency's nurses as would the agency. Further, unions might now turn their attention to organizing temporary agencies and other contractors as a way to place unionized employees in non-union facilities. What may further complicate matters is if a hospital is unionized and managers have to follow one set of rules for the hospital's unionized workforce and a second set of rules for the hospital's unionized contingent workforce represented perhaps by another union or covered by a different collective bargaining agreement.

Unions see this long-awaited change as an opportunity to grow their member rolls; The new joint-employer standard may make union organizing easier. For instance, during a union campaign to organize contract employees, employers previously could legally terminate the contractor to avoid unionization. (The contractor could not shut down for this reason.) As a joint employer, entities no longer have this option without liability.

During the Obama presidency, the Labor Department and related agencies including the Occupational Safety and Health Administration (OSHA) and the Wage and Hour Division have been more closely reviewing employer-employee relationships, and more rigorously regulating independent contractor classifications. The Board decision also may lead OSHA to expand liability for workplace safety under the Occupational Safety and Health Act and for the Equal Employment Opportunity Commission (EEOC) to assert jurisdiction over user employers in class action suits.

Legal Challenges

This decision emanated from an NLRB election, meaning that it only can be reviewed by the federal courts if the union wins the election and the employer refuses to bargain. So even if a union prevails in the NLRA

[4] Trottman, Melanie. "Ruling Clears Way for Unions." *Wall Street Journal.* 27 Aug. 2015.

election, it may be some time before a court even reviews this decision. If the union does not prevail, the Browning-Ferris decision will continue to be "the law of the land" until such time as the composition of the Board changes or Congress intervenes legislatively. Indeed, the International Franchise Association and other trade associations representing employers are urging Congress to overrule the Board's decision and convince Congress not to appropriate funds for the Board to apply its new joint-employer doctrine.

The NLRB framed its decision in part on broad policy reasons, including the proposition that federal labor law has not kept up with changes in the labor market, which increasingly relies on contingent employees. The Board wrote, "If the current joint-employer standard is narrower than statutorily necessary and if joint-employment arrangements are increasing, the risk is increased that the board is failing in what the Supreme Court has described as the board's 'responsibility to adapt the (National Labor Relations Act) to the changing patterns of industrial life.'"[5]

The NLRB majority cited a "dramatic growth in contingent employment relationships (that) potentially undermines the core protections of the (National Labor Relations Act) for the employees impacted by these economic changes."[6] Employers increasingly have been using temporary contract workers to provide staffing flexibility and for non-core services that can be more effectively and efficiently operated by subcontractors that specialize in those service lines.

More than 2.87 million American workers were employed through temporary staffing agencies through August 2014, according to the NLRB, and nine percent (9%) of them worked in healthcare.[7]

RECOMMENDATIONS

The NLRB will look closely at the relationship between the primary employer and contractor to determine whether the user and supplier employers "share or codetermine those matters governing the essential terms and conditions of employment." The Board will consider three points: Direct control; Indirect control; and Potential future control.

With this in mind, employers should consider the following options:

1. User employers should write a "hold harmless clause" into contracts with supplier employers related to NLRB unfair labor practice or representation issues requiring that the supplier employer reimburse the user employer for all expenses related to NLRB issues.
2. User employers also should verify that their supplier employers have established separate employment terms and conditions for employees and have separate employment policies and a separate employee handbook.
3. User employers should develop a distinction between the work and payment structure its employees perform versus that of the supplier employer's employees who are assigned to the user employer's workplace.

[5] Scheiber, Noam and Stephanie Strom. "Labor Board Ruling Eases Way for Fast-Food Unions' Efforts." *New York Times*. 27 Aug. 2015.
[6] Trottman, Melanie. "Ruling Clears Way for Unions." *Wall Street Journal*. 27 Aug. 2015.
[7] Rubenfire, Adam. "NLRB ruling could shake up healthcare staffing industry." *Modern Healthcare*. 28 Aug. 2015.

4. User employers should take a census of what supplier contractors they are currently engaged with to determine whether they have a unionized workforce and to assess risk as to whether they, as a user employer, could become embroiled in any labor issues between the supplier contractor and the unions that represent its employees.
5. User employers should regularly monitor the supplier employer to learn whether any organizing activity is occurring among its employees and whether those employees are working for the user employer.
6. User employers should regularly review all so-called independent contractor relationships to examine the terms and conditions of those relationships in light of this new decision and where necessary modify the contractual arrangements with suppliers to avoid to the extent possible being found to be a joint employer.

ELECTRONIC SIGNATURES

A week after the Board announced an updated joint-employer standard, the NLRB's General Counsel Richard Griffin issued a guidance memorandum approving the immediate use of electronic signatures to support a showing of interest.

"The Board's traditional procedures have met the test of time and applying them to electronic signatures will not pose either significant costs or risks to the public or to the Agency," the general counsel wrote. The memo outlines "Requirements for Acceptance of Electronic Signatures," which include: The signer's name, email address or social media account, telephone number, the language to which the signer has agreed, the date of the electronic signature and the name of the employee's employer.

The petitioner must declare what electronic signature technology was used and the controls it used to ensure the signature is valid and that the employee saw the language to which he/she has agreed.

Certainly, there will be legitimate concerns about fraudulent signatures or employees being coerced or harassed to sign – just as there are today with union authorization cards and petitions. The general counsel does not directly address these concerns, but does state in the memo that he thinks the new requirements for electronic signatures are "more stringent than what is currently required for non-electronic signatures." He also noted that parties will not be required to submit electronic signatures in support of their showing of interest and are permitted to submit paper-based signatures. Alarmingly, the new process permits parties to collect signatures through email and websites.

Coupled with the NLRB's Purple Communications decision allowing employees to organize using employers' email systems and new expedited election rules, it is ever more important for employers to quickly address early warning signs of union activity and prepare in advance readiness plans should a union file a petition to represent their employees.

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