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KD Employment Law Alert: NLRB Reverses Decades of Precedent for New Joint Employer Standard

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Overview.

A very recent decision by the National Labor Relations Board ("NLRB") could have dramatic consequences for employers who rely on the services of staffing agencies to provide their workforce. In *Browning-Ferris Industries of California, Inc., ("Browning-Ferris") the NLRB reversed more than 30 years of precedent by drastically expanding the scope of its definition of a "joint employer" within the context of union organizing attempts. In light of this revised decision, employers may now be forced to collectively bargain with employees provided through staffing companies when such employers have the ability to make decisions which alter the terms and conditions of employment for the "staffing agency" employees.*

NLRB's Expanded Definition of an "Employer".

In *Browning-Ferris, the NLRB opted to review the existing standard under which two (or more) entities may be deemed to be joint employers of a temporary workforce. The NLRB found that the company that contracted with a staffing agency to supply it with workers, retained significant control over hiring employees, the processes that shaped the workers' day-to-day work, and determining their wages. As such, the company was deemed to be a joint employer together with the staffing agency, and both were subject to the NLRA's collective bargaining requirements.*

The NLRB concluded that two or more entities are joint employers of a single workforce if they both have the right to control employees' work and if they share, or codetermine, those matters that govern the essential terms and conditions of employment. Having control of employees' work means having the right to direct the hiring and firing of employees, employees' wages and hours worked, disciplining of employees, and supervision and direction of the manner and method in which work is performed. These are essential terms and conditions of employment.

The Old Definition.

Prior to *Browning-Ferris, a joint employer relationship could only exist where two (or more) entities shared or codetermined those matters governing the essential terms and conditions of employment and where the two entities actually exercise such control in a direct and immediate fashion. Under the new standard, however, an employer need not actually exercise the authority to control employees' terms and conditions of employment so long as it inherently possesses this control. In fact, the NLRB determined that this authority need not even be directly vested in one of the employers, determining that even control that can be exercised through an intermediary may suffice.*

NLRB Guidance.

Despite this sweeping amendment to existing and settled law, the NLRB has provided little in terms of guidance for employers. The NLRB dismissed suggestions that its decision could lead to absurd results, such as a situation where a plumber is deemed to be an employee of a homeowner when he is fixing a toilet. However, the NLRB opted to reserve the ability to make determinations of joint employer status on a case by case basis. As a result, employers will now be forced to sit and wait as the NLRB gradually begins applying its new standard to similar employers.

Impact on the Business Community.

Notwithstanding the lack of guidance from the NLRB, employers should begin to insulate themselves from joint employer liability under the new standard. Specifically, employers should promptly review all contractual agreements that they have in place with staffing agencies to determine the nature and extent of their ability to control or determine employees' terms and conditions of employment. In doing so, employers should be certain to limit the extent of such control as much as possible to ensure that the staffing agency remains the sole legally bound employer.

The NLRB's decision to expand the definition of an employer from an entity that directly exercises control over the terms and conditions of employment to an entity that either indirectly exercises such control or has the potential to exercise control should give employers significant cause for concern. Employers that had previously utilized the services of staffing agencies with the expectation that the staffing agency would be considered the employer of any temporary employees who were hired and that any liability arising from the employment relationship would be ascribed to the staffing agency can no longer feel secure in this assumption. Entities who utilize such services should expect that going forward, they may be considered statutory employers under the NLRA and may be subject to the NLRA's collective bargaining requirements.

Expansion of New Standard.

Finally, while this new standard is currently only applicable to proceedings before the NLRB, its impact is expected to stretch beyond the union representation context. In order to be subject to the collective bargaining requirements of the National Labor Relations Act ("NLRA"), an employer-employee relationship must exist between an entity and its workers. As such, the NLRB arguably has an interest in expanding its definition of an employer so as to increase the number of entities that are subject to its jurisdiction and whose employees may petition for union representation. Indeed, given the NLRB's very public agenda to protect employee rights, it is very likely that this decision will ultimately result in an expansion of the joint employer doctrine into other areas of law, such as employment discrimination and wage and hour matters. Accordingly, employers should be proactive to avoid unforeseen liability in other employment exposures.

The attorneys at Kaufman Dolowich & Voluck are available to assist employers in navigating the troubled waters created by this decision, including in determining whether it is sensible to enter into a relationship with a staffing agency or to review the terms and conditions of a preexisting relationship.