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SPECIAL BULLETIN

THE NATIONAL LABOR RELATIONS BOARD REDEFINES WHO IS AN "EMPLOYER"

On August 27, 2015, the National Labor Relations Board (the "Board") issued its decision in *Browning-Ferris Industries of California vs. Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters*. This decision radically changes the standard for assessing joint-employer status under the National Labor Relations Act in a way that may find most companies and their contract staffing companies, as well as franchisors and franchisees, to be joint employers for purposes of union representation proceedings, unfair labor practices and collective bargaining.

For the past three and a half decades, the Board, when considering when two companies may be joint employers, has focused on the *actual* exercise of control, direction and supervision over the terms and conditions of employment. *For example*, in 1991, the Board refused to find that a building management company was a joint employer of employees supplied by a janitorial company notwithstanding the fact that the "user" mandated the number of workers to be employed, directed work assignments, and exercised oversight of operations and efficiency. Only when the Board found that supervision rose above "limited and routine" supervision was the Board willing to find joint-employer status.

According to the Board in its new decision, the Board's old joint-employer standard has failed to keep pace with the "current economic landscape." According to the Board, the new standard incorporates the common-law concept of control and asks whether the user employer "possesses sufficient control over the work of the employees to qualify as a joint employer with another statutory employer." Factors considered by the Board will include (a) the extent of control which, under the contracting agreement, the user employer may exercise over the details of the work; (b) whether or not the employee is engaged in a distinct occupation or business different from the primary occupation of the user employer; (c) whether the occupation is usually performed under the direction of the user employer or by a specialist without supervision; (d) the skill required by the occupation; (e) whether the user employer or the employee supplies the tools required; (f) the length of time for which the employee is employed; (g) the method of payment, whether it is by increments of time or by the job; (h) whether the work is part of the regular business of the employer; (i) whether or not the parties believed that they are creating the relationship of employer and employee; and (j) whether the employee is engaged in *bona fide* business. These factors are all historic indicia of an independent contractor versus employee relationship.

The primary change in the Board's new focus is that, while *direct* and *actual* control was required in the past for application of the joint-employer doctrine, *indirect* control now will suffice for the finding of a joint-employer relationship. According to the Board, "two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may 'share' control over terms and conditions of employment or 'codetermine' them." In determining shared control or

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codetermination of terms and conditions of employment, the Board will consider whether the user of contract services or a franchisor may have the powers of hiring, firing, discipline, supervision, direction, wages, hours, scheduling, seniority, overtime, and work assignments, or anything that determines the manner and method of work performance. The *exercise* of the authority to control the terms and conditions of employment is no longer the determining factor. The *right* to control, whether direct or indirect, will suffice.

From a practical standpoint, the Board's new focus will affect all employers who utilize staffing companies to provide all or part of their workforce. The decision will also affect franchisors' relationships with their franchisees, depending upon the nature of their contractual relationship. The more control that a contract labor "user" or a franchisor retains over the terms and conditions of employment, the greater likelihood that the user employer and staffing company, or franchisor and franchisee, could be joint-employers. The practical effect of the decision means that employers and staffing companies or franchisors and franchisees both may find themselves parties to a collective bargaining agreement in the event of a successful petition for representation even in the absence of the historical requirement for multi-employer consent to such representation. In addition, ultimate users of contract labor or franchisors could find themselves liable for unfair labor practices of staffing agencies or franchisees. Employers should also expect unions to use this new standard to their advantage in defining the appropriate unit whenever a representation petition is filed.

If you have any questions, please call The Kullman Firm attorney with whom you customarily work.

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