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TO: National Association of Convenience Stores

FROM: Tim Columbus
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RE: NLRB Applies New Joint Employer Standard

On October 21, 2015, the National Labor Relations Board ("NLRB" or "Board"), Region Five, issued a decision in *Green JobWorks/ACECO,*[1] another case involving a union petition to represent a unit of employees under the National Labor Relations Act ("NLRA") and a question of joint employer status. The *ACECO* decision comes on the heels of *Browning-Ferris*[2] in which the Board restated its standard for joint employers.

The practical effect of the Board's new standard for determining joint employer status (i.e., whether two employers share in certain legal obligations to a defined unit of employees) is that more employers can now be held liable for unfair labor practices under the NLRA. The *Browning-Ferris* decision and its progeny will undoubtedly influence the way businesses structure their contracts insofar as those agreements include any employment terms for shared or joint work forces. The full reach of the decision, including its impact on different types of

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[1] *Green JobWorks, LLC/ACECO, LLC*, Case 05-RC-154596 (Oct. 21, 2015) (hereinafter "*ACECO*").

[2] *Browning-Ferris Industries of Ca.,* 362 N.L.R.B. 186 (Aug. 27, 2015).

business relationships (e.g., franchisor-franchisee relationships, product quality control specifications, advertising and branding requirements, etc.), remains to be seen.

Applying the *Browning-Ferris* test and analysis, the Regional Director in *ACECO* concluded that the union "did not meet its burden of introducing specific, detailed and relevant evidence into the record [] to find that ACECO is a joint employer of the [Green JobWorks ("GJW")] employees in the petitioned-for unit." This early application of the *Browning-Ferris* test is instructive on the type of factual record and business arrangement that may or may not support a finding of joint employer status. Below is a detailed summary of the *ACECO* decision.

The "Browning-Ferris" Joint Employer Standard

The Board may find that two or more entities are joint employers of a single work force if:

(1) they are both employers within the meaning of the common law, and

(2) they share or codetermine those matters governing the essential terms and conditions of employment.

Undergirding the second prong of the standard is an employer's level of *control* over employees' employment terms and conditions. Following *Browning-Ferris*, the *right* to control, along with the actual exercise of control (direct or indirect) is probative of joint employer status. The *Browning-Ferris* Board reasoned:

> Where a user employer reserves a contractual right to set a specific term or condition of employment for a supplier employer's workers, it retains the ultimate authority to ensure that the term in question is administered in accordance with its preferences. Even where it appears that the user, in practice, has ceded administration of a term to the supplier, the user can still compel the supplier to conform to its expectations. In such a case, a supplier's apparently independent control over hiring, discipline, and work direction is actually exercised subject to the user's control. . . . Where a user has reserved authority, we assume that is has rationally chosen to do so, in its own interest. There is no unfairness, then, in holding that legal consequences may follow from this choice.

"Essential terms and conditions of employment" include matters such as: hiring, firing, discipline, supervision, direction, wages, hours, number of workers to be supplied, scheduling, seniority, overtime, assignment of work, and manner and method of work performance. According to the NLRB, the joint employer standard should be applied and evaluated "in the context of specific factual circumstances."

Application of the Standard to GJW and ACECO

GJW, the supplier firm, provides demolition and asbestos abatement laborers to various construction companies. ACECO, the user firm, is a licensed demolition and environmental remediation contractor that supplements its own workforce with GJW employees. The Construction and Master Laborers' Local Union 11 filed a petition to represent a unit of employees (purportedly) jointly employed by GJW and ACECO.

The Regional Director in *ACECO*, using the *Browning-Ferris* record as a benchmark, concluded that there was insufficient evidence to establish that GJW and ACECO are joint employers under the new standard. In so finding, the Regional Director relied on the factual circumstances detailed below and highlighted key differences between them and the facts in *Browning-Ferris*.

Key facts pertaining to business organization, hiring, transferring, discipline and firing

- The contract between ACECO and GJW places all hiring and discipline authority within GJW's exclusive discretion;
- GJW recruits and hires its employees without any involvement from ACECO and assigns them to ACECO work sites;
- ACECO may request specific GJW employees, but GJW is under no obligation to fulfil any such request or provide particular employees;
- The instances in which GJW employees were sent home by non-GJW representatives were based on directives from the general contractor, not ACECO itself;
- ACECO may request not to have specific GJW employees work at its sites, but GJW has final discretion over placement of the employees;
- ACECO has the right to refuse a GJW employee for "safety issues or any other reasonable objections to such staff members remaining on site," which the Regional Director found does not "rise to the level" of BFI's power in *Browning-Ferris* to reject or discontinue the use of any personnel for "any reason;" and
- The record does not indicate that ACECO has the authority to request immediate dismissal of employees or that ACECO has ever exercised such a right (compared to BFI emailing Leadpoint and causing immediate dismissal of Leadpoint employees in *Browning-Ferris*).

Key facts pertaining to wages

- The only influence exercised by ACECO over wages of GJW employees is in negotiating the contract price for each project (i.e., setting of the reimbursement rate), which the Regional Director found too attenuated (compared to BFI, which specifically prohibited Leadpoint from paying its employees more than BFI employees are paid for similar work); and

- GJW employees have the power to individually negotiate a higher wage with GJW by demonstrating outstanding work performance.

Key facts pertaining to daily supervision

- GJW sends employees home, sets their schedules, and informs them of their next project;
- Employee-wide trainings/meetings are held for orientation purposes and are conducted by the general contractor, not ACECO (compared to BFI holding meetings for Leadpoint employees to direct them on work performance in *Browning-Ferris*);
- ACECO assigns daily tasks, but exercises minimal supervision over GJW employees in terms of directing them how to work (compared to BFI, which exercised "direct and constant oversight" during the work day); and
- The day-to-day schedule is set by the general contractor, not ACECO (for ACECO and GJW employees alike).

Ultimately, with respect to the appropriateness of ACECO's participation in collective bargaining discussions, the Regional Director concluded that there was insufficient evidence of ACECO's control over bargainable issues like break times, safety, speed of work, and productivity of GJW employees. He pointed out that the contract between GJW and ACECO specifically assigns the power over breaks and productivity to GJW supervisors—a fact not contradicted by evidence of ACECO's actions. The decision also notes that other parties like the general contractor and the site hygienist have more input and control than ACECO on issues of scheduling and safety.

Throughout his decision the Regional Director emphasizes the *absence* of evidence to support a finding of joint employer status (i.e., lack of direct evidence of control by ACECO over essential employment terms and conditions) and points out specific examples of what is missing from the union's factual record.[3] Consequently, although the result of the decision is a finding of no joint employer status, the decision serves as a blueprint of sorts for future petitioners seeking to establish such status.

[3] Notably, although the parties were invited to provide supplemental briefing following the *Browning-Ferris* decision, development of the factual record in *ACECO* was completed before the NLRB announced its new joint employer standard.