JOINT EMPLOYMENT – HOW TO DIAGNOSE THE ISSUES AND REDUCE THE PAIN

34th Annual Labor & Employment Law Conference

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TOPICS TO BE COVERED

- Common joint employment situations
- Why is it important to your business?
- Historical standard for joint employment
- *Browning-Ferris* – Facts and the new (current) test
- *Hy-Brand* – Facts and the new test
- Derailment/status of the new test

TOPICS TO BE COVERED (CONT.)

- Particular joint employment issues
  - Department of Labor – FLSA
  - FMLA – Primary and secondary employers
  - Franchisors/Franchisees
  - OSHA/MIOSHA issues
- Practical considerations to reduce the pain
  - Amending relationship and contract with joint employer
  - Attempts to isolate a subsidiary or affiliate

COMMON JOINT EMPLOYMENT SITUATIONS

- Use of temporary employment agency
- Contractor/sub-contractor
- Franchisor/Franchisee
- Parent/subsidiary/sister corporation interaction
- Employee leasing arrangement
- Predecessor/successor

WHY IS A FINDING OF JOINT EMPLOYMENT IMPORTANT TO YOUR BUSINESS?

- Legal implications
  - Exposure to alleged wrongdoing of a third party
  - Joint liability for ULPs
  - Joint liability for contract violations
  - Joint liability for violations of Federal and State statutes
- Union organizing implications
  - Risk of union attempting to organize third party employees who work in your facility
  - Union organizing campaigns to organize jointly-employed employees
  - Unions will try to bring deeper pockets to the table
  - Concerns over which employer will bargain about what issues

WHY IS A FINDING OF JOINT EMPLOYMENT IMPORTANT TO YOUR BUSINESS? (CONT.)

- Union organizing implications (cont.)
  - Information disclosures may disrupt leverage/relationship among contracting entities
  - Union can try to organize a discrete "jointly-employed" unit or a broader "mixed" unit
- "Innocent" party may end up with unanticipated employee costs and obligations
- Secondary pressure
  - Generally, primary employer protected

HISTORICAL STANDARD FOR JOINT EMPLOYMENT

- Joint employment found where two employers "share or co-determine" essential terms and conditions of employment
  - Actual control must be shown
  - Hypothetical unexercised control is not sufficient
- *TLI, Inc.* 271 NLRB 798 (1984)
  - Contract language establishing control not sufficient absent evidence the "joint employer" affected terms and conditions of employment
- Control among "joint employers" must be "direct and immediate" (to wit, hiring, firing, direction and supervision)

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, 362 NLRB NO 186 (AUGUST 27, 2015)

- Browning Ferris Industries (BFI) operates a waste recycling facility
- BFI subcontracts employees from Leadpoint, a staffing services company, to sort recyclable items inside the facility, clean screes, and performing housekeeping duties
- Leadpoint provided approximately 240 employees to BFI
- Union, which already represented approximately 60 direct BFI employees working on the exterior of the facility, filed a petition to represent the approximately 240 employees
- Union argued that BFI and Leadpoint were joint employers of those employees

BROWNING-FERRIS (CONT.)

- Modified the Joint Employer Standard to be:
  - Whether a common law employment relationship exists
  - Whether the potential joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining"

BROWNING-FERRIS (CONT.)

- Common law employment relationship:
  - Restatement (Second) of Agency: "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is **subject** to the other's control or **right** to control"
- "Sufficient control" includes:
  - Indirect control or control that is "limited or routine, or a reserved right to control the employee – regardless of whether control is actually exercised
    - Contract language establishing control is sufficient
- This represented a dramatic shift in the applicable standard for joint employment under the National Labor Relations Act

BROWNING-FERRIS (CONT.)

- Key indicators of joint employer status:
  - Controlling number of employees needed
  - Safety rules and standards
  - Production standards
  - Determining job duties
  - Instruction relating to means and manner of work
  - Training employees or creating employee training requirements
  - Indirect control of employee wages through commercial agreement
  - Retaining potential control over employment conditions reserved in commercial agreements
  - Retaining right to terminate relationship
  - Requiring employees follow rules or handbooks

HY-BRAND INDUSTRIAL CONTRACTORS AND BRANDT CONSTRUCTION CONTRACTORS, 365 NLRB NO. 156, (DEC. 2017)

- Hy-Brand, a general contractor specializing in building steel warehouses and other structures, and employs about 10 ironworkers, carpenters and masons
- Brandt performs public works and other construction projects, with 140 employees, who act as laborers, operators, ironworkers, carpenters, masons and drivers
- Five Hy-Brand employees and two Brandt employees went on strike and were subsequently discharged
- Complaint alleged Hy-Brand and Brandt were joint employers and that their discharge of the seven employees violated Section 8(a)(1) of the NLRA

HY-BRAND (CONT.)

- Board ruled that Hy-Brand and Brandt were joint employers… but
- Returned to the traditional joint employment test:
  - Board: There must be "proof that the alleged joint employer entities have actually exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine"
  - Indirect or potential control not enough

DERAILMENT/STATUS OF NEW TEST

- The December, 2016 decision in *Hy-Brand* was vacated by three Board members on February 26, 2017
  - Based upon alleged conflict of interest by the fourth NLRB member
  - NLRB general counsel chastised the Board members for excluding the fourth member from the decision vacating the ruling
  - Future status is unclear
- Appeal of *Browning-Ferris* to DC circuit is held in abeyance

PARTICULAR JOINT EMPLOYMENT ISSUES

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JOINT EMPLOYMENT AND THE FLSA

- Definition of employer continues to expand through case law
- Historically, Department of Labor has identified two likely scenarios for joint employment
  - Horizontal employment: Where employee has two (or more) technically separate but related associated employers
    - Example: Employee works for two restaurants that are separate but have the same managers and the managers jointly coordinate the scheduling of employee's hours so they can both benefit form the employee's work

JOINT EMPLOYMENT AND THE FLSA (CONT.)

