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The Evolving Joint Employer Concept and the NLRB

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Whether an employer is subject to joint employer liability depends on many factors. Does the case deal with a parent-subsidiary relationship? A purported independent contractor situation? A contractor/subcontracting relationship? Two separate companies with common management? A franchisor/franchisee relationship? One must then decide which factors are relevant in determining whether a joint employer relationship exists. Add to the mix the many types of cases where a court would need to determine whether joint employment is present, such as in breach of contract, Fair labor Standards Act (FLSA), Title VII or under the National Labor Relations Act (the "Act"). It is abundantly clear that this area of law is complex, and the issue is of significant importance to both employers and employees. For example, being designated a joint employer under the Act can mean the putative employer is subject to unfair labor charges and open to being included in a representative election and the unionization of its workforce.

The National Labor Relations Board (the "Board") is the tip of the spear promoting a more expansive way to evaluate whether an employer is indeed a joint employer. The impact of the Board's efforts goes far beyond the typical labor law dispute under the Act, and may eventually redefine the employer-employee relationship in other areas of the law. This evolution is in its early stages, but if the Board is ultimately successful in achieving its goal, employers will have a new set of obligations that they never thought would be imposed on them *vis a vis* workers they never viewed as employees.

What Is a "Joint Employer?"—A Brief Overview

The joint employer doctrine's history is not as long as one might think. The first time the U.S. Supreme Court used the words "joint employer" was in a 1941 NLRB case.[1] The first Second Circuit case to use the term in an employment case was in 1962.[2] The New York State Supreme Court first examined a joint employment issue in 1953, in connection with a decision by the Workman's Compensation Board.[3]

One of the first statutes to impact the joint employer analysis was the Labor Management Relations Act of 1947 (LMRA), better known as the Taft-Hartley Act. The LMRA specifically excluded "independent contractors" to ensure that the Board and the courts applied general agency principles when distinguishing between employees and independent contractors. Invariably, in such cases courts have looked to traditionally employed common-law agency concepts in joint employment cases where courts assess the amount of control the putative employer has over the worker.[4] However, in a 1961 FLSA case, the Supreme Court held that an entity that suffers or permits an individual to work may, as a matter of "economic reality," function as the individual's employer. In his opinion, Justice Douglas made it clear that "'economic reality' rather than 'technical concepts' [was] to be the test of employment."[5]

The "economic reality test" was born. After some refinement by the courts, the test came to include inquiries into: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[6] In FLSA matters, it has long been recognized that no one factor standing alone is dispositive. The "economic reality" test encompasses a "totality of circumstances" approach—any relevant evidence may be examined so as "to avoid having the test confined to a narrow legalistic definition"[7]

In a 2003 FLSA case involving subcontracting, the Second Circuit delineated a revised test to determine whether an employer was a joint employer. The factors were: (1) whether the putative employer's premises and equipment were used for the plaintiffs' work; (2) whether the company which was the immediate employer had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to the putative employer's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the putative employer or its agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the putative employer.[8]

Where independent contractor status is at issue in a FLSA matter, the employer's identity is also relevant. In such cases, the Second Circuit has applied a different and more expansive test, examining (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.[9]

In the Title VII context, the Second Circuit has stated that a four-part test developed by the Board is the appropriate guide for determining when parent companies may be considered the employer of a subsidiary's employee. This test analyzes the (1) interrelation of operations; (2) centralized control of labor operations; (3) common management; and (4) common ownership or financial control with the focus on "centralized control of labor relations."[10] From these examples it is clear that

the courts continue to outline partial bright-line tests to provide as much guidance as they can on the issue.

As far as the Board is concerned, a pair of NLRB 1984 rulings originally set the standard for what constituted a joint employer for purposes of enforcement of the Act. *Laerco Transportation* and *TLI, Inc.* held that the Regional Director correctly ruled that joint-employer status is established when there is "a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[11] That ruling was later interpreted by the Board to require "direct and immediate" control by the putative employer over employment matters.[12]

There is no question that courts have been guided by Board decisions in connection with joint employment issues, and have applied those concepts to other cases when joint employment is at issue. Unquestionably, what the Board does today will influence the courts, not merely in terms of their approach to appeals from Board decisions, but also in other joint employer cases.

