

Duff on Hospitality Law

Sharing is Daring Under Browning-Ferris

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From franchisers and companies hiring workers through staffing agencies, to participants in the so-called “sharing economy,” companies and individuals today enter into a variety of contractual arrangements to reduce costs and to maximize available capital, flexibility, talent and efficiency in delivering goods and services. The recent decision of the National Labor Relations Board (“NLRB” or “Board”) in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), may change how many of these relationships function, and even, whether some of them are now too risky for some participants.

Under *Browning-Ferris*, the NLRB has shifted the joint-employer standard and increased the risk that employers could be liable for claims and actions against the entities with whom they contract. In the decision, the Board “restated” that it may find that “two or more entities are joint employers of a single work force” if they essentially share or co-determine matters that govern the essential terms and conditions of employment. After restating this general principle, however, the NLRB proceeded to expand the standard for assessing joint employer status, and to overrule legal precedent it had been following for the past 30 years.

The case involved Browning-Ferris Industries, which operates a recycling facility and staffs its operation with about 60 of its own employees and an additional 240 workers contracted through a staffing agency, Leadpoint Business Services. When a local union filed a petition to represent Leadpoint’s employees, it argued that Browning-Ferris was a joint employer with Leadpoint, and should, therefore, be required to engage in collective bargaining with the union with respect to the Leadpoint workers.

The Board supported the union’s argument, holding that the Board would no longer require that an employer actually exercise authority over workers’ terms and conditions of employment and that the mere possession of such authority was sufficient to make an employer a joint employer. Conditions of employment include such issues as hiring, firing, wages, scheduling, discipline, supervision and direction of work. The Board also overturned its prior requirement that a joint employer’s control must be exercised directly and immediately. Control reserved in a contract or exercised indirectly, through an intermediary, may now establish joint-employer status.

Why Does *Browning-Ferris* Matter?

Browning-Ferris does not mean that every employer who uses contract labor will now be found to be a joint employer. In fact, other agencies besides the NLRB apply varying joint-employer standards under particular statutes and regulations, including Title VII of the Civil Rights Act, which addresses issues of discrimination, and the Fair Labor Standards Act, which addresses wage and hour issues. Those agencies and the courts may or may not be influenced by the NLRB decision.

But a company should care about *Browning-Ferris* and its implications for joint-employer status if it contracts with other entities, such as staffing agencies, subcontractors and franchisees, to deliver, develop or manufacture certain of its goods and services or perform functions like those typically performed by the company's employees. Under the new test, if the contract reserves the right to control or specify any of the terms or conditions of employment, even if the company does not exercise those rights, there is now a real likelihood that a company could be a joint employer, at least for collective bargaining purposes.

Hospitality is an industry that should be particularly attentive to the NLRB decision because many hotel operators supplement their workforce with, for example, temporary banquet staff, valet attendants, cleaning crews, or engineering staff for remodels and upgrades. Many owners seek to control some hiring and staffing decisions of the management company. Moreover, most hotels in the U.S. are operated by franchisees of the brands. In an effort to control quality, service, and uniform standards, operators or franchisors may wish to have input on which workers are hired or assigned to their worksites, staffing levels, or how work is performed. Such control may be reserved in the contract even if not enforced, and the NLRB has clearly stated that the mere reservation of these rights is sufficient to find a company is a joint employer.

To reduce the possibility of joint-employer status and liability, companies should consider the following suggested best practices when franchising or hiring a staffing agency, contractor or vendor to provide employees:

- Avoid contract language that reserves for the company any control over franchisee, contractor, staffing agency or vendor workers, and their terms and conditions of employment. Disclaim such control when possible.
- Refrain from actually exercising control over contract workers. This may be challenging for a company that wants to ensure its standards are upheld and that it maintains compliance with applicable laws and rules, but such control puts the company at risk of being a joint employer. Although exercising control is unnecessary for the NLRB to find a company is a joint employer, it certainly may still do so where a company *is* actually exercising control, even if it disclaims a right to do so in its contract.

- Avoid contracting for work that is similar to the duties performed by the company's employees.
- Require staffing agencies or other contractors to provide a written agreement that states that they will comply with all federal, state and local labor rules. This may help insulate the company financially, but it will not prevent the company from having to endure costly and time-consuming litigation or government investigations if the staffing agency, vendor, or contractor has a compliance issue and the company is implicated as a joint employer.
- Focus on the contracted company or agency's outcomes rather than its means to achieve them.
- Minimize contact with a contracted company or agency's non-supervisory employees. Avoid providing direction, materials, training or benefits to contract workers unless necessary.
- If the contracted company or agency's workers are represented by a union, do not participate or retain the right to participate in collective bargaining or in administration of the collective bargaining agreement.

Tags: Browning-Ferris Industries of California, collective bargaining, contract labor, Fair Labor Standards Act, franchisees, franchisers, hotel operators, Inc., joint-employer standard, joint-employer status, National Labor Relations Board, sharing economy, staffing agencies, Title VII of the Civil Rights Act of 1964, union