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NLRB's New Joint-Employer Standard To Be Put To The Test In Federal Court

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As previously reported by the blog and widely throughout mainstream media, last year the NLRB significantly altered its standard for evaluating whether staffing companies and their customers constitute as "joint-employers" under the NLRA. Under the NLRB's old test for finding "joint-employer status," the NLRB found such status "where two separate entities share or codetermine those matters governing the essential terms and conditions of employment." *TLI, Inc.*, 271 N.L.R.B. 798, 798 (1984). Additionally, "there must [have been] a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." TLI, 271 N.L.R.B. at 798. In *Browning-Ferris Industries of California, Inc.*, 32-RC-109684 (August 27, 2015), however, the NLRB revisited this standard. The NLRB specifically examined whether Browning-Ferris Industries of California Inc. was a joint-employer of workers who were provided to it by a staffing agency, Leadpoint Business Services, Inc. In finding that Leadpoint and Browning-Ferris were joint-employers, the NLRB announced that it was abandoning its old joint-employer test and setting forth a new one. On its website, the NLRB is summarizing its new test resulting from Browning-Ferris as follows: The Board applies long-established principles to find 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; and (2) they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the Board will – among other factors – consider whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so.

On Jan. 20, however, Browning-Ferris filed an appeal with the U.S. Court of Appeals for the D.C. Circuit challenging the NLRB's decision in its case, including the revised joint-employer standard. Accordingly, we should know later this year whether the NLRB's new test is likely here for the long run or whether employers may see some reprieve. Stay tuned to the blog for updates on this case.

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