

Appeals Court's Joint Employer Ruling Provides Possible Roadmap for Overturning Trump Rule

AUGUST 4, 2022

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The Trump-era National Labor Relations Board (the “Board”) “made multiple overlapping errors” in determining that Browning-Ferris Industries of California, Inc. (“BFI”) does not have a duty to bargain with the Teamsters, the U.S. Court of Appeals for the District of Columbia Circuit found.

The decision, which orders the Board to reconsider its ruling, is the latest twist in the Teamster’s struggle since 2013 to force BFI-as a joint employer of temporary workers assigned to its recycling facility by a staffing company-to the bargaining table.

While the scope of the U.S. Court of Appeals decision is limited to BFI, it does provide a roadmap for the Biden Administration as it seeks to re-examine a rule issued by the Trump-era Board in 2020 that shields companies from joint-employer liability unless they possess “substantial direct and immediate control” over another’s employees to be considered a joint employer.

That 2020 rule actually overturned the Board’s 2015 decision under the Obama Administration involving BFI, which had expanded the joint employer standard by holding that an employer’s status is dependent on the employer’s reserved and indirect control, and not actual control.

Although some have argued that the 2015 decision overturned longstanding precedent requiring “direct and immediate control,” which had been established in 1984 under *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transp.*, 269 NLRB 324 (1984), the Court of Appeals noted that the “Board’s precedent on the joint-employer standard was anything but static.”

In fact, the Court of Appeals found that the “direct and immediate control” standard was first adopted in 2002 and that the Board acknowledged in 2020 that “it in fact had never actually ceased considering indirect and reserved control, even though it did not consider those factors dispositive standing alone.” In other words, the Court of Appeals found, there has been a “longstanding role of indirect control in the Board’s joint-employer inquiry” that is based on the facts of each individual case. However, the 2015 *BFI* decision by the Board gave that indirect control factor enhanced weight in the analysis that arguably trumped actual implementation of any control and elevated its importance to a level that never existed previously.

It is unclear when the current Board will make a decision regarding the joint employer test, but the themes from the Court of Appeals’ decision may provide all the reasoning it needs to replace the 2020 rule with something similar to the Obama-era reserved and indirect control test, given the current Board’s makeup.

We will continue to monitor developments as they are announced and, as always, Benesch is available to answer any questions regarding the likely changes.

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