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# The NLRB's Expanded Definition of Joint Employer Will Impact Hospitals and Health Care Firms

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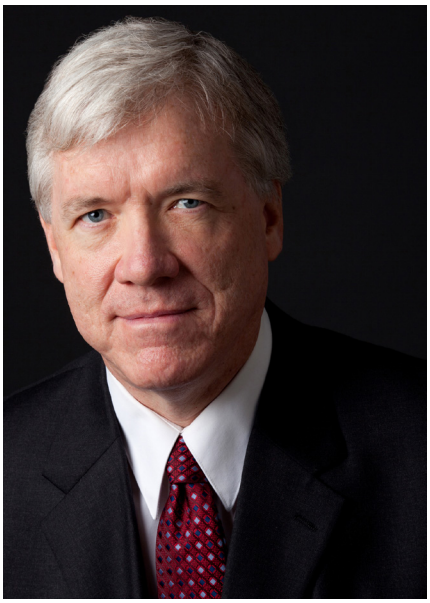

On August 27, 2015, the National Labor Relations Board ("NLRB" or "Board") issued its long-awaited decision in *Browning-Ferris Industries of California* ("*Browning-Ferris*"), greatly expanding the definition of who is a joint employer, i.e., a "putative" employer that does not hire, fire, supervise or determine the wages and benefits of a third party's employees, but which is responsible to those employees under the National Labor Relations Act ("NLRA"). This decision will have significant impact on hospitals and other health care institutions with related clinics or subsidiaries, or those whose business models depend on services provided by vendors and other outside firms.

In a 3-2 decision, the Board held that two or more otherwise unrelated employers may be found to be a joint employer of the same employees under the NLRA "if they share or codetermine those matters governing the essential terms and conditions of employment." When analyzing whether a putative joint employer meets this standard, the threshold inquiry is whether there is a common-law employment relationship with the workers in question. If this common-law employment relationship exists, the inquiry turns to whether the putative joint employer possesses sufficient control over the worker's essential terms and conditions of employment to permit meaningful collective bargaining.

In *Browning-Ferris*, a Teamsters local filed a petition seeking to represent certain workers employed by Leadpoint, a subcontractor performing sorting, screen cleaning, and housekeeping work. The Union claimed that Browning-Ferris, a waste and recycling services company, was a joint employer with Leadpoint because it contracted with Leadpoint to obtain temporary labor to perform equipment cleaning and sorting services. An NLRB Regional Director applied existing law and issued a decision and direction of election holding that Leadpoint was the *sole* employer because, among other things, it alone recruited, hired, counseled, disciplined, reviewed, evaluated, and terminated its employees. The Union filed a request for review with the Board in which the Union asked the Board to rule that Browning-Ferris was also the employer of Leadpoint's employees.

On review, the Board restated the Board's legal standard for joint employer determinations. The Board will 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. Of particular note, the Board will no longer require that a joint employer exercise the authority it has to control the workers' terms and conditions of employment. In this regard, the Board overruled decades-old case law requiring the putative employer to "meaningfully affect matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction." Now, the Board holds that "[t]he *right* to control, in the common law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect." (emphasis added). In other words, the putative employer must only have the *right* to control the contractor's employees; it is not necessary that it actually exercises that control. To the dissent, the majority opinion contravened Congressional intent, common law understandings of co-employment relationships, and Board and court precedent.

*Browning-Ferris* will have significant impact on hospitals and non-acute care entities, including clinics, nursing homes and assisted living centers. Any such entity that regularly uses contractors, such as a cleaning or janitorial services, maintenance services, food service firms/caterers, staffing agency employees and other workers employed by third parties, is susceptible to an NLRB finding that those outside workers are also the employees of the hospital or health care entity. For example, agency nurses (i.e., "travelers") potentially can be accreted to an RN bargaining unit under the Board's new joint employer doctrine. A hospital that contracts out its diagnostic imaging services can find these employees bootstrapped into an existing Tech bargaining unit. A hospital with clinics or other subsidiaries may be considered a joint employer of these entities if the hospital has the right to control essential terms and conditions of the clinic's or subsidiary's employees. Unfair labor practices committed by a clinic or vendor can be imputed to the hospital as a joint employer. In short, the decision opens the door to expansion of bargaining units, and increases the potential for hospital and health care employer liability for unfair labor practices resulting from misbehavior by the outside vendor, service provider, clinic or subsidiary.

Because of this new legal reality, hospitals and health care entities should review and modify its agreements with these third parties. At a minimum, this would include requiring the third party to maintain separate employment policies and employee handbooks, provide its own supervision of its workers, and provide wages and benefits distinct from those provided by the putative employer. Even with these measures in place, there remains the potential that a hospital or other health care employer will face unfair labor practice charges brought by a third party's employees, or that it will have to defend against a union organizing drive naming the hospital or other health care entity as a joint employer of the third party's workers whom a union has targeted for unionization. There is also the threat that a hospital's incumbent union may seek to include contract workers and other agency personnel into an existing bargaining unit through accretion or unit clarification proceedings before the NLRB. Preventive measures will help fend off these union initiatives, but *Browning-Ferris* makes it much more difficult for an employer to avoid completely joint employer status and the attendant liabilities.

*Matt Lynch is a shareholder with SEBRIS BUSTO JAMES. Matt represents private and public sector employers in all aspects of labor relations, and has negotiated hundreds of collective bargaining agreements, represented management in grievances and labor arbitrations, and handled many cases in front of the National Labor Relations Board. In addition, Matt is a trusted adviser who assists employers in both day-to-day and strategic employee relations issues, including discipline and discharge, employee leaves, employment agreements, policy development, handbooks, wage and hour and discrimination. Before joining the firm, Matt was the Director of Labor Relations Services and General Counsel for the largest employer association in the Pacific Northwest, having been with that association for over 24 years. He also served as a management trustee on a Taft-Hartley insurance trust. Matt has extensive experience in assisting employers in the healthcare, print and broadcast media, education and non-profit sectors. He can be reached at mlynch@sebrisbusto.com.*