BACK to the FUTURE

The NLRB Returns to a More Liberal Joint-Employer Standard

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The Obama-appointed National Labor Relations Board (Board) has been sending shock waves through the business community over the past few years, and we felt the most recent tremor last month when the Board flipped the standard for joint employer liability for the purpose of collective bargaining and labor relations. Nearly all businesses, including non-union employers, will feel the ripple effect of this decision, but it will hit businesses that utilize contracted workers (employees of another business) the hardest.

Under the new standard, businesses are responsible for unfair labor practices and other labor relations matters that arise between a third party and its employees, even if the business is non-union.

Under the Board's new joint-employer standard, a business needs only to reserve authority to control another business's employees to be tagged with the joint-employer label. The Board will first determine if a business has reserved authority sufficient to establish the common-law employment relationship with the workers of another business. If that condition is met, the Board will look at whether the business has the potential to control the working conditions of another business's employees to allow meaningful collective bargaining.

In the decision, the Board majority claimed it was returning to the traditional joint-employer standard, which is based on the common-law definition of joint employer and the right to control test.

A business may intentionally or inadvertently retain sufficient control through a term(s)in an agreement with another business to provide some services, such as maintenance or cleaning. The new standard will be determined on a case-by-case/fact-specific basis, which makes it hard to predict how far the Board will go. The facts of the case before the Board involved Browning-Ferris Industries (BFI), which had a contract with another company, LeadPoint, to provide employees to work in a BFI recycling center.

The terms of the contract between BFI and LeadPoint included provisions common in most business contracts, plus a disclaimer that LeadPoint was the sole employer of its employees. BFI maintained the authority to reject any LeadPoint personnel for any reason. In practice, BFI and LeadPoint employed separate on-site supervisors and maintained separate Human Resource offices. LeadPoint was responsible for hiring decisions based on minimum qualifications set by BFI.

LeadPoint was solely responsible for discipline and terminations — although there were two reported incidents that a BFI supervisor reported misconduct of a LeadPoint employee to a LeadPoint supervisor, and LeadPoint took disciplinary action. BFI retained the right to set the hours for the recycling facility's operations based on the amount of materials to be sorted at the recycling facility, which resulted in setting the hours of work for LeadPoint employees, including overtime.

Finally, the contract was a cost-plus contract, where BFI reimbursed LeadPoint for labor costs plus a percentage markup. Based on these facts, the Board determined BFI retained sufficient control over the conditions of LeadPoint employees' employment, and BFI was labeled a joint employer.

The immediate and practical impact of the decision means that more businesses will be liable for labor relations violations of another business, vendor, franchisee, or subcontractor. Before entering into new service agreements, businesses would be wise to assess the labor relations matters of potential business partners, and to review and revise the standard terms in such agreements. For example, it is common for a service agreement to include the following term: "the contractor's employees shall observe all of business's policies, including but not limited to those covering smoking, fire, safety and security, and any conflict between the contractor's policies shall be trumped by the business's policies." Such a term may inadvertently lead to joint-employer liability for all topics covered by the business's policies, and the business should consider revising such a term.

To be sure, businesses need to reserve certain rights in service agreements to protect the business; however, it is now important to strike a balance between protecting the business and the risk of being labeled a joint employer. Additionally, businesses should consider broad indemnification agreements with third parties.

While the recent Board decision is limited to the joint-employer standard for labor relations purposes (unfair labor practice charges and collective bargaining obligations), there is no telling where other federal agencies, such as the Department of Labor or the Equal Employment Opportunity Commission, may go on the issue of joint-employer liability (unless you have a DeLorean).

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