National Pest Management Association

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NLRB Redefines "Joint Employer" Liability

On August 27, 2015 the National Labor Relations Board (NLRB) redefined the labor relations "joint employer" standard in *Browning-Ferris Indus. of California, et al v. Sanitary Truck Drivers*. (*Browning-Ferris*). In *Browning-Ferris*, Browning-Ferris Industries (BFI) subcontracted with an employment agency to provide staffing for tasks to be performed for BFI. Workers for the employment agency attempted collective bargaining as a union with BFI directly, not the subcontractor that employed them. NLRB ruled in favor of the workers and found that a joint employer relationship existed with both BFI and the subcontractor, and therefore both should be liable under the National Labor Relations Act (NLRA).

NLRB overturned a 30 year precedent of what constituted a joint employer relationship. Previously a joint employer was only liable for NLRA activity if they retained direct control over operations, hours, working conditions, etc. The new ruling relies on both direct and indirect control and a factual analysis of whether the employer has the authority, whether exerted or not, to control operations, hours, working conditions, etc.

What is the NLRB?

The NLRB is a federal agency that has the authority to investigate and remedy unfair labor practices in the private sector under the NLRA. The NLRA, also known as the *Wagner Act*, guarantees employees the right to organize into trade unions, the right to decertify a trade union, engage in "concerted activity" to request better wages and work conditions and negotiate collective bargaining agreements with employers. NLRB is focused primarily on union activities and should be distinguished from the below agencies that take the lead on other labor related issues.

- **Department of Labor's Wage and Hour Division** - Wages, tips, work hours, overtime, breaks, vacation pay.
- **Occupational Safety and Health Administration (OHSA)** – Work related safety and health issues.
- **Equal Employment Opportunity Commission (EEOC)** – Discrimination against because of race, ethnicity, religion, age, gender, national origin or sexual orientation.

NLRB enforcement resides in the power of a general counsel to investigate complaints followed by a hearing where an administrative law judge determines the outcome. The decision is then reviewed by a 5 member panel, appointed by the President and approved

by the Senate. NLRB decisions are appealable to the U.S. Court of Appeals of proper jurisdiction, if petitioned. A final ruling by the NLRB is a binding decision unless overturned by the U.S. Court of Appeals.

What is the Impact of the NLRB Ruling in *Browning-Ferris*?

The NLRB ruling will have the most significant impact to those employers that subcontract with workers in union states. In those states the decision potentially exposes employers to collective bargaining obligations directly with the subcontracted workers. The *Browning-Ferris* case is a narrow ruling of joint liability under the NLRA and situations involving unions and collective bargaining. This ruling does not necessarily apply to other areas of liability in employment law.

The concern with this ruling is that labor will most certainly attempt to apply this new standard in other areas of labor law and it is uncertain how courts may apply this ruling.

In other areas of liability in employment law, there is no bright-line rule for finding joint employer liability. Each case will continue to be a fact specific analysis of the degree and ability of control by the primary employer.

With changing jurisprudence in joint liability, organizations should consider reviewing their employment practices and contractual arrangements with staffing agencies and subcontractors. Please contact Andrew Bray abray@pestworld.org with further questions on this matter.

NPMA supports the *Protecting Local Business Opportunity Act* (S. 2015/H.R. 3549). The bill would reverse the NLRB decision in *Browning-Ferris*. NPMA has signed on to a letter supporting the *Protecting Local Business Opportunity Act* and will continue to lobbying Congressional leaders to alter the NLRB ruling.