- Vertical Employment: Where one employer provides labor to another employer and the workers are economically dependent on both employers
  - Example: When a business contracts with staffing agency to engage workers. The workers are the employees of the staffing agency, but in some situations, can also be considered employees of the company that contracted with the staffing agency.
- Potential cost of joint employer status: Wage and overtime liability together with liquidated damages and the employee attorneys' fees

JOINT EMPLOYMENT AND THE FMLA

- Vertical Employment: Where one employer provides labor to another employer and the workers are economically dependent on both employers
  - Key features:
    - Definition: Joint employment exists when an employee is employed by two (or more) employers such that the employers are responsible for compliance with the FMLA
  - Primary employer is responsible for:
    - Giving required notices to its employees
    - Providing FMLA leave
    - Maintenance of health benefits
    - Job restoration

JOINT EMPLOYMENT AND THE FMLA (CONT.)

- Secondary employer responsible for:
  - Accepting the individual upon return from the FMLA
  - Note: Secondary employer would also be prohibited from interfering with an employee's FMLA rights and also from discriminating against him/her for protected activities, even if the company is not otherwise a covered employer under the FMLA
- Determining whether an employer is a primary or secondary employer depends upon the particular facts of the situation. Factors to consider include:
  - Who has authority to hire and fire, and to place or assign work to the employee
  - Who decides how, when, and the amount that the employee is paid
  - Who provides the employee's leave or other employment benefits
- In the case of a temporary placement or staffing agency, the agency is most commonly the primary employer

JOINT EMPLOYMENT AND THE FMLA (CONT.)

- Employer coverage and employee eligibility under the FMLA
  - Employees who are jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility under the FMLA, regardless of whether the employee is maintained on one or both of the employers' payrolls
  - The employee's worksite is the primary employer's office from which the employee is assigned or to which the employee reports. However, if the employee has physically worked for at least one year at a facility of a secondary employer, then the employee's worksite is that location.

FRANCHISORS/FRANCHISEES

- A Franchise may be held responsible for actions of a Franchisee under Joint Employer Theory
  - Look to BFI standard for joint employment
  - McDonald's USA, LLC before the NLRB, initiated in 2014
    - Operational control vs. setting expectations and providing advice
    - Proposed settlement w/o admission of Joint Employment

FRANCHISORS/FRANCHISEES (CONT.)

- Responding to *BFI* decision, the Michigan legislature amended a number of employment-related state statutes to further define “employer” in the franchise context

- For example, Workforce Opportunity Wage Act, MCL 408.412(d)

  - (d) "Employer" means a person, firm, or corporation, including this state and its political subdivisions, agencies, and instrumentalities, and a person acting in the interest of the employer, who employs two or more employees at any one time within a calendar year. An employer is subject to this act during the remainder of that calendar year. Except as specifically provided in the franchise agreement, as between a franchisee and franchisor, the franchisee is considered the sole employer of workers for whom the franchisee provides a benefit plan or pays wages.

OCCUPATIONAL AND SAFETY HEALTH ISSUES

- OSHA (MIOSHA) becoming very active in joint employment
  - Broad scope of obligations to worker safety viewed as more effective/efficient
  - Initial (2013) focus on Temporary workers at Host facilities – published guidance on the division of health and safety obligations (e.g. training)
  - Recent (2015) proposed guidance to review franchisor/franchisee relationship for expanded joint employment liability for safety violations
- Michigan legislature amended definition of employer under MIOSHA to address Franchisors/Franchisees

PRACTICAL CONSIDERATIONS TO REDUCE THE PAIN

- Review key areas of relationship
  - Contract provisions
    - Key definitions
    - Wage control
    - Indemnity clause
  - Policies and procedures
    - Employee conduct and disciplinary rules
    - Safety rules and standards
  - Day-to-day interaction
    - Supervision and instruction
    - Production standards
    - Training

ISOLATING A PARENT, AFFILIATE OR SISTER CORP.

- Treat all as separate corporate entities
- Focus is on operational and corporate aspects of the business:
  - Separate officers and directors – overlap is dangerous
  - Maintain separate operational control
  - HR and "employment decisions" (i.e. pay decisions, hiring, firing, evaluations) to be made locally
  - Separate/tailored policies and rules – even if very similar
  - No sharing or exchange of employees
  - Employees of sub work only for sub and are paid by sub
  - Pay employees of parent or sister at same facility under separate payroll
  - Real or personal property leases in one name; specify no joint employment
  - Limit sharing of work for same customers/clients

ISOLATING A PARENT, AFFILIATE OR SISTER CORP. (CONT.)

- Accurately track credits and debits between sub/parent/sister corp.
- Adhere to corporate formalities
- Any leases or contracts (preferred) to clearly deny joint employment
- Best practice: Shared services contract (for billing, marketing, accounting and other services) shared with parent or sister corp.
- Keep financial records separate
- Parent/other subs must cede control – separation must be real and not just window dressing

QUESTIONS?

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THANK YOU

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