Federal Agencies Heighten Focus on Joint Employers as the Sharing Economy Expands

By Mary L. Knoblauch

The U.S. Department of Labor (DOL) recently joined the National Labor Relations Board (NLRB) to expand who will be considered a "joint employer" and therefore, responsible for violations of the laws these federal agencies enforce. Business owners of all sizes – especially those who participate in the sharing economy as well as franchisors and companies hiring workers through staffing agencies – need to pay close attention to both the NLRB's recent decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015) and an administrative guidance from the DOL issued Jan. 20, 2016. The message is clear from the NLRB and the DOL. Both agencies intend to "modif[y] the legal landscape for employers" as the NLRB stated in *Browning-Ferris* and take a broad stance on the concept of joint employment to hold more businesses liable under employment and labor laws.

In *Browning-Ferris Industries* (BFI), the NLRB set out a new and more expansive test to determine joint employer status for purposes of the National Labor Relations Act. BFI (the host employer) had a traditional staffing agreement with a staffing agency named Leadpoint who provided workers for a variety of tasks at a recycling facility owned by BFI. Leadpoint screened, tested, hired, compensated and disciplined its employees assigned to BFI and the staffing agency also provided some supervisory control of its employees at the BFI worksite. BFI assigned the work to be done, scheduled the hours of work, set productivity and safety standards, and had the right to reject any employee or "discontinue the use of any personnel for any or no reason." A local union filed a petition to represent Leadpoint's employees and claimed that BFI was a joint employer with Leadpoint and should therefore, be required to engage in collective bargaining with the Leadpoint employees.

In ruling that BFI was the joint employer of Leadpoint's employees, the NLRB overruled its long-standing requirement that a potential joint employer's control must be exercised directly and immediately. The NLRB reasoned that its joint employer standard was "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships." The NLRB's new standard is that indirect control or merely possessing control through the terms of a staffing contract is sufficient for joint employer status. The NLRB concluded that BFI had indirect control over both the wages paid to Leadpoint employees and the discipline of these employees. This was central to the NLRB's ruling that BFI was a joint employer of Leadpoint's employees. BFI recently appealed the NLRB's decision to the U.S. Court of Appeals for the D.C. Circuit and the case may very well end up in the U.S. Supreme Court.

As it stands now, the NRLB's holding is a setback for businesses that rely on contract workers as well as franchisors. These companies could find themselves alongside staffing companies or franchisees at the bargaining table, or liable for unfair labor practices based on incidents not involving their own employees. In particular, the NLRB's decision does not bode well for McDonald's and its franchisees, who are facing multiple unfair labor practice charges that they violated the NLRA rights of workers.

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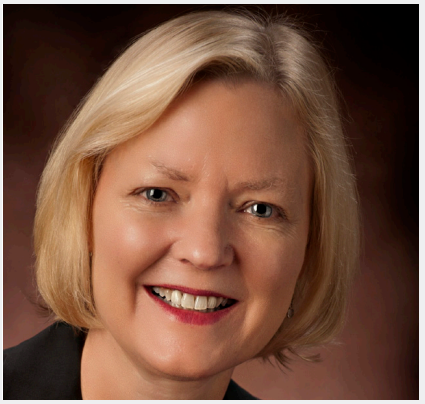

An NLRB administrative law judge will be determining whether McDonald's is a joint employer with its franchisees for purposes of NLRB liability.

The DOL's Jan. 20, 2016 guidance on joint employment is akin more to a public alert to employers. The DOL's new guidance covers a range of organizational and staffing models, such as third-party management companies, independent contractors and staffing agencies. For the first time, the DOL analyzes joint employment in "vertical" arrangements, when one company contracts with another company and "horizontal" arrangements, when one worker is employed by two related companies. Hundreds of DOL investigations each year address the question of joint employment. This new guidance provides employers with a road map to the aggressive stance the DOL will be taking on joint employment.

In response to the heightened focus of the NLRB and DOL, staffing companies and host employers need to do two things. First, they need to carefully review their agreements. The agreements should have unequivocal statements that the host employer does not have the authority to direct, control, supervise or otherwise influence employment decisions relating to workers provided by staffing companies. Second, the host employer must actually avoid exercising control over contract workers. In particular, the host employer needs to leave all disciplinary decisions up to the staffing company. In terms of wages, the host employer needs to avoid any control over the wages earned by the staffing company's employees.

The nature of the work performed is also significant. Ideally, a host employer should avoid contracting for work that is similar to the duties performed by the host employer's employees.

From the host employer's perspective, broad indemnification provisions are even more critical now to avoid the significant expense involved in defending a joint employer claim. The agreement should also contain an affirmative representation that the staffing company will comply with all employment and labor laws. These same recommendations should be followed by franchisors.

With the new emphasis by federal agencies on joint employment liability, companies need to be diligent about the terms of their contracts with staffing companies. Equally important, on a day-to-day basis, companies need to carefully avoid exercising control over the terms and conditions of another company's employees. This two-step approach can help minimize the risk of a federal agency finding joint employment liability.