Bloomberg BNA

BNA's Health Law Reporter™

VOL. 24, NO. 35 SEPTEMBER 3, 2015

Unfair Labor Practices

NLRB Adopts New Joint Employer Standard; Ruling Could Affect Health-Care Industry

In a long-awaited ruling that could affect large health care providers, the National Labor Relations Board Aug. 27 held 3-2 that a company can be the joint employer of workers provided by another organization if the two firms share or codetermine matters governing the essential terms and conditions of employment of the employees in question (*Browning-Ferris Indus. of Calif., Inc.*, 2015 BL 278454, 362 NLRB No. 186, 8/27/15).

NLRB Chairman Mark Gaston Pearce and members Kent Y. Hirozawa and Lauren McFerran reversed a regional office finding that Browning-Ferris Industries of California Inc. wasn't the joint employer of workers provided by a labor contractor, Leadpoint Business Services. Overturning several long-standing precedents, the board said it will consider whether a ''user'' firm indirectly controls the employment relationship or has reserved the right to do so.

Pearce, Hirozawa and McFerran said the board's standard hadn't kept pace with the expanded use of contingent workforces provided by employment agencies. Members Philip A. Miscimarra and Harry I. Johnson joined in a lengthy dissent.

Decision Could Affect Providers. Although the board's decision involved labor organization efforts by a group of contingent employees at a recycling center, the ruling could have an effect on large health care providers, including some of the major hospital corporations that could be subject to federal jurisdiction, according to Patrick J. Hoban, an attorney at Zashin & Rich in Cleveland.

''One significant way in which the NLRB's *Browning-Ferris* decision could affect health care providers who meet the National Labor Relations Act's jurisdictional standard is, if they subcontract parts of their operations out to an entity that employs contingent or temporary employees to fulfill the subcontract,'' Hoban told Bloomberg BNA Aug. 31.

''For example, if a hospital subcontracts its cleaning operations out and if the subcontract is specific about how many cleaners are needed, when they must work, what rules they have to follow, and how they have to perform that work for the hospital, and those cleaners organize, the hospital could find itself in negotiations for a collective bargaining agreement with individuals that it never considered as its employees.''

The decision could also affect health care providers whose subsidiaries use contingent or temporary workers, Hoban said.

''Another way *Browning-Ferris* could affect the health care industry is in a parent-subsidiary situation,'' Hoban said. ''In the case where the parent is setting employment standards for the subsidiary, for example, work rules, benefits or qualification. The parent doesn't have to have actual control over the subsidiary's employees to be found to be a joint employer under this decision. The parent risks being deemed a joint employer with the subsidiary if it directly or indirectly controls terms and conditions of employment or has reserved the right to do so.''

According to Hoban, the decision also could lead to liability as a joint employer for an unfair labor practice committed by a subcontracting entity, subsidiary or an employer that supplies contingent employees. ''This might be the more pernicious aspect of the ruling,'' Hoban said. ''An employer who uses an entity that provides contingent employees, may not really be paying attention to the labor practices of that entity, but, as a joint employer under this ruling, an employer could be found liable for an unfair labor practice that it didn't know was taking place.''

Joint Employer Issue Arose at BFI Recycling Plant. In August 2013, NLRB's then-acting regional director in Oakland, Calif, directed an election among employees of FPR-II LLC, a subcontractor doing business as Leadpoint Business Services that provided recycling service workers to Browning-Ferris at its Milpitas, Calif., facility.

Citing existing board precedents, the official rejected the arguments of International Brotherhood of Teamsters Local 350 that the Browning-Ferris subsidiary, doing business as BFI Newby Island Recyclery, was the joint employer of approximately 240 workers provided by Leadpoint under a labor services agreement.

Finding that only Leadpoint had authority to control the recruitment, hiring, counseling, discipline, scheduling and termination of Leadpoint employees, the acting regional director determined BFI's power to control shift times, the speed of a trash processing line, and other plant operations wasn't sufficient to make the Browning-Ferris subsidiary a joint employer of the Leadpoint workers.

 ISSN 1064-2137

Board Reconsidered Earlier Precedent. Local 350 filed a request for NLRB review of the regional director's determination.

In finding for the union, the board majority said previous NLRB decisions in *TLI, Inc.*, 271 NLRB 798 (1984), and *Laerco Transportation*, 269 NLRB 324 (1984), were ''ostensibly based'' on a 1982 decision of the U.S. Court of Appeals for the Third Circuit involving Browning-Ferris.

