NLRB Changes the "Joint Employment" Standard

Browning-Ferris Industries of California, Inc. Decision is a Game-Changer for Businesses that Subcontract Labor
By: John Baker and Tanya Salgado
Labor and Employment Alert
9.9.15

The National Labor Relations Board has issued a decision that presents new challenges for business owners. The decision, *Browning–Ferris Industries of California, Inc.*, 362 NLRB No. 186, decided on August 27, 2015, is particularly important for businesses that subcontract work, are subcontractors themselves, are in a franchise relationship or use staffing agencies to provide temporary laborers. This decision broadens the scope of the joint employment relationship between two companies, essentially making them both employers over the same employees. This will likely come as a great surprise to many businesses, which may have assumed that their staffing and subcontracting arrangements insulated them from Union trouble.

Leadpoint Business Services supplied laborers to Browning-Ferris. The Union petitioned the Board to represent these employees. The Regional Director of the Board held that Leadpoint was the sole employer of the employees. The Union appealed this issue to the Board itself, seeking to have Browning-Ferris also deemed an employer. If so, then Browning-Ferris would have to negotiate with the Union in tandem with Leadpoint, over the terms and conditions of employment of the Leadpoint employees. In analyzing the Union's position, the Board revisited the critical question: who controls the employees?

Prior to the Browning-Ferris decision, the standard used by the Board to determine whether a joint employment relationship existed focused on the putative employer's *actual* exercise of control over the workers. It was not enough that an employer merely *reserved* the authority or right to control the terms and conditions of employer. In the Browning-Ferris decision, the Board held that "the right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect." The Board's guiding principle in changing decades of Board law was the need to "adapt their rules and practices to the Nation's needs in a volatile, changing economy."

The Board's decision is highly controversial and almost certainly will be appealed. Until it is overturned, business relationships between companies should be examined and strategies prepared to avoid unwittingly having to negotiate with a Union over another company's employees.

We will continue to monitor this issue and provide updates of further developments. Please contact John K. Baker (610.782.4913; bakerj@whiteandwilliams.com), Tanya Salgado (215.864.6368; salgadot@whiteandwilliams.com) or any other member of our Labor and Employment Group for further assistance.