NLRB Ruling Creates New **Punch List** for General Contractors

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PRECISION AND PREDICTABILITY are harbingers of a successful construction project. The failure to adhere to specifications or customer preferences can have serious consequences on the integrity, safety or profitability of a project. While not every aspect of a build can be reduced to a blueprint, general contractors know that their ability to minimize and adapt to the unknowns – including unexpected labor issues – often makes the difference. A recent decision of the National Labor Relations Board (NLRB or Board) won't make those tasks any easier.

The Board is the federal agency charged with administering the nation's key labor law, the National Labor Relations Act. Its interpretation of the law impacts every employer subject to its jurisdiction, whether or not they employ union-represented workers. It also touches every construction project on which an entity works, regardless of whether the project is public or private, and regardless of whether it is being built non-union, with some building trades involvement, or fully subject to a project labor agreement.

JOINED AT THE HIP?

On August 27, the Board handed down its long-awaited decision in Browning-Ferris Industries of California, Inc., 362 NLRB No. 186. In that decision, the Board revised the standard for determining when nominally separate employers constitute joint employers, such that they may share exposure to union organizing, collective bargaining obligations, labor disputes and unfair labor practice liability. The fallout from Browning-Ferris is significant for general and prime contractors, as it could potentially ensnare them in their subcontractors' labor issues, with game-changing consequences.

For years, the Board considered two entities to be joint employers if they exercised "direct and significant control" over the same employees such that they shared or co-determined matters governing the essential terms and conditions of employment of those employees. The Board considered factors such as the right to hire, supervise, discipline and fire employees. Under that analysis, the Board evaluated whether an employer merely retained the right to exercise its authority in these areas via, for example, a commercial contract between the parties, or whether it actually exercised authority to act directly regarding employees. In cases where the employer did not actually and directly exercise its authority, the Board was far less likely to find that the two entities were joint employers.

The Board in Browning-Ferris opined that cases over the past three decades had strayed from the core principles set forth in the past, and concluded that it was time to refocus. The Board then concluded that just having the ability to control the terms and conditions of employment of another employer's workers – whether exercised or not, and whether direct or indirect – could be enough to establish a joint employer relationship. Further, the list of terms and conditions of work subject to the Board's joint employer analysis expanded significantly, and will now include terms dealing with staffing levels, scheduling, the assignment of work, and the manner in which work is to be performed. Thus, if a general contractor hires a subcontractor and requires that the sub's employees possess minimum safety training credentials or that they abide by the general contractor's sign-in/sign-out procedures – very customary (and prudent) terms – the parties could be waltzing themselves toward a finding of joint employer status. The operative term here is could be, as one of the few things that is crystal clear from Browning-Ferris and decisions since is that there are many questions unanswered about the intended scope and future application of the joint employer doctrine.

WHAT THE JOINT EMPLOYER ISSUE MEANS TO CONTRACTORS

The Browning-Ferris decision creates significant uncertainty for general and subcontractors, as the consequences of a joint employer finding could include, but are not limited to:

A seat at the table: Because joint employers share in each other's collective bargaining obligations, the union or non-union status of subcontractors takes on much greater significance. Contracting with a sub that employs union-represented workers could result in mandatory participation in the bargaining process in the wake of a joint employer finding. Contracting with a sub that does not employ union–represented workers may or may not insulate a general contractor, depending upon the likelihood of an organizing drive directed at the sub, and/or its preparedness to lawfully campaign against one. And, in a post-Browning Ferris world, a general contractor who is a joint employer with its sub likely can no longer terminate a subcontract due to a concern over union issues.

Increased scrutiny: Getting caught up in litigation on the joint employer issue would likely entail the collection

and analysis of a significant amount of information about both companies. In the course of that process, and regardless of the representational status of its workforce, a general contractor may have to divulge business and employee information, which would then become subject to greater scrutiny by the Board, or perhaps a union interested in organizing workers of the alleged joint employer.

Labor disruptions: Because companies that are joint employers are both considered "primary" for labor dispute purposes, the law's prohibition against picketing neutral employers would offer no relief to union demonstrations triggered by one of the joint employers, but directed at both. Thus, a general contractor that is a joint employer with a subcontractor being picketed at the job site would be unable to isolate picketing to just the affected sub by implementing a reserved or dual-gate system. Instead, the general contractor's own employees may be required to cross a picket line to access the site. And if the general contractor itself has union-represented employees, they may have the contractual right to engage in sympathy strike activity, effectively shutting down operations.

These are but a few brief examples of how the scope of the Browning-Ferris decision could suck into its gravitational pull all sorts of business relationships previously untouched by the joint employer doctrine. The decision may spawn new and creative organizing and litigation tactics as unions probe to see just how effective this new tool is (assuming, of course, that the courts don't override the Board's decision). At the same time (and largely for the same reason), the new joint employer standard will generate litigation before the Board and then in court, as businesses first litigate to avoid a joint employer finding, and then potentially sue each other under contracts that address issues of liability and indemnity.

WHAT DOES YOUR JOINT EMPLOYER PUNCH LIST INCLUDE?

General contractors who wish to steer clear of their subcontractors' labor relations issues must, at a minimum, understand the red flag issues that could invite a joint employer challenge; how to structure subcontract relationships to minimize risks; and how to develop contingencies to deal with potential joint employer findings.

KNOW YOUR SUBS

What is the overall labor relations climate of each of the subcontractors? If labor and employee relations are bad, the risk of union organizing, labor disputes and unfair labor practice liability increases, and therefore the risks as a joint employer increase. By the same token, to remain an attractive business partner and a minimal joint employer risk, subcontractors should evaluate their own exposure to employee dissatisfaction, organizing, labor disputes and unfair labor practice liability. By being able to demonstrate that they have done so in a systematic and thorough fashion, subcontractors can hold themselves out as safe business partners – at least insofar as the joint employer issue is concerned.

Rethink contract documents. Review subcontract agreements (existing as well as templates) to determine whether any indicia of direct or indirect control are present. In Browning-Ferris, the Board found such control to exist in contract clauses enabling one employer to, among other things, dictate staffing levels, work schedules and training prerequisites. If contract clauses like these exist – and they likely do — amendments should be considered to decrease the likelihood of a successful joint employer challenge while preserving to the extent possible the quality control, reputation management, goodwill and security that is every company's objective in negotiating protective contract language. And once subcontract agreements have been vetted, stick to them. The written agreement will not protect an entity unless it is an accurate representation of how the subcontract relationship is actually governed.

FOCUS ON THE BIG PICTURE

Take care to provide general goals and directives, while letting subs deal with the details of how they will complete their scope of work. Avoid providing subcontractors' workers with specific directives wherever possible. Consider how much direct control is needed to ensure the subcontractor's successful performance, and scale back where appropriate.

PLAN AHEAD

General contractors should strategize in advance what their position will be if a joint employer allegation is made, as it relates to both the union making the allegation and the alleged joint employer. For example, if participation in union negotiations is required by a joint employer finding, who will be the chief spokesperson at the bargaining table, who will draft and respond to bargaining proposals and information requests, and what will the parties do in the event an agreement cannot be reached? As between the joint employers, what arrangements can and should be made at the outset of the relationship to memorialize these concerns, apportion costs and responsibilities, and minimize legal exposure?

The Board acknowledged in Browning-Ferris that it will only be through future litigation that the joint employer doctrine will develop. Thus, an entity's approach to the joint employer dilemma will by necessity continue to evolve. The ability to be flexible and adapt is certain to make a difference in this area of the law, where the blueprints are still being developed.