Temporary Staffing Agencies & User Companies Deemed "Joint Employers" By the NLRB

Labor & Employment Law Update

By Jeffrey Risch on August 28, 2015

As we anticipated and previously discussed, on August 27, 2015, the National Labor Relations Board (NLRB) issued its ruling in the closely watched Browning-Ferris Industries of California, Inc. (BFI) case (Case 32-RC-109684). In rejecting over 30 years of precedent and the underlying Administrative Law Judge's ruling on the issue, the NLRB's pro-union majority established a new standard for determining joint-employer status. While the decision related to a company's engagement of a subcontractor supplying workers, the NLRB's new joint-employer standard will certainly have a direct impact on franchisor/franchisee relationships, temporary staffing and leased employee business models as well as all aspects of employment outsourcing. In short, it lays the groundwork to overturn other past NLRB decisions and will, if left unchecked, alter how two or more independent businesses conduct business in the United States.

The underlying case: Teamsters Local 350 filed an organizing petition seeking to represent employees of Leadpoint who were placed at BFI's facility. BFI and Leadpoint objected to this organizing attempt and ultimately prevailed before the NLRB's assigned Administrative Law Judge. The ALJ, in applying decades of precedent, ruled that BFI and its subcontractor, Leadpoint, were not joint employers because BFI did not share "immediate and direct control" over the terms and conditions of Leadpoint's employees working at the BFI facility. The Teamsters appealed the decision and urged the NLRB to adopt a new standard to allow the representative process to move forward. The NLRB's General Counsel advanced the Teamsters' position as well as a host of pro-union organizations — once invited to do so by the NLRB.

The new standard: According to the NLRB's majority, two or more entities should be deemed joint employers of a single workforce under the Act when (1) they are both employers within the meaning of the common law; and (2) they directly or indirectly share or codetermine essential terms and conditions of employment. In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the NLRB will now consider whether an employer has exercised or reserved ANY control over terms and conditions of employment (directly or indirectly). Suffice to say… it's now a very

low standard. According to the majority, the new standard is designed "to better effectuate the purposes of the Act [National Labor Relations Act] in the current economic landscape." However, make no mistake… this means exactly what the union, pro-union organizations and the NLRB's own General Counsel advanced — which was essentially: if business conditions make it more difficult for unions to organize workers or collectively bargain, then the standards must be lowered to allow such.

Board Chairman Mark Gaston Pearce was joined by Members Kent Y. Hirozawa and Lauren McFerran in the majority opinion; Members Philip A. Miscimarra and Harry I. Johnson III dissented. Interestingly, and fodder for future legal challenges, the 2-member dissent stated: "…our colleagues have announced a new test of joint-employer status based on policy and economic interests that Congress has expressly prohibited the Board from considering."

The impact: Two separate and distinct legal entities could now be embroiled with one another's alleged unfair labor practices, union organizing drives, strike activities and picketing disputes as well as mandatory bargaining obligations. Further, this decision lays the groundwork for the NLRB to overturn other key decisions and continue its recent actions to provide unions with life-support. For instance, in July 2015, the NLRB invited briefs in the Miller & Anderson, Inc. matter (05-RC-079249), to help determine if the NLRB should overturn its decision in Oakwood Care Center (343 NLRB 659), which disallowed inclusion of solely employed employees or jointly employed employees in the same unit absent consent of both employers. Have no doubt, the writing is already on the wall here. Additionally, this decision will certainly be used by the EEOC, U.S. DOL and other federal agencies in their ongoing efforts to increasingly regulate the workplace.

Conclusion: Take action now! Don't wait. First, immediately review and analyze all written agreements in place between your organization and any 3rd party. Whether you are a franchisor, franchisee, user company, general contractor, subcontractor, supplier company, temporary staffing firm…. It does not matter. Review all agreements through the lens of the NLRB and its bent towards finding joint-employer status. Second, carefully review and evaluate actual supervisory functions and oversight, training requirements and other day-to-day activities surrounding employee relations (of your own direct employees and 3rd party employees). Finally, perhaps its time to sit down and determine whether your current business model needs to be tweaked or modified in light of these disturbing developments.