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NLRB Revisits Joint Employer Standard

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On August 27th, in the case of *Browning-Ferris Industries*, the National Labor Relations Board "refined" its tests for determining when two or more entities can be considered a "joint employer" for purposes of complying with the National Labor Relations Act's employer obligations. Specifically, the Board found that two or more entities are joint employers of the same employees if the entities "share or codetermine those matters governing the essential terms and conditions of employment."

According to the Board's decision, the relevant question is whether the potential joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. However, the NLRB is no longer concerned with whether "actual" control is exercised by an entity, but rather whether that entity has the indirect or potential right to control, which may occur when a business uses third party services, including, but not limited to, staffing services.

The majority also said indirect control may establish joint-employer status, and that the Board won't require that an entity's control be "exercised directly and immediately" before finding that the entity is a joint employer. In their dissent, Board members Phil Miscimarra and Harry Johnson called Thursday's ruling "the most sweeping of recent major decisions" and said the majority had rewritten the long-standing test for determining who qualifies as a joint employer.

In light of this ruling, businesses need to examine carefully the relationships they have with outside entities, such as franchisees and temporary employment agencies. The possibility exists that the employees of such outside entities may be deemed employees of the contracting business for purposes of a union election or other rights and obligations under the National Labor Relations Act.