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CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

DATE: August 31, 2015

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: NLRB Decision Makes It Easier For Businesses to Qualify As A Joint Employer Over Workers Provided By Contractors or Other Staffing Agencies

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On August 27, 2015, the National Labor Relations Board (the "Board") repudiated the Board's 30-year case history and expanded the scope of the joint-employer relationship. The *Browning-Ferris Industries*[1] decision (the "Decision") restates the joint-employer standard as requiring merely the *right* to exert control, either directly or indirectly, and not the *actual exercise* of control, over a worker's essential terms and conditions of employment. The Decision will affect employers who subcontract out departments, use staffing agencies, have concession operations, or utilize franchise arrangements.

In *Browning-Ferris Industries*, the Board held that a recycling facility that utilized a contractor to provide workers for a portion of its operations was a joint-employer under the National Labor Relations Act ("NLRA") because it exerted indirect control over the workers by, among other things, placing limits on wages and certain conditions on hiring. The Board overruled prior decisions that refused to find joint-employer status because those employers did not exert actual and direct control over workers.

The potential impact of the Decision is significant as it may unravel business relationships and contracts entered into based on the joint-employer standard requiring actual control. According

[1] Browning-Ferris Industrs. Of Ca., Inc., d/b/a BFI Newby Island Recyclery, *and* FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner, Case No. 32-RC-109684 (August 27, 2015), 362 NLRB No. 186.

to the Board, the new standard is consistent with common law, prior court decisions, and its own more liberal approach utilized prior to the Reagan era. Ostensibly, the Board issued the Decision in the wake of a proliferation of the use of staffing or subcontracting arrangements, citing its responsibility to "adapt [its] rules and practices to the Nation's needs in a volatile, changing economy." From the Board's perspective, the new standard closes a perceived loophole where employers contract out work and avoid, whether intentionally or unintentionally, unionization or engagement in the collective bargaining process over that work.

Browning-Ferris means that the Board will likely seek to find entities, other than the commonly-recognized employer, liable for unfair labor practices under the NLRA and to extend representation proceedings to the putative employer. More broadly, the expansion of the term "employer" is likely to be pursued by the U.S. Department of Labor, Equal Employment Opportunity Commission, and other agencies, as well as by plaintiffs' attorneys.

The New Standard: Actual Control Not Required

Under the new standard, employers now need only possess the right to control a worker's essential terms and conditions of employment. "Essential terms and conditions of employment" has a broad, non-exhaustive definition, which includes:

1. Hiring, firing, and disciplining,
2. Supervising and directing,
3. Determining wages and hours,
4. Dictating the number of workers to be supplied,
5. Controlling scheduling,
6. Controlling seniority and overtime, and
7. Assigning work and determining the manner and method in which to perform the work.

Following certain precepts under common law, if an employer invokes the right to exert control, such control no longer has to be direct and in fact can be very attenuated. This is so even if the employer/contractor relationship is governed by a labor services agreement that expressly precludes any employer/employee relationship between the employer and the contractor.

Under its prior 1984 *Laerco Transportation* decision, the employer had to engage in direct control over the staffing agencies' workforce. Direct control required a showing that the employer "meaningfully affect[ed] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."

In *Browning-Ferris Industries*, the workers, who made up a portion of the personnel at the facility, stood at conveyer belts and sorted through certain waste and recyclable materials. According to the Board, BFI exerted indirect control over these workers for the following reasons:

1. BFI had no input in the contractor's hiring decisions but required that the workers meet a certain standard of performance,
2. BFI never engaged in disciplinary action over the workers (*i.e.*, did not conduct investigations or have any input in the decision to terminate) but recommended the termination of two workers, which the contractor acted upon,

3. The contractor set wages and handled all payroll but was not permitted to set wages above those of BFI's employees,
4. BFI had sole control over scheduling and break times and oversaw workers' hours because it had the right to refuse payment to the contractor if a worker misstated his or her hours,
5. BFI dictated the number of workers needed and how the work on the conveyer belts should be performed, including directing contractor supervisors to alter work assignments,
6. BFI provided job training in addition to the contractor's own job training, and
7. BFI had the right to enforce its safety policy against the workers.

Implications of the Browning-Ferris Industries Decision

While *Browning-Ferris* and other decisions like it will certainly be appealed, employers must recognize that the outcome of that litigation is uncertain. Therefore, it is imperative that employers take steps to assess the practical impact of the Decision. To that end, employers should consider:

- Reviewing existing service or subcontracting relationships (and their underlying agreements) to ensure that any employer's right to exert control is eliminated, and

- Make certain that personnel documents, such as employee handbooks, are also reviewed for the same purpose.

***Browning-Ferris* and the IWA**

Among the business relationships potentially most affected by the Decision are franchise arrangements. Franchise agreements are common in many businesses and industries, perhaps no more than in the hotel industry. Many commentators voice concern that *Browning-Ferris* will lead to union organizing of franchises.

In the course of the 2012 industry wide collective bargaining negotiations, the Union sought to modify Article 60, Accretion and Neutrality/Card Check, to apply to franchises. The 2012 MOU provides that Article 60(A) and (B) do not apply to "bona fide" franchise agreements. That term is not defined in the IWA and now with the Decision, its meaning takes on a greater significance. Accordingly, hotel companies are encouraged to structure or modify franchise agreements to remove any elements of employer control.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Lois M. Traub, Alexander Soric, Robert L. Sacks, Michael C. Lydakis, or Jaclyn K. Ruocco.

cc: Joseph E. Spinnato, Esq.
Vijay Dandapani, Chairman