Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

What Browning-Ferris Means to Union and Non-Union Employers

In a controversial 3-2 ruling, the National Labor Relations Board has overturned three decades of its own precedent and redefined joint employment in a manner that promises to create a sea change in labor relations and business relationships.

A fundamental concept in employment and labor law is defining the "employer." The National Labor Relations Act provides that an "employer" has a duty to bargain in good faith with the labor union representing its workers, must comply with the resulting collective bargaining agreement, and may be subjected to picketing and strikes by its employees. However, companies that have business relationships with the employer generally do not have these duties and, in general, unions cannot lawfully engage in picketing, strikes, and other industrial action against them, unless they are considered "joint employers."

In Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015), the Board significantly revised and broadened its standard for determining joint employer status under the NLRA. In a sweeping departure from the current rule, the NLRB announced that joint employer status will now exist when an entity controls the terms and conditions of employment of another business's employees, or has "indirect" control of such terms and conditions of employment, or where the entity has merely reserved the right to take such control.

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Based on this ruling, a business that engages a third-party contractor to perform services at the business's facilities may be deemed to be a joint employer of the contractor's workers, even without the business exercising any supervision or control over the contractor's staff. In *Browning-Ferris Industries* ("BFI") for example, BFI's contractor, Leadpoint, supplied temporary employees to BFI's waste management facility. Leadpoint handled all discipline of the Leadpoint employees, determined their wages (which BFI only mandated could not be higher than BFI employee wages), and hired and discharged them (while BFI could only prohibit them from continuing to work at a BFI facility). Asserting that it was adopting a standard that was based on common law principles of control including assessing "overall circumstances" and "industrial realities," the Board found that BFI and Leadpoint were joint employers. Under the NLRA, this joint employer finding means that both businesses, despite being fully independent and separate, will need to engage together in collective bargaining with the employees' union.

Browning-Ferris has greater reach than many traditional labor law cases and may be used by the courts, various administrative agencies and the plaintiffs' employment bar to hold "joint employers" liable for other statutory violations. Even though the tests under the NLRA and the Fair Labor Standards Act for identifying the employer-employee relationship are different (common law v. economic reality), the U.S. Department of Labor's Wage and Hour Division and the plaintiffs' employment bar will likely cite the Board's new broad definition of joint employer in efforts to make companies alleged to be "joint employers" liable for wage and hour violations. Further, federal courts have long ruled that Title VII of the Civil Rights Act of 1964 and the NLRA are in *pari materia* (of the same matter) and thus must be read and construed together. Accordingly, the U.S. Equal Employment Opportunity Commission and the plaintiffs' employment bar will likewise seek to rely on the NLRB's expanded view of joint employment in an effort to make a broader definition of "joint employer" liable for employment discrimination claims.

The Board's *Browning-Ferris* ruling also will be used as a union organizing tactic that will enable labor to increase its efforts to force to the collective bargaining table the corporate users, such as BFI, of employees supplied by staffing firms. Even though *Browning-Ferris* did not concern a franchisor-franchisee relationship, the NLRB's expanded view of joint employment is also bad news for franchisors, which the Board has targeted as alleged joint employers of the workers of their franchisees.

In light of the Board's decision, employers should review carefully their contracts with staffing agencies and consider eliminating potential examples of shared control or of

the right to control the staffing agencies' workers. The attorneys in the Sills Cummis & Gross Employment and Labor Law Group can assist companies in such reviews and in responding vigorously to union organizing that may result from *Browning-Ferris*.

If you have any questions regarding information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

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