aalrr Atkinson, Andelson Loya, Ruud & Romo
A Professional Law Corporation

Who Do You Employ? It May Be More Than You Think: National Labor Relations Board Expands the Definition of "Joint Employer"

Presented by:
Thomas A. Lenz, Partner
Christopher S. Andre, Partner

aalrr
Atkinson, Andelson
Loya, Ruud & Romo
A Professional Law Corporation

Meet Thomas Lenz & Christopher Andre…

Thomas Lenz handles all aspects of labor and employment law issues and heads the firm's traditional labor and National Labor Relations Board practice. He works with employers in all major industries across California and the West. He is currently a member of the Executive Committee of the Labor and Employment Section for the State Bar of California. Tom has been named to the Top One Hundred Labor Attorneys in the United States by Labor Relations Institute, Inc.

Christopher Andre is a seasoned civil litigator who focuses his practice on civil litigation. Mr. Andre advises and represents employers with a wide variety of matters, including: wage and hour compliance; class action avoidance; workplace tort claim avoidance; alleged violation of federal and state wage and hour laws; alleged violation of the PAGA; alleged discrimination, harassment, retaliation, and wrongful termination; alleged violation of federal and state leave laws; and alleged breach of contract.

aalrr

Disclaimer

This AALRR presentation is intended for informational purposes only and should not be relied upon in reaching a conclusion in a particular area of law. Applicability of the legal principles discussed may differ substantially in individual situations. Receipt of this or any other AALRR presentation/publication does not create an attorney-client relationship. The Firm is not responsible for inadvertent errors that may occur in the publishing process.

aalrr

Browning-Ferris Industries

- *Browning-Ferris Industries of California, Inc.* 326 NLRB No. 186 (2015)
- Expands the definition of employer

aalrr 3

Background

- Browning-Ferris Industries of California, Inc. ("BFI") owned and operated a recycling facility in Milpitas, California.
- BFI directly employed approximately 60 employees, most of whom worked outside BFI's facility.
- BFI contracted with Leadpoint Business Services ("Leadpoint") to provide another 240 workers whose jobs included sorting recyclables within BFI's facility.

LEADPOINT

aalrr 4

Background (continued)

- BFI and Leadpoint were parties to a temporary labor services agreement which provided that Leadpoint was the sole employer of the personnel it supplied.

LEADPOINT

aalrr 5

Background (continued)

- BFI and Leadpoint employed separate supervisors and lead workers at BFI's facility.
- Leadpoint was responsible for recruiting, interviewing, testing, selecting, and hiring personnel to perform work for BFI, subject to certain requirements contained within the labor agreement between BFI and Leadpoint.

aalrr 6

Background (continued)

- Leadpoint was solely responsible for disciplining, reviewing, evaluating, and terminating personnel assigned to BFI, subject to BFI's right to reject or discontinue the use of any personnel.
- Although Leadpoint was responsible for determining the rates paid to personnel supplied to BFI, BFI was responsible for paying the labor (plus a markup for Leadpoint).
- BFI set the hours of facility operation, and Leadpoint was responsible for supplying the workers required to cover the scheduled shifts.

aalrr 7

Background (continued)

- The International Brotherhood of Teamsters (the "Union") petitioned to represent the workers supplied by Leadpoint.

aalrr 8

Background (continued)

- The NLRB's Regional Director, applying the prior standard for joint employer status, found that BFI was not a joint-employer of the Leadpoint workers because BFI did not "share or codetermine those matters governing the essential terms and conditions of employment."

aalrr 9

Background (continued)

- The Union filed a request for review of the Regional Director's decision, contending the Board should reconsider its standard for evaluating joint-employer relationships.
- The Board granted the Union's request for review.

THE UNION

aalrr 10

Previous Standard for Joint Employment

- A party asserting joint-employer status previously had to demonstrate that the putative joint-employer both possessed and exercised authority to control employees' terms and conditions of employment.
- Consent also was important where unions tried to organize multiple employers.

aalrr 11

NLRB Articulates New Standard

- Under the new standard articulated by the Board in *Browning-Ferris*, a party can now establish joint-employer status by demonstrating that the putative joint-employer *reserved* authority to control, or exercised *indirect* control over, the terms and conditions of employment.
- Consent of employers is now irrelevant.

aalrr 12

Reason for Change in Standard

- Citing to an increase in the number of workers now employed through temporary services companies and a "responsibility to adapt the Act to the changing patterns of industrial life," the Board held that the existing joint-employer standard did not best serve the policies of the National Labor Relations Act.

aalrr 13

Reason for Change in Standard (continued)

- A return to the Board's broader, pre-1982 test for determining joint-employer status was required: "The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment."

aalrr 14

Control Over Terms/Conditions of Employment

- The Board held that it would utilize an inclusive approach in defining "essential terms and conditions of employment."
- In addition to traditional terms of employment such as hiring, firing, discipline, and supervision, the Board will now consider control over seemingly less significant terms of employment such as scheduling, dictating the number of workers to be supplied, authorization of overtime, assigning of work, and determining the manner and method of work performance.

aalrr 15

Minimal Control Required

- The Board's intent in establishing a new standard for determining joint-employer status is to minimize the degree of control required to establish joint-employment.
- Less ability for employers to say "no" or object to joint-liability or shared union bargaining duties.

aalrr 16

Reserved Authority to Control Terms/Conditions of Employment

- The Board will no longer require that a joint-employer both possess the authority to control the terms and conditions of employment and exercise that authority "directly, immediately, and not in a 'limited and routine' manner."
- Rather, the Board will examine the putative joint-employer's *right* to control, whether or not actually exercised and whether direct or indirect.

aalrr 17

Effect of Decision: More Joint-Employer Relationships?

