LONG-AWAITED JOINT EMPLOYER DECISION ISSUED BY NLRB

By Matt Austin

We have warned you several times (here, here and here) that the National Labor Relations Board was going to change the definition of joint employer to the detriment of Companies. Yesterday our fear came true. In fact, two Board members said this was "the most sweeping of recent major decisions." Staffing and user companies, franchisors, franchisees, warehousing, and third-party logistic companies are the most likely to be immediately impacted by this decision, but any company that shares control of workers from another company – either directly or indirectly – must take note of this change in the law.

On August 27, 2015, the National Labor Relations Board issued a decision in which it "refined" its standard for determining joint employer status. "Refined" appears to be a euphemism for "totally re-did it in a manner that hurts employers." The Board will now find that two or more companies 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 co-determine those matters governing the essential terms and conditions of employment. Joint employers no longer need to actually exercise authority to control terms and conditions of employment.

The Board claimed that a user firm would not 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." Rather, it "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." But overall "direct, indirect, and potential control over working conditions" are relevant to the joint-employer inquiry.

The facts of this case show how the corporate structure and day-to-day activities of the user company (BFI) and supplier company (Leadpoint) are familiar to companies in a multitude of industries.

> BFI owns and operates a recycling facility. The essential part of its operation is the sorting of these materials that are then sold to other businesses. BFI solely employs approximately 60 employees that mostly work outside the facility.
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> The interior of the facility houses four conveyor belts, called material streams. Workers provided to BFI by Leadpoint stand on platforms beside the streams and sort through the material as it passes. The Union seeks to represent these approximately 240 Leadpoint employees.
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> The relationship between BFI and Leadpoint is governed by a temporary labor services agreement. It can be terminated by either party at will with 30 days' notice. The Agreement states that Leadpoint is the sole employer of the personnel it supplies, and that nothing in the Agreement shall be construed as creating an employment relationship between BFI and the personnel that Leadpoint supplies.

Initially, relying on 30-plus years of legal precedent, the NLRB Regional Director ruled that BFI and Leadpoint were not joint employers. Only Leadpoint had authority to control the recruiting, hiring, counseling, discipline, scheduling, and termination of Leadpoint employees. While BFI had the power to control shift times, the speed of the trash processing line, and other plant operations, that control was not sufficient to make it a joint-employer of the Leadpoint workers.

On appeal, the NLRB focused on similar factors. While most factors revealed a common user / supplier relationship that historically resulted in companies not being joint employers, the Board changed the law and determined that the two companies were joint employers. The Board specifically noted that BFI communicated directives concerning work performance through Leadpoint supervisors to the Leadpoint employees. To the Board, this constituted "obvious control" of Leadpoint employees by BFI. The Board further found that BFI "codetermined the outcome" of the process by setting conditions on hiring, and exercised complete control over the speed of sorting lines and other productivity standards.

Under the test, BFI and Leadpoint are joint employers even though the contract between them specifically prohibited that from occurring. This means that if the Union is successful in organizing Leadpoint employees that work inside the BFI facility, BFI must aid in negotiating the collective bargaining agreement (with Leadpoint) and is co-liable (with Leadpoint) for Leadpoint's violations of the National Labor Relations Act, i.e. unfair labor practices, if any. In fact, the Board even mentioned that "it is difficult to see how Leadpoint alone could bargain meaningfully about such fundamental working conditions as break times, safety, the speed of work, and the need for overtime imposed by BFI's productivity standards.

Companies using temporary employees should be concerned about this eroded joint employer standard. Until now, companies had the freedom to contract with a third party to supply labor without the fear of becoming the employer of those employees. Companies across the United States had relied upon a lawful business model that now, overnight, may subject them to increased costs and future uncertainties. Every company that in some capacity either directly, indirectly, or potentially could have a modicum of control over another company's employees must immediately evaluate how this sweeping change in the law impacts the way it does business.

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