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Employment & Labor Issue Alert

Franchisors, Parent and Sibling Entities, and Employers Who Use a Staffing Agency, Subcontractor, or Vendor: Beware! You (Perhaps) Just Became A "Joint Employer."

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A new ruling by the National Labor Relations Board (NLRB) threatens to destroy the line separating corporate entities and the corresponding limitations on liability by dramatically expanding the definition of "joint employer" in the labor context.

For more than three decades, the NLRB had applied the same joint-employer standard: where one employer exercises sufficient direct control over the terms and conditions of another's employees, they are "joint employers." This means that both employers have collective bargaining obligations with respect to the joint employees, face potential liability for unfair labor practices or breach of a collective bargaining agreement, and are subject to economic protest activity, such as strikes, boycotts, and picketing.

Background – Union Alleges that Company Is Joint Employer with Its Staffing Agency

A Teamsters union sought to organize the employees of a recycling center in California. The workers were employed by a staffing agency, Leadpoint Business Services, and worked on the premises and alongside employees of Browning-Ferris Industries (BFI). The union argued that BFI was a joint-employer, but the Regional Director rejected that argument under existing precedent. While BFI had contractual rights to control certain aspects of the employment relationship, it had not actually exercised those rights, and it's control was so indirect, limited, and routine, that BFI could not be considered a joint employer.

On appeal, the NLRB, in a 3-2 decision, abandoned the current joint employer test in favor of a much broader, union-friendly test, and concluded that BFI and Leadpoint were joint employers.

NLRB's New Test – It's All About Right to Control, Even If Unexercised and Indirect

The NLRB set forth the following two-part inquiry regarding the joint employment standard:

- Do the employers share or codetermine matters governing the terms and conditions of the employees' employment? This can be shown, for example, where both employers make decisions together; where each employer has control of different aspects of the employment relationship (e.g., one employer defines and assigns tasks, while the other supervises how those tasks are carried out); or where one employer retains the right to set a term or condition of employment (e.g., reserving the right to refuse to allow certain individuals to work on the premises).

- Do the employers each exercise sufficient control over those terms and conditions to permit meaningful collective bargaining? Rather than giving any guidance as to where this line might be drawn, the NLRB merely indicates that each case must be considered on its own facts.

This new standard deliberately removes two prior limitations. First, it eliminates the requirement that the putative joint employer actually exercise its right to control. Now, mere contractual right to control is sufficient to establish the joint employment relationship. Second, it eliminates the requirement that the putative joint employer exercise direct control over another's employees. Indirect control exercised through an intermediary (such as a manager of a franchisee or staffing agency) can be enough.

Reliance on past precedent will provide employers who now suddenly qualify as "joint employers" very little protection, at least in unfair labor practice charges involving representation issues. The NLRB declared, at least in this context, that its new standard applies retroactively.

The Impact of the BFI Ruling Will Be Widespread

The NLRB's new standard will impact companies in many different settings: franchisors and their franchisees; parent companies and their siblings or subsidiaries; and any employer and its staffing agencies, subcontractors, and vendors. In many of these contexts, it is almost inevitable that the employer retains some level of control over the work performed by others, potentially subjecting it to joint-employer status.

The NLRB's refusal to give specific guidance on how it will apply this new standard introduces great uncertainty and makes it impossible to offer a one-size-fits-all evaluation of your potential joint-employer exposure. Before the NLRB comes knocking at your door, any company with potential joint-employer exposure should coordinate with labor counsel to review existing contracts and determine what changes, if any, can be made to insulate yourself from a joint-employer finding or, alternatively, to comply with your obligations as a joint-employer.

For More Information

If you have questions or want more information regarding the NLRB's new joint-employer standard, you should contact your labor law counsel. If you do not have regular labor law counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs. You may contact **Charles McClellan** at **cmcclellan@foulston.com** or by calling 316.291.9764. You may also contact **Boyd Byers**, Employment and Labor Practice Group Leader, at **bbyers@foulston.com** or 316.291.9716. For more information on the firm, please visit our website at **www.foulston.com**.