Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
September 13, 2022 Edition

NLRB PROPOSES NEW "JOINT-EMPLOYER STATUS" STANDARD

On September 6, 2022, the National Labor Relations Board ("NLRB" or "Board") issued a Notice of Proposed Rulemaking ("NPRM") that addresses the standard for discerning joint-employer status pursuant to the National Labor Relations Act ("NLRA"). The NPRM suggests rescinding a Trump-era joint-employer rule and replacing it with one that incorporates a standard previously articulated in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) ("*BFI"*). Given the potentially wide-ranging significance, NLRB Members Marvin E. Kaplan and John F. Ring issued a dissenting view. Comments to the NPRM from interested parties must be submitted to the Board on or before November 7, 2022.

The Board's decision in *BFI* clarified the traditional, common-law based standard for determining whether two employers are joint employers. In *BFI*, the Board explained that it would consider evidence of reserved and indirect control over employees' essential terms and conditions of employment when analyzing joint-employer status. Following a change in the Board's make-up and while *BFI* was pending on review before the U.S. Court of Appeals for the District of Columbia, the Republican majority Board issued an NRPM that implemented a joint-employer standard that was inconsistent with *BFI.* In 2018, in *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195, 1222 (D.C. Cir. 2018), the Court issued its decision upholding "as fully consistent with the common-law the Board's determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis," and remanded the case to the Board to refine the new standard.

According to the NPRM, the Board emphasized "that the 2020 final rule ("2020 Rule") repeats the errors that the Board corrected in *BFI*." Consequently, the Board suggested replacing the Republican majority 2020 Rule with "a new rule that incorporates the *BFI* standard and responds to the District of Columbia Circuit's invitation for the Board to refine that standard in its 2018 decision on review." The NPRM proposes clarifying that an entity will be considered an employer "if the employer has an employment relationship with those employees under common-law agency principles." Second, the NPRM proposes establishing that two or more employers of the same particular employees are joint employers "if the employers share or codetermine those matters governing employees' essential terms and conditions of employment." By including this language, the proposed rule "codifies the long-standing core of the joint-employer test, consistent with the formulation of the standard that several Court of Appeals (notably, the Third Circuit and District of Columbia Circuit) have endorsed."

Third, the NPRM suggests defining "share or codetermine" to mean "for an employer to possess the authority to control (whether directly, indirectly, or both) or to exercise the power to control (whether directly, indirectly, or both) one or more of the

employees' essential terms and conditions of employment." The Board believes that such a definition for "share or codetermine" is "consistent with common-law agency principles and avoids one of the key errors of the 2020 Rule." Fourth, the NPRM suggests defining "essential terms and conditions of employment" as to "generally include, but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance." The NPRM notes that one of the shortcomings of the 2020 Rule was that it included an "exhaustive list" of essential terms and conditions of employment which notably did not include "workplace health and safety" – a shortcoming that was revealed during the COVID-19 pandemic. Accordingly, the NPRM states that "[t]his experience has persuaded the Board, subject to comments, that other similarly unforeseen circumstances may arise in the future and so the joint-employer standard should not adopt an exhaustive list of essential terms and conditions of employment in given workplaces, but instead leave some flexibility for the Board in future adjudication under a final rule."

Fifth, the NPRM suggests specifying that common law agency principles determine "whether an employer possesses the authority to control or exercises the power to control one or more of the employees' terms and conditions of employment" and that evidence of reserved or indirect control is sufficient to establish joint-employer status. Sixth, and again consistent with the ruling in *BFI,* the NPRM suggests clarifying that "an employer's control over matters that are immaterial to the existence of an employment relationship under established common-law agency principles, or that otherwise do not bear on the employees' essential terms and conditions of employment, is not relevant to the joint-employer inquiry." Lastly, the NPRM proposes that the party asserting joint-employer status has the burden of establishing the relationship by a preponderance of the evidence.

