

Union Election Ordered After NLRB's Joint-Employer Ruling Regarding Construction Company And The Temporary Staffing Agency Which Provided Temporary Workers

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In a recent decision, the National Labor Relations Board (NLRB) followed its controversial August 2015 joint employer ruling known as Browning-Ferris, in which the NLRB expanded its standard on joint employers to include indirect control. On August 16, 2016, the NLRB ruled that Retro Environmental Inc., a construction company, was a joint employer with staffing agency Green JobWorks LLC regarding a group of full- and part-time laborers. As a basis for its holding, the NLRB found that the construction company primarily controlled the day-to-day work of the temporary workers, while the temporary staffing agency handled matters such as hiring and assigning employees to job sites, completing pre-employment drug screens, and conducting background checks. Green JobWorks also controlled the rate of pay and payroll procedures for the temporary workers, as well as discipline and termination, although Retro could request a replacement when unsatisfied with a particular worker's performance. During the summer of 2015, the staffing agency provided workers to the construction company for two demolition and asbestos abatement projects scheduled to conclude in July. In June 2015, the NLRB's Regional Director dismissed the petition because the projects were close to being completed and there was not enough evidence to suggest the companies would continue working together. In a two to one decision reversing the Regional Director, however, the NLRB rested its decision, in

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part, on the reasoning that the staffing agency had supplied workers to the construction company on several projects before, so it was foreseeable that it would do so again. This decision by the NLRB is the latest in a line of decisions regarding whether separate companies are deemed joint employers over a single group of workers for purposes of collective bargaining. Both staffing agency employers and employers who contract with staffing agencies should be mindful of ongoing attempts by unions to organize a single group of workers in this context, and they should contact qualified counsel regarding strategies for handling possible joint employment scenarios, including the drafting and implementation of service agreements and the areas of control that an entity may want to exclusively maintain or forego.