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NLRB's Broader "Joint Employer" Standard Raises CSR Policy Concerns

Microsoft Corp. has submitted an amicus brief warning that a recent change to federal labor rules would discourage corporate responsibility practices.

Last year, the National Labor Relations Board (NLRB) made sweeping changes to its "joint employer" standard announcing a test that will lead to more findings of joint employment relationships under the National Labor Relations Act. Under the new standard announced in *Browning-Ferris Industries*, a company is a joint-employer if it exercises "indirect control" over working conditions or if it has "reserved authority" to do so.[1] This expanded the NLRB's prior "joint employer" test, which required "two separate entities share or codetermine those matters governing the essential terms and conditions of employment." In particular, an employer had to "meaningfully affect [ ] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[2]

The *Browning Ferris Industries* theory of joint employment has far-reaching and troubling impacts on employers in many business contexts, particularly in the franchisee/franchisor context where, with limited exceptions, franchisors have historically been found not to be joint employers of their franchisees' employees. Entities that are deemed to be joint employers under this new standard may face collective bargaining obligations and find themselves enmeshed in labor disputes between direct employers and labor organizations.

Browning-Ferris Industries appealed the NLRB's decision to the U.S. Court of Appeals for the D.C. Circuit, and Microsoft submitted an amicus brief in in support of the waste management company's case on June 14, 2016. In its brief, Microsoft took the novel approach of criticizing the NLRB's "joint employer" definition by focusing on corporate social responsibility (CSR) programs. It

1 *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (Aug. 27, 2015).

2 *TLI, Inc.*, 271 NLRB 798, 798 (1984); *Laerco Transportation*, 269 NLRB 324, 325 (1984).

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argued that the NLRB's new joint employer standard would "cause companies to question whether CSR initiatives will contribute to findings of joint employment relationships, and ultimately deter adoption of such initiatives."[3]

Microsoft warned the court that companies that adopt certain shared guidelines and practices may be legally responsible for each other's alleged labor violations or forced to bargain with each other's unionized employees: "Companies with existing CSR initiatives now have a strong incentive to terminate them, and others considering such policies will be more likely to table their plans."[4] The brief also pointed out the conflict of being punished for participating in a program that President Barack Obama (D) has repeatedly praised:

> Thus, on one hand, the United States President has praised Microsoft for its market-leading CSR initiative that predicates supplier eligibility on the suppliers' provision of paid leave to their workers, and encourages others to do the same. On the other hand, the NLRB has adopted a joint employment standard that encourages unions to use the same policy to bring an unfair labor practices claim against Microsoft and against other companies that create similar CSR initiatives establishing eligibility criteria for suppliers.[5]

Various other amicus briefs were also filed in support of Browning-Ferris Industries' case against the NLRB. Final briefs are due in August 2016, oral argument is not yet scheduled and a decision is not anticipated before the fall. Although joint employment status is a factual inquiry that will vary from company to company, a decision will likely affect how companies structure their employment practices, agreements and course of dealings. We will continue to monitor developments in this case.

3 Brief for Microsoft Corp. and HR Policy Assoc. as Amici Curiae at 1, *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, Nos. 16-1028, 16-1063, 16-1064 (D.C Cir. June 14, 2016), ECF No. 1619387.
4 *Id.* at 26.
5 *Id.* at 29.