NLRB BUTTONS UP STANDARD FOR EMPLOYER BANS ON UNION APPAREL

Recently, the National Labor Relations Board ("NLRB" or "Board") found that Tesla Inc., ("Tesla") violated the National Labor Relations Act ("NLRA") by banning workers from wearing shirts with union insignia shortly after the United Auto Workers ("Union" or "UAW") began its union drive at Tesla's facility in Fremont, California. *Tesla, Inc.*, 379 NLRB No. 131 (August 29, 2022). In doing so, the Board overruled its decision *in Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019). NLRB Members Kaplan and Ring dissented.

Tesla had the following team wear policy ("Policy") for production associates ("Associates") who install parts on the vehicles' bodies:

> Team Wear: It is mandatory that all Production and Leads wear the assigned team wear.
>
> - On occasion, team wear may be substituted with all black clothing if approved by supervisor.

- Alternative clothing must be mutilation free, work appropriate and pose no safety risks (no zippers, yoga pants, hoodies with hoods up, etc.).

Associates' uniforms consisted of black cotton shirt with Tesla's logo and black cotton pants with no buttons, rivets or exposed zippers. Production leads and supervisors wore red shirts and line inspectors wore white shirts, all of whom had to wear the same black pants. In Spring 2017, Associates began wearing black cotton shirts with the Union's campaign slogan "Driving a Fair Future at Tesla" in front and a large UAW logo on the back. Beginning in August 2017, Tesla began to strictly enforce the Policy. However, Tesla allowed Associates to wear plain black shirts or to cover non-Tesla logos with tape. Eventually, Tesla prohibited UAW shirts but allowed workers to wear union stickers.

In finding Tesla violated the NLRA, the Board overturned its decision in *Wal-Mart Stores, Inc.*, which explained that the *Boeing* standard, rather than *Republic Aviation*, should be applied where an employer maintains facially neutral rules limiting union gear. *Wal-Mart*, 268 NLRB No. 146 (2019), slip op at 2-3 (citing *Republic Aviation v. NLRB*, 324 U.S. 793 (1945) and *Boeing Co.*, 365 NLRB No 154 (2017)). The *Wal-Mart* decision made a distinction between rules that completely prohibit the display of union insignia, which would be controlled by *Republic Aviation*, and rules that partially restrict the display of union insignia, where *Boeing Co.*, would govern. Under *Boeing*, where an employer's facially lawful policy would potentially interfere with the exercise of an employee's rights under the NLRB, the Board balances "(i) the nature and extent of the potential impact on NLRA rights and (ii) legitimate justifications associated with the rule." *Boeing*, slip op at 3. Under *Republic Aviation* and its progeny, when the employer interferes with its employees' right to display union insignia, the rule is presumptively invalid, and the employer has the burden to show that its interference was justified by special circumstances. *See Tesla*, slip op. at 1, 7.

The *Tesla* Board found that *Wal-Mart* improperly abandoned the "special circumstances" requirement set forth in *Republic Aviation* by holding "that an employer's willingness to permit the display of some union insignia warrants a more forgiving assessment of its asserted justification for banning other union insignia. *Tesla*, slip op at 16. In so finding, the *Tesla* Board also overruled *Wal-Mart* and reinstated the special circumstances test. Under *Republic Aviation*, there is "a presumption that any employer limitation on the display of union insignia is invalid, with the burden on the employer to establish special circumstances to justify its action." *Tesla*, slip op at 6. Regarding employer restrictions on union insignia and apparel the Board has found special circumstances exist "when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissention, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp.,* 342 NLRB 649, 650 (2004)).

Applying *Republic Aviation* to Tesla, the team wear policy prohibited Associates from substituting their Tesla shirt for one bearing a union insignia. *Tesla*, slip op at 18.

Therefore, the rule prohibits employees from displaying union insignia and Tesla had the burden to establish special circumstances. *Id*. Tesla could have established a special circumstance if union insignias could have caused damage to its products. *Id*. However, Tesla did not present evidence that cotton shirts with union logos posed a mutilation risk to unfinished vehicles, there was no evidence of a shirt with a logo damaging a vehicle, and, in fact, one manager testified the union logo shirts were not a mutilation risk. *Id.* at 18-19. Furthermore, Tesla could maintain visual management in General Assembly if Associates were wearing black union shirts. *Id.* Therefore, the Policy was not narrowly tailored to address the mutilation risk as required under the special circumstances test, and the Board found Tesla violated Section 8(a)(1) of the NLRA. *Id.*

