Tamara Devitt in Bloomberg: NLRB's Joint Employment Theory Faces Key Court Test

March 15, 2017 Tamara Devitt

PRACTICES Labor and Employment

The National Labor Relations Board March 9 defended its theory that companies can be classified as joint employers if they “share or codetermine” the employment terms of a group of workers (Browning-Ferris Indus. of Calif., Inc. v. NLRB, D.C. Cir., No. 16-1028, oral argument 3/9/17).

Browning-Ferris urged the U.S. Court of Appeals for the District of Columbia Circuit to reject the new NLRB standard, which critics have called a threat to franchising and other business models.

The NLRB adopted the standard in a 2015 ruling that Browning-Ferris Industries of California Inc. was a joint employer with Leadpoint, a staffing firm that provided workers to the recycling company. The board overruled 30-year-old precedents that companies should share legal responsibility for employees only if they exercise “direct and immediate control” over the workers...

Attorneys following the Browning-Ferris case told Bloomberg BNA they have different views and expectations about the outcome.

Tamara I. Devitt, a management lawyer and partner at Haynes Boone in California, told Bloomberg BNA that the case has been a “hot button” issue. But she said she wouldn't be surprised to see the appeals court defer to the NLRB and enforce the board's order against Browning-Ferris.

The board's new test leaves businesses guessing about how much evidence is required to show joint employer status, she said. Employers may have to wait for President Donald Trump to appoint board members to vacant seats and for a reconstituted NLRB to hear another case raising the issue.

Excerpted from *Bloomberg BNA*. To read the full article, please click here.