In that decision, *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), the court said employers could be considered joint employers under the NLRA if they ''share or codetermine those matters governing the essential terms and conditions of employment.''

The NLRB ''embraced'' the Third Circuit decision, the board said in the instant case, but *TLI* and *Laerco* improperly ''narrowed'' the joint employer standard.

''Most significantly,'' the majority wrote, ''the Board's decisions have implicitly repudiated [the board's] earlier reliance on reserved control and indirect control as indicia of joint-employer status. The board's approach since 1984 focused exclusively on a putative employer's actual control over workers, without considering its right to control them, they added.

Changing Economy a Factor. The board cited Bureau of Labor Statistics survey findings that contingent workers accounted for 4.1 percent of all employment in 2005, while temporary employment has expanded into more occupations than ever before.

''This development is reason enough to revisit the Board's current joint-employer standard,'' the board said.

The board members said the existing joint employer standard followed by the board was ''out of step with changing economic circumstances,'' causing a ''disconnect [that] potentially undermines the core protections of the Act for the employees impacted by these economic changes.''

Majority Announced New Test. The majority of the board said that, under common law principles, an organization may be considered an employer if it has the right to control the performance of work. Common law precedent has not required the actual exercise of that right, the board majority said, but the board's ''current joint employer standard is significantly narrower than the common law would allow.''

''The result,'' the board said, ''is that employees covered by the Act may be deprived of their statutory right to bargain effectively over wages, hours, and working conditions, solely because they work pursuant to an arrangement involving two or more employee firms, rather than one. Such an outcome seems clearly at odds with the policies of the Act.''

The board cautioned it wasn't suggesting that a user firm would be considered a joint employer based on its ''bare rights to dictate the results of a contracted service or to control or protect its own property.''

''Instead,'' the board said, ''we will evaluate the evidence to determine whether a user employer affects the means or manner of employees' work and terms of employment, either directly or through an intermediary.''

Dissent Called New Standard Ambiguous. Miscimarra and Johnson joined in a lengthy dissent, calling the board's ruling ''the most sweeping of recent major decisions.''

The dissenters said the majority abandoned a ''longstanding test that provided certainty and predictability'' and replaced it with ''an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships.''

Miscimarra and Johnson said the board was ''motivated by a policy concern that an imbalance of leverage reflected in commercial dealings between the undisputed employer and third-party entities prevents 'meaningful bargaining' over each term and condition of employment and is therefore in conflict with the statutory policy of encouraging collective bargaining.''

The majority's aim, they said, is ''to ensure that third parties that have 'deep pockets,' compared to the immediate employer, become participants in existing or new bargaining relationships, and that they will also be directly exposed to strikes, boycotts and other economic weapons, based on the most limited and indirect signs of potential control.''

The dissenting members said ''this fundamental balancing of interests has already been done by Congress'' and lies outside the board's authority.

''Our quarrel with the majority stems not from any disagreement about the concept of joint employment status but rather from their imposition of a test that we firmly believe cannot be reconciled with the common-law agency standard the Board is duty-bound to enforce,'' Miscimarra and Johnson wrote.

''We believe that the Board should adhere to the 'joint-employer' test that has existed for 30 years without a single note of judicial criticism. In our view, the Regional Director correctly applied that test in concluding that Leadpoint was the sole employer of employees in the petitioned-for unit.''

Decision May Face Challenge. According to Hoban, *Browning-Ferris* can be challenged. ''Since this decision arose from the certification process, there is no direct appeal to the federal court,'' he said. ''If there is an election and the NLRB certifies the union as the exclusive bargaining representative of these employees, BFI may refuse to bargain. That would likely draw an unfair labor practice charge from the union and through that process, BFI can object to the NLRB's revised joint employer standard. An NLRB decision in that matter is appealable to the federal courts.''

Indicating that he thought the decision ''is a pretty big deal,'' he said he anticipated that a federal court would eventually review *Browning-Ferris* and the new joint employer standard.

  HLR ISSN 1064-2137

But Hoban also pointed to another possible problem for this decision. ''We have about 16 months until a new administration takes office, and that may include a change in the party controlling the White House'' he said. ''A newly constituted NLRB appointed by a new administration could reverse this decision and will probably be under some political pressure to do so.''

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