OATH ADMINISTRATIVE LAW JUDGE MAKING WAVES FOR CITY BY RULING THAT SI FERRY BOAT CAPTAINS ARE OWED PREVAILING WAGES

On August 23, 2022, Administrative Law Judge Faye Lewis decided that City-employed marine engineers and chief marine engineers assigned to the Staten Island Ferry ("SIF") perform work comparable to that of private sector engineers aboard the U.S.-flag Maersk Line Ltd. cargo ships and thus, are entitled to higher prevailing wages and supplemental benefits. Should the prevailing wage recommendation be accepted by City Comptroller Brad Lander ("Comptroller"), it would significantly increase the amount the City would be required to pay SIF engineers ("Engineers") represented by the Marine Engineers' Beneficial Association ("MEBA"). A decision from the Comptroller's office is expected in the coming weeks.

Engineers have been working under a contract that expired in 2010 and they are the only bargaining unit with an open contract pending from the Bloomberg era ("CBA"). MEBA has been vocal that the failure to reach a new contract compounded by the existing low wages have contributed to the City's inability to recruit and retain talent during a national maritime worker shortage. It claims that evidence of the effect of such stagnated wages has led to short-staffing on SIF boats, which recently led to publicized service reductions during rush hour commutes. Additionally, it asserts that deflated wages have also caused attrition problems for Engineers with 20% of crew members retiring or migrating to other states.

Talks at the bargaining table with the Adams administration were set to resume on August 29, 2022 after MEBA recently accepted the City's offer to use a mediator to settle the 12-year stalemate. The City's last offer included a 10% raise over seven years, in line with a pattern for stationary engineers/HVAC service operators employed in buildings under a collective bargaining agreement between Local 94-94A-94B International Union of Operating Engineers, AFL-CIO and the Realty Advisory Board on Labor Relations ("RAB Agreement"). This equates to a captains' pay topping out at $70,926 a year and salaries for mates capped at $57,875. However, in 2003, following a SIF crash that killed 11 passengers, a study commissioned by the City found that the SIF was not paying adequate wages for mariner positions.

Section 220 of the New York State Labor Law ("PWL") requires the City of New York to pay its "laborers, workmen or mechanics" the prevailing rate of wages and supplemental benefits paid in the private sector "for a day's work in the same trade or occupation in the *locality*" where the work is performed. Labor Law §§ 220(3)(a) and 220(5)(a)(emphasis added). The PWL authorizes a covered labor union to file a complaint with the Comptroller if the organization fails to reach a contract with the City. The Comptroller is required to conduct an investigation and hearing on PWL issues, over which OATH presides and makes a recommendation, which serves as support for a final Comptroller determination. The Comptroller sought that OATH uphold its determination the Engineers be paid the same as building engineers covered by the RAB Agreement.

In connection with the 8-day prevailing wage proceeding recently held before Judge Lewis, MEBA, the Comptroller, and the Office of Labor Relations all agreed that the Engineers and engineers on U.S.-flag Maersk cargo ships perform "comparable" work and are both required to obtain and hold a U.S. Coast Guard unlimited horsepower engineering license. However, the Comptroller and OLR, asserted that Maersk engineers do not work in the same locality as the Engineers and assuming *arguendo*, MEBA did not establish that it represents 30% of the workers as required by PWL § 220.

The PWL defines "locality" as "such areas of the state described and defined" in a CBA for the relevant trade or occupation. PWL § 220 (5)(d)). First, Judge Lewis rejected OLR's claim that Maersk engineers do not perform work in New York City because the evidence established that while Maersk ships maneuver through New York Harbor, their engineers are on watch, inspecting equipment and "ensuring that the propulsion and power generation were in order." *Id*. at 5. Furthermore, she also found, among others, that court precedent and the language of the PWL severely undercut the Comptroller's claim that the Engineers were not entitled to prevailing wages because any work performed by Maersk engineers in New York Harbor was undertaken during transit, rather than at its final port of call in New Jersey. In sum, Judge Lewis determined that by regularly passing through New York Harbor, which could last up to 6 hours, Maersk engineers work in the same locality as Engineers.
