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NLRB: When the Law is Not the Law – A Huge Change in Business Relationships

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The National Labor Relations Board (NLRB) in a 3-2 decision last Thursday gutted more than 30 years of legal precedent when it changed the joint employer standard in business relationships in a case involving Browning-Ferris Industries (BFI). Under this decision, contractors and subcontractors, franchisors and franchisees, and employers and staffing companies (and others) may all be deemed to be joint employers and each subject to the NLRB and its decisions. This ruling is a part of an overall strategy of the Obama NLRB to change the business model to favor unions.

The NLRB had held that two or more employers are joint employers of the same employees if they share essential terms and conditions of employment, and the employer must exercise this control directly and immediately. That principle has been reversed with the following statement: "If otherwise sufficient, control exercised indirectly such as through an intermediary, may establish a joint employer status."

In this case, the NLRB found that BFI and Leadpoint Business Services (LBS) were joint employers of LBS' employees. Significantly, BFI's employees were already represented by a union, and the same union wanted to add LBS' employees to the bargaining unit. The decision turned on the agreement with LBS. Thus, the agreement with the temporary agency is critical.

Here are a few of the takeaways from the decision that can now show a joint employer relationship:

1. Having the ability to reject temporary employees or to ask the agency to remove employees
2. Establishing the qualifications of the temporary employees
3. Requiring a drug test of temporary employees
4. Requiring a maximum wage scale to be paid to temporary employees
5. Requiring that only the primary employer can establish the work shifts
6. Requiring the temporary employees to comply with the primary employer's safety and training procedures
7. Having the primary employer's supervisors supervise the temporary agency's employees

Changing the test of who the employer is in a business relationship has huge implications. The NLRB rewrites the law and liberalizes the standard that makes "two separate and independent entities a joint employer of certain employees." According to the dissent, "This change will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity…."

If this decision stands, all employers should review all relationships and contracts with third parties and discuss them with their labor counsel for labor law compliance and strategy. For insight on the next best steps to take, contact your regular Baker Donelson attorney or any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Tallahassee, Florida; Atlanta, Georgia; Baton Rouge and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.