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Who Are My Employees?

By: Paul L. Bressan and Ruth L. Seroussi

The legal landscape for employers is changing. Led by the National Labor Relations Board (the "NLRB"), there is a growing trend to hold employers accountable, not only for their own employees, but also for the employees of their contractors, franchisees, and others with whom they do business. This increased accountability results from the expanding definition of "joint employer."

Browning-Ferris

On August 27, 2015, the NLRB issued its decision in *Browning-Ferris Indus. of California, et al. v. Sanitary Truck Drivers*, 362 NLRB No. 186. In *Browning-Ferris*, the NLRB held that it was no longer necessary to exercise direct, immediate control over workers to be deemed a joint employer. Rather, the NLRB found it sufficient for a finding of joint employer status if an employer exercises "indirect control" over working conditions or if it has "reserved authority" to do so. The NLRB therefore concluded that Browning-Ferris Industries of California Inc. ("BFI") was a joint employer of workers provided by a staffing agency at a BFI recycling plant. This in turn resulted in a requirement that BFI participate with the staffing agency in negotiations with the Teamsters union (which won the union election conducted among the staffing agency's employees) for a collective bargaining agreement covering the wages, hours and terms and conditions of those employees. The NLRB's ruling potentially subjects employers to collective bargaining obligations for employees provided to them by staffing agencies and to liability for labor violations committed by their labor contractors if a joint employer relationship is found.

Franchises and Contractors

Even though the *Browning-Ferris* ruling involved a contractual relationship between a staffing agency and an employer and not a franchisor-franchisee relationship, there are many parallels between franchisor-franchisee relationships and contractor-subcontractor relationships. In fact, the NLRB has filed complaints against McDonalds USA, LLC, with respect to employees of certain of its franchisees, contending that McDonalds should be held to be a joint employer of these employees. It is likely that the NLRB will apply the broader standard articulated in *Browning-Ferris* when it ultimately rules on the McDonalds cases.

Miller & Anderson, Inc.

For over a decade, the NLRB has held that, where there is a joint employer relationship, both employers must consent for the employees to be part of a multi-employer bargaining unit. In a pending case against Miller and Anderson, Inc., the NLRB may change this rule. The NLRB recently extended an invitation to file briefs on the issue of whether an appropriate employee unit for collective bargaining should include both the employees of the staffing agency and the employees of the contracting company, without the consent of both entities. If the NLRB determines that it should, this would extend the holding of *Browning-Ferris* by potentially requiring the contracting company to bargain with a successful union, not only with respect to the employees of the staffing company, but also with respect to a bargaining unit consisting of employees of both entities. Presuming the NLRB decides Miller and Anderson this way, as is expected, then if joint employment status is indeed easier to establish following *Browning-Ferris*, more employers may be compelled to bargain with unions in a multi-employer unit comprised of regular employees and temporary employees.

California Labor Code Section 2810.3

California has gone even further in expanding the scope of liability for employers who contract with temporary staffing agencies. On September 28, 2014, Governor Brown signed California's AB1897 into law, adding section 2810.3 of the California Labor Code. Each affected California employer now "shares" civil responsibility and liability with its "labor contractors" (defined as an individual or entity that "supplies a client employer with workers to perform labor within the client employer's usual course of business") regarding the "payment of wages" and "any failure to secure valid workers compensation coverage" with respect to temporary workers assigned to the employer. These obligations remain regardless of the affected employer's participation in or control of the payment of wages to these contracted employees by its labor contractor, or any knowledge of the labor contractor's failure to provide workers' compensation coverage for these employees. In effect, if Labor Code section 2810.3 is applicable, the using company becomes a "joint employer" of these employees for the stated civil liability, without any proof of joint employer status under any standard.

Some Steps Employers and Franchisors Can Take to Reduce the Risk of Liability

In the face of this expanded joint employer liability, employers and franchisors should consider the feasibility of reducing their control over the employees of their contractors and franchisees, by taking steps such as the following:

- Reviewing and revising contracts to establish the requisite separation between the two entities;

- Reviewing and revising contracts to provide for indemnification in the event of a finding of joint employment and resultant liability, in accordance with applicable law;
- Limiting direction to product and brand quality protection to ensure "a standardized product and customer experience;"
- Steering clear of codetermining matters governing the wages, hours and essential terms and conditions of employment for the employees of contractors and franchisees;
- Avoiding the exercise of direct or indirect control over wages, hours or working conditions;
- Staying away from providing directives to the contractor's and franchisee's employees concerning day to day operations;
- Relinquishing any "reservation of authority" or right to exercise direct or indirect control over wages, hours or working conditions; and
- Eschewing any mandatory requirement that contractors or franchisees strictly follow your rules on employment practices or policies.

Although these suggestions will not insulate affected California employers from potential civil liability under Labor Code Section 2810.3, they may help employers reduce their overall exposure and a finding of joint employer status in other circumstances.

Conclusion

It remains to be seen how far the NLRB will go in this joint employer arena, and whether pending legislation to combat the NLRB will be successful in any respect. It also remains uncertain whether and to what extent this NLRB expansion will find its way into standards by the Department of Labor, the Equal Employment Opportunity Commission and other federal agencies. Nevertheless, prudent employers should hope for the best, but prepare for the worst.

Paul L. Bressan is a Shareholder in the Orange County office, Co-Chair of the Labor and Employment Practice Group and Assistant General Counsel to the firm. He can be reached at 949.760.1121 or pbressan@buchalter.com.

Ruth L. Seroussi is Of Counsel in the Firm's Labor and Employment and Litigation Practice Groups in the Los Angeles Office. She can be reached at 213.891.5149 or rseroussi@buchalter.com.