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NEWSLETTERS

A New Frontier: The Changing Landscape Of Joint-Employers

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In the past year, there have been two noteworthy and disappointing developments involving two separate federal agencies – the National Labor Relations Board (NLRB) and Department of Labor (DOL) – that have broadened the definition of “joint-employers.” “Joint-employment” is a legal doctrine that can impose liability on two or more companies that employ the same person(s) (*e.g.,* staffing companies and their end-users) for employment related claims brought by employees.

In light of the fact the doctrine often is invoked in situations where companies are using staffing agencies to supply their labor and/or augment their workforce, the ramifications of these developments will have a significant impact on industries that utilize staffing agencies to help supply labor. As we all know, third-party logistic providers and warehouse operators extensively use staffing companies and temporary labor, so it is critical that the warehouse and logistics industry understands these new developments and evaluates ways to mitigate their impact.

NLRB Tightens Its Joint Employer Standard

In 1984 the NLRB issued a decision known as *TLI, Inc.* that set a relatively employer-friendly standard in terms of when it would find two or more companies to be joint-employers. In that case, the Board established that joint-employment would *only* be found when *both* entities *actually* exercised *direct* or immediate control over the employment of the same workers. For example, in the warehousing context, a warehouse employer would be deemed a joint-employer of a staffing agency’s workers *only* if it actually controlled decisions like “hiring, firing, discipline, supervision, and direction” of the staffing company’s workers in a direct or immediate manner.

A 2015 NLRB decision, however, captioned *Browning-Ferris Industries of California, Inc.*, significantly altered that decades-old precedent. *Browning-Ferris* involved a staffing company and an end-user. There, the contract between the end-user and staffing agency was not intended by either party to create a joint-employment relationship with respect to the staffing company’s workers. To that end, the contract contained a customary disclaimer and also vested the staffing agency with nearly all hiring, firing, and control over its supplied workers. Despite that language, the NLRB found that the two entities were joint-employers over the supplied employees. In coming to that conclusion, the NLRB abandoned its long-standing joint-employer test and set forth a new one. The NLRB found that the contract in *Browning-Ferris* allowed the employer to reserve control over certain terms and conditions of the supplied workers’

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employment, such as a reserved right to reject a temporary hire and set the hours of the workforce as a whole. Though minimal, this was enough, in the NLRB's view, for the companies to be joint-employers. Thus, the NLRB's new standard is that *reserved* control of terms and conditions of employment can be sufficient for finding joint-employment – as opposed to the prior test which required *actual* control.

On its website, the NLRB is summarizing its new test for joint-employment as follows:

The Board applies long-established principles to find that two or more entities are joint employers of a single workforce if (1) they are both employers within the meaning of the common law; and (2) they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the Board will – among other factors – consider whether an employer has exercised control over terms and conditions of employment *indirectly* through an intermediary, or whether it has *reserved* the authority to do so. (Emphasis added)

In short, *reserved* control now potentially is enough for a joint-employer finding by the NLRB.

In changing this standard, the NLRB continued its now-common overreach and has complicated employment arrangements like those involving staffing agencies. Indeed, to the extent a staffing company and its end-user are found to be joint-employers, *both* entities could be liable for any NLRB charges filed against either company that relate to the shared employees. Further, to the extent the employees at issue ever formed a union, *both* entities likely would have an obligation to collectively bargain with the workers over their terms and conditions of employment – a very costly proposition.

DOL Issues New Administrative Interpretation on Joint-Employment

On the heels of the NLRB's revised joint-employer standard, the DOL's Wage and Hour Division issued a new "Administrator's Interpretation No. 2016-1" ("AI") on January 20, 2016 that revises its test for joint-employer status under the federal employment laws within its control, most notably the Fair Labor Standards Act (FLSA). Following the NLRB's lead, the DOL has made it easier for joint-employment relationships to be found. Moreover, the AI explicitly states it is targeting specific industries, *including the warehouse/logistics industry and the staffing industry*.

The DOL's AI focuses in large part on what it calls "vertical joint-employment" relationships. According to the DOL, a vertical joint-employment relationship occurs when an intermediary employer is under contract to provide some service – like workers – to another employer. Under applicable regulations and prior guidance, the DOL previously only found joint-employers in this context under three discrete scenarios:

1. Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees;
2. Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

3. Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

The AI, however, announced a more lenient "test" for evaluating joint-employment within so-called vertical joint-employment relationships.

Specifically, the AI announced that the DOL will use an "economic realities test" that does *not* focus solely on the control that a possible joint-employer has over an employee but rather centers on whether an employee is "economically dependent" on the potential joint-employer. A number of factors are considered by the DOL under this new test, including the amount of control the employer has over the working conditions and the work performed by the employees; the duration of the relationship between the company and employees at issue; the nature of the work being performed and its importance to the company; the location where the work is being performed (*i.e.,* whether it is on the company's premises); and others. The new, laxer standard set forth by the DOL likely will find many more joint-employers within the industries it is targeting compared to prior years.

A finding of joint-employment by the DOL imposes significant risks on companies. Indeed, aside from having joint liability potentially imposed on two or more employers for wage-based and other DOL-related claims, the number of hours worked by an employee during any given week for each joint-employer can be aggregated when evaluating whether overtime obligations are triggered (under the FLSA, weekly overtime obligations kick in for any time worked over 40 hours in a week). For example, assume a warehouse is using a staffing company to augment its workforce and the supplied employees are working 35 hours per week at the warehouse and then another 10 hours per week separately for the staffing agency. While employees would not be entitled to weekly overtime payments based on the 35 hours worked at the warehouse, the additional 10 hours worked separately for the staffing company would push them over the threshold and entitle them to overtime pay for that week.

What Your Company Can Do Now to Mitigate the Impact

The new joint-employer rules promulgated by the NLRB and DOL make the employer-staffing agency relationship more complex; but it does *not* mean you need to shy away from these arrangements. Instead, you should to be vigilant by taking steps to ensure your staffing agency relationships are constructed in a way that will mitigate the chances that a joint-employment relationship will be found under the new standards and/or abate the risks associated with being found to be a joint-employer. Options to consider include:

- To the extent possible and practical, ensure any contract clearly defines the staffing company as having direct and exclusive control over the working conditions of the workers and refrain from your company having any significant "reserved control." Of course the NLRB, DOL, other administrative agencies, and courts will look at the realities of the circumstances and not just the contract, so it is equally important to ensure your company is not controlling the supplied workers' terms and conditions of employment.

- Include a "disclaimer" in any contract that clearly identifies the staffing company as the "employer" and state that the agreement is *not* intended to create a joint-employer relationship. While certainly not dispositive, this is potentially helpful evidence in any future litigation or administrative hearings.

- Set defined periods of assignments for workers being supplied by staffing companies. To the extent supplied workers are at your site for many months, years, or on an indefinite basis, that could lead to a finding of joint-employment – especially by the DOL under its economic realities test.

- Include indemnification language in any contracts with staffing agencies that requires reimbursement for any monetary liability that has been imposed on your company for the acts or omissions of the staffing agency.

- Ensure that any staffing company you utilize is a reputable company engaging in sound, lawful employment practices. By choosing a solid business partner, you greatly reduce the risks associated with a liability finding for an alleged unlawful practice/act.

Evaluating these and other options can help mitigate the risks the business community now faces in these areas. It's a new frontier and more complicated out there than ever on the employment front, but with proper analysis and planning you can put your company in a strong position in the face of the ever-changing rules on joint-employment.

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