

# PUBLICATION

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## The Flipside of BFI: Joint Employment Not Found

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Back in August of this year, Baker Donelson issued a [Labor & Employment Alert](#) regarding the National Labor Relations Board's (NLRB) new joint employer standard as announced in its *Browning Ferris Industries* (BFI) decision. In *BFI*, the Board set aside more than 30 years of precedent to ease the burden of finding a joint employer relationship between separate entities. Nevertheless, in the first major decision applying the BFI joint employer standard, the NLRB found that *no* joint employment relationship existed in *Green JobWorks, LLC/ACECO, LLC (GJW)*.

As a brief refresher, *BFI* had held that two or more entities will be considered joint employers of a single workforce if: (1) there is a common-law employment relationship with the employees in question; and (2) the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. With regard to the second element, the Board announced that the putative employer's reserved authority to control terms and conditions of employment, *even if not exercised*, is probative of a joint-employer relationship, as is the actual exercise of that control. Thus, this twist on the joint employer standard no longer requires that an employer exercise control *directly and immediately* over the employees' terms and conditions of employment.

### *Overview of the GJW case*

In the *GJW* case, the Union had filed a representation petition with the NLRB seeking to represent a unit of employees "jointly employed" by GJW and ACECO. GJW and ACECO opposed the Union's "joint employer" characterization of their relationship.

GJW is a staffing company that provides temporary demolition and asbestos abatement laborers to various construction companies, including ACECO. ACECO is a licensed demolition and environmental remediation contractor that primarily deals with asbestos removal. ACECO was hired by a general contractor to provide asbestos removal services. The general contractor employed a supervisor who was responsible for the general safety and coordination of the work site. ACECO's supervision of the work site was restricted and subject to the general contractor's instructions.

### *The Master Labor Services Agreement*

GJW and ACECO entered into a Master Labor Services Agreement (MLSA) that set the terms for GJW laborers on ACECO work sites. The MLSA stated that GJW would provide "lead workers" at ACECO work sites where GJW workers were assigned, who were tasked with documenting and tracking GJW employee hours, determining breaks and rest periods, and removing GJW workers from a site, if necessary.

Importantly, the MLSA also provided for the following *exclusive* responsibilities of GJW regarding its employees:

- Recruiting, hiring, assigning, orienting, reassigning, counseling, disciplining and discharging the employees.
- Making available all employment-related work site postings.

- Establishing, calculating and paying the employees' wages and withholding and remitting their payroll taxes.
- Providing employees with GJW benefits.
- Exercising human resources supervision over the employees.
- Maintaining the employees' personnel records.
- I-9 administration.
- Providing workers' compensation benefits and fulfilling GJW's obligations for unemployment compensation.

Moreover, GJW set the rate of pay for its employees without input from ACECO. GJW crew leaders could negotiate with GJW for additional wage premiums. GJW also provided its employees with the necessary safety items – hardhats, safety vests, safety glasses, steel-toed boots and respirators.

ACECO employs its own workforce, pays its own employees and provides them with ACECO benefits, such as a 401(k) and paid time off. ACECO also independently provides its employees with the safety equipment listed above.

### *The Board's Analysis*

The Board examined several factors from its *BFI* decision to determine the status of GJW and ACECO's relationship as set forth below.

#### 1. Business Organization, Hiring, Transferring, Disciplining and Firing

##### Business Organization

The Board found that GJW and ACECO are separate business entities with different management. The Board noted that this independent relationship was embodied in the MLSA (outlined above) and there was insufficient evidence to support the Union's contention that either company influenced the decisions of the other with regard to the essential terms and conditions of employment.

##### Hiring

As noted above, GJW recruits and hires its own employees, and those selected employees for assignment at ACECO sites are free to accept or reject employment. ACECO is not involved in interviewing or hiring GJW employees.

##### Transferring/Discipline

The Board noted that there was insufficient evidence to show that ACECO had the authority to transfer GJW employees from one assignment to another or to discipline GJW employees. The record revealed that it was the general contractor who instructed ACECO to request that GJW send its employees home on a few occasions. And, although ACECO requested GJW on occasion to not have specific employees at its work site, the evidence showed that while GJW was open to accommodating ACECO's requests, GJW had final discretion in those matters.

##### Firing

The one factor the Board found that arguably favored a joint-employer relationship was that the MLSA granted ACECO the right to dismiss GJW employees from the work site for safety issues or any other *reasonable* objections to GJW staff remaining on site. Nevertheless the Board distinguished this factor from *BFI* because it determined that BFI had the unqualified right to refuse any of Leadpoint's employees for *any reason*. The record supported the fact that ACECO did not have the authority to dismiss GJW employees for *any reason*, nor had it exercised such a right.

2. Wages

The Union argued that because the contract between the parties provided for a set amount per hour for different tasks to be completed by GJW employees, in effect, that limited GJW as to the wages it could pay its employees. However, the Board found that despite the contract, GJW employees could receive higher wages based upon stellar job performance and other relevant factors and, indeed, several employees had done this successfully.

3. Daily Supervision

The Board found that ACECO had minimal involvement in the daily supervision of GJW employees. GJW made nearly all of the substantive decisions, including setting the employees' schedules and sending employees home. Moreover, the Board found that the general contractor had more supervisory authority over GJW's employees than ACECO.

*Conclusion*

The Board found insufficient evidence that a joint employer relationship existed between GJW and ACECO after examination of all of the relevant factors.

*Takeaways*

Although the Board will look at the actual "facts" of the relationship between two entities in determining whether a joint employer relationship exists, the *GJW* case underscores the importance of having a well-drafted labor agreement (such as the MLSA outlined above) between the entities that provides as much autonomy to each entity as possible given the nature of the project at issue.

Consequently, employers considering entering into an agreement to utilize another entity's workforce should take note of the above factors, which the Board analyzed in making its decision. In that manner, the employer can make an informed decision as to whether the scope of the engagement would allow for the necessary separation of employment terms and conditions, to guard against being drawn into a collective bargaining relationship it never wanted.