- Employers which may have previously maintained a degree of independence from their customers and contractors sufficient to withstand a finding of joint-employment, may now find themselves in a joint-employer relationship.

aalrr 18

Effect of Decision: More Union Organizing Efforts?

- Unions may be encouraged to attempt organizing multiple employers at once, particularly:

(1) employers utilizing staffing companies;

(2) employers who are parties to a contractor/subcontractor relationship; and

(3) employers who are parties to business relationships with other entities where both have some degree of control over employees' working conditions.

aalrr 19

Effect of Decision: Disruptions Caused by Unions?

- Apart from shared bargaining obligations and shared liabilities for unfair labor practices, the ruling stands to expand unions' abilities to create headaches for employers which could threaten business relationships.
- Picketing or pressure on third parties deemed to have control over another employer may prosper with the new analysis.

aalrr 20

Effect of Decision: Unfair Labor Practices Charges?

- The NLRB may be encouraged to pursue shared liabilities against both user-employers and supplier-employers for unfair labor practices and joint bargaining obligations.
- Dissent: Caution that the change in the joint-employer test 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."

aalrr 21

Evaluation of Employment Practices and Business Relationships

- Employers concerned with being parties to a joint-employment relationship should critically evaluate their employment practices and business relationships.
- Employers entering into business relationships may wish as a matter of due diligence to spend more time on contract language and investigating the day-to-day policies and practices of a new business partner in order to gauge potential risks and benefits.

aalrr 22

Evaluation of Employment Practices and Business Relationships (continued)

- Management training should warrant consideration to avoid inadvertent pitfalls.
- Staffing companies, in particular, should take caution to protect against the risk they may be held liable for the employment practices of the companies to which they supply employees, while user-companies should beware they may acquire previously non-existent collective bargaining obligations.

aalrr 23

The Future of *Browning-Ferris*

- The nuances of the *Browning-Ferris* decision will play out as the current NLRB members rule in other cases.
- Court review should be expected given the importance of the ruling.
- Whether the analysis survives may depend not only on federal appellate court review, but also the next presidential election, as it is the President who appoints the NLRB's five Board members.

aalrr 24

Joint Employer Doctrine

- Regardless of what the future might hold for the *Browning-Ferris* decision as it applies to the National Labor Relations Act, the joint employer doctrine will continue to apply to wage and hour claims under California state law.

aalrr 25

"Person" and "Employer" are Broadly Defined

- Any "person" can be deemed to be an "employer" under the *Labor Code*. *Labor Code* section 18 states:

  > "Person" means any person, association, organization, partnership, business trust, limited liability company, or corporation.

- The California Industrial Welfare Commission ("IWC") Wage Orders define the term "employer" broadly. The IWC Wage Orders state:

  > "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

aalrr 26

Martinez v. Combs (2010)

- The California Supreme Court has embraced the IWC's definition of "employer." In *Martinez v. Combs* (2010) 49 Cal.4th 35, the court held:

  > In actions under section 1194 to recover unpaid minimum wages, the IWC's wage orders do generally define the employment relationship, and thus who may be liable.

- The Supreme Court went on to state that the IWC's broad definition of employer is specifically intended include situations where there is effectively more than one "employer" for purposes of liability under California's wage and hour laws, stating…

aalrr 27

Martinez v. Combs (2010)

- [T]he language of the IWC's employer definition has the obvious utility of reaching situations in which multiple entities control different aspects of the employment relationship, as when one entity, which hires and pays workers, places them with other entities that supervise the work. Consistently with this observation, the IWC has explained its decision to include the language in one modern wage order as —specifically intended to include both temporary employment agencies and employers who contract with such agencies to obtain employees within the definition of 'employer."

aalrr 28

Joint and Several Liability

Under California law, joint employers are jointly and severally liable for:

- Unpaid or underpaid wages
- Rest period violation penalties
- Meal period violation penalties
- Wage statement violation penalties
- Waiting time penalties
- Interest
- Attorney's fees
- Costs of suit

aalrr 29

aalrr Atkinson, Andelson Loya, Ruud & Romo
A Professional Law Corporation

Question & Answer Session

Thank You

For questions or comments, please contact:

Thomas A. Lenz
(562) 653-3200
tlenz@aalrr.com

Christopher S. Andre
(562) 653-3200
candre@aalrr.com

aalrr
Atkinson, Andelson
Loya, Ruud & Romo
A Professional Law Corporation