Fox Valley CLE Conference

Joint Employer Issues

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A New World Order

- The law of “joint employer” is in flux
- “Joint employer” – an entity can be jointly liable for violations of labor and/or employment law committed by an affiliate entity against its workers
- Traditionally, turns on degree of control exercised by an entity over the employment circumstances of the other entities’ workers

Employment/Labor

- Applicable to:
  - Wage/hour laws and leave laws enforced by DOL
  - Employment discrimination laws enforced by EEOC
  - Labor Laws

- Organized labor is driving change
  - Unions need new organizing tools
  - NLRB – 2014 – started down two paths to expand joint employer liability: Browning- Ferris and McDonald’s
    - Browning-Ferris - Union sought to organize the temp employees used by the primary employer at a recycling plant
    - McDonald’s - Labor Board seeks to hold the franchisor liable for unfair labor practices of franchisees
Browning - Ferris

- August 27, 2015: NLRB decided 3-2 to reject 30-year-old “joint employer” standard that focused on the actual exercise of direct control over another business’ employees
- New standard: “Joint employer” status based on mere “right to control” employment terms, even if not actually exercised, or indirect control through intermediaries
  - Decision provides unions with new power to go after employers for the actions of (potentially) their franchisees, contractors, suppliers, subsidiaries, and staffing agencies

Recycling operations

- Primary Company (BFI) / 60 employees
- Temp Agency (Leadpoint) / 240 Employees
  - Sorters, Screen Cleaners, and housekeepers

- BFI reserved rights regarding Temps:
  - Follow all safety rules / No booze while working
  - Don’t pay more than we pay our own employees
  - Shift start and stop times, and when OT needed
  - How many employees needed for shifts
  - Right to request discontinuance of temp placement
There can be many “employers”

- Direct control: wages
- Indirect Control: hiring
- Potential Control: firing, discipline, direction of work

No limits?

Simple Temp relationship
- You could have an election among your temps.
- Be required to bargain with your temps.
- Liability for ULPs from your temps
- Strikes from your temps?

What if you are a cleaning company?
- Cleaning contracts with three customers
- Same workforce works at all three customer sites.
- The three customers have different terms.

Who is the employer?
- Who must bargain?
The dissent lists a variety of business relationships that are “fundamentally altered” by the Board’s new joint-employer standard:

- user-supplier
- lessor-lessee
- parent-subsidiary
- contractor-subcontractor
- franchisor-franchisee
- predecessor-successor
- creditor-debtor

For example, franchisors may now be required to bargain with their franchisees’ employees and be held responsible for their franchisees’ unfair labor practices.

Primary employer may be required to bargain with the secondary employer’s employees.

Primary employer may be liable for unfair labor practices of secondary employer.

Primary employer may be liable for unlawful terminations by the secondary employer.

Applies only to NLRA at this point.
Background
- So-called “worker centers” (backed by the SEIU) organized a series of strikes and protests across the country by fast food workers calling for higher wages and better working conditions.
- The NLRB’s GC filed some 19 complaints against McDonald’s and its franchisees alleging that they trampled rights of workers who participated in the protests.
- Liability for McDonald’s perhaps a foregone conclusion after Browning-Ferris?

Freshii
- NLRB GC determined franchisor was not a joint employer
  - Franchisor played no role in franchisee’s hiring, firing, disciplining or supervising employees
  - No role in setting wages, raises or benefits
  - Franchisor’s control limited to insuring a standardized product and protecting the quality of the product and the brand.
Indemnification

■ Number one rule in all primary/secondary relationships – recognize it may not be possible in many situations to avoid joint employer liability, and negotiate the best possible indemnity language you can under the circumstances.

Embracing Joint Employer Concept

■ Often, we want and need to retain control of the third party employees working in our facilities, e.g., temporary agency employees.
  - we will very likely have joint employer liability, and embrace and maintain the control we think we need to manage the relationship.

■ In these situations, giving up “a little control” will likely not be enough to avoid joint employer liability,
  - so there is little reason to give away any ability to control the secondary employees.

■ In fact, it may make sense to double down on our level of control.
  - If we are going to have joint employer liability anyway in a particular situation, we want to make very sure the secondary employer isn’t doing anything to create liability (especially if we don’t have a strong indemnification clause, or if we are worried we may not be able to enforce/collect on the indemnification).
Avoiding Joint Employer Liability

■ In these limited situations, if we want to avoid joint employer liability, we should follow the teachings of Freshii: a) we shouldn’t play a role in the hiring, firing, or supervising of the supplier’s employees, b) we shouldn’t set their wages or benefits, and c) we shouldn’t discipline the employees, or give them performance reviews.

■ We can contract with the supplier as to the product they need to provide us, the required quality of that product, and the timing for delivery of the product, but we should not control the method or manner in which the supplier’s employees perform the work.

Avoiding Joint Employer Liability

■ Supplier and Agency Contracts
  − Be careful about providing in the supplier or agency contract that we have the right to control their employees if we don’t really mean it, need it, or intend to exercise it. Remember, the Board will find joint employer status if the primary employer has mere possession of authority to control employees, even if it is not actually exercised, or indirect control through intermediaries.
Avoiding Joint Employer Liability

**Written Materials**
- If we want to avoid joint employer status, don’t provide the secondary employer or the secondary employees with written work rules, employee handbooks, employment applications or performance reviews
- Also avoid job descriptions, safety training, and written instructions about how to do the job

**Employment decisions**
- If we want to avoid joint employer status, stay detached
  - Do not screen hiring or firing decisions
  - Do not reward suppliers who follow recommended HR policies or punish those that do not
Avoiding Joint Employer Liability

■ Do not:
- require the secondary employer to use our payroll, administrative or accounting services
- set specific schedules for you the supplier’s workers
- set job assignments for the supplier’s workers
- set minimum staff size requirements for the supplier

■ Do: make the secondary employer solely responsible for training its workers

If all of these things necessary to avoid joint employer status don’t seem like a good idea, then consider whether to maintain control and accept the likelihood of joint employer status.
Questions?

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