As for the Board itself, the definition of "joint employer" is significant. As stated, it affects collective bargaining. Instead of allowing for larger collective bargaining units and the power of numbers they provide, a more narrow definition of a joint-employer limits opportunities for unionization—potential members are splintered among hundreds of small companies. As the Board is charged with investigating and prosecuting unfair labor practices under the Act, employers who believed they had no involvement with certain terms and conditions of employment are suddenly and potentially liable for violations. Accordingly, Board decisions on this issue are poised to have far reaching implications.

The Board's Gambit: *Browning-Ferris* and the McDonald's Cases

In the recent case of *BFI Industries of California, Inc. and FRR-II, LLC d/b/a Leadpoint Business Services and Local 350, International Brotherhood of Teamsters,* the Board considered whether it should adopt a different standard for what constitutes a joint employer in the context of a subcontracting case. Petitioner, Local 350, International Brotherhood of Teamsters ("Local 350") sought to represent all full time and regular part-time employees jointly employed by FRR-II, LLC d/b/a Leadpoint Business Services ("Leadpoint"), a temporary staffing agency, and BFI Industries of California, Inc. ("BFI"), the client to whom Leadpoint supplied employees. The Regional Director rejected Local 350's claim that Leadpoint and BFI were joint employers. On appeal, the sole issue before the Board was whether BFI jointly employed Leadpoint's workers.[13]

Local 350 argued that while the facts supported a finding that the employers were joint employers even under the existing standard, the Board needed to adopt a broader standard to effectuate the purposes of the Act and to conform with prior case law and "industrial realities." Local 350 maintained that "require[d] the Board to consider not merely the indicia of control exerted over the employees by each employing entity, but also the relationship, and the extent of control as between the two employing entities," which, it concluded, "require[d] consideration of indirect control." From Local 350's standpoint, the Board's narrow view of employment "ma[de] even less sense in our current economy" where "the modern worker is awash in a sea of multi-layered and dependent relationships, and the current joint employment standard leaves him or her bereft of meaningful resort to the protections and processes of the Act."

BFI's opposition was based on the argument that the proposed joint employer standard was, in reality, no standard at all and thus failed to satisfy due process. BFI posited that the "standard" argued by the union and the General Counsel provided no guidance for businesses on how to structure their operations to provide certainty as to whether they were, or were not, joint employers under the Act. Using its own version of the "industrial realities" standard, BFI and Leadpoint pointed out that business relationships typically involve agreements that indirectly, but necessarily, impact the terms and conditions of employment. They argued that service contracts often involve significant control by the customer over the service provider, and when services are performed on the customer's property the amount of control is even greater. Moreover, BFI reasoned that the standard proposed by Local 350 would violate the Act by failing to give ordinary meaning to the term "employee," namely, that "an employment relationship does not exist unless the worker is directly supervised by the putative employer." Finally, BFI argued that adoption of the new standard would violate the Taft Hartly Act. Taft Hartly directed the Board to apply common law agency principles, requiring "a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."

On August 27, 2015, by a 3-2 margin, the Board issued its decision citing that "the diversity of workplace arrangements in today's economy has significantly expanded," pointing to the growth in the temporary help services industry from 1.1 million workers in 1990 to 2.87 million workers in August of 2014.[14] The Board noted that past decisions narrowed the joint employer definition and said it would follow a common law agency test it argued was supported by the Supreme Court's decision in *Boire v. Greyhound*.[15] It stated, "the Board may find that two or more entities are joint employers of a single workforce if they are both employers within the meaning of the common law, and if they share or co-determine those matters governing the essential terms and conditions of employment." The Board also remarked it would no longer require a joint employer to not only possess the authority to control employee's terms and conditions of employment but also to exercise that authority and do so directly, immediately, and not in a "limited and routine manner."

Thus *Laerco and TLI* as well as several other prior Board decisions were overruled. Under this new test, if the employer can "[r]eserve[] authority to control terms and conditions of employment, even if not exercised," indirect control, even through an intermediary, would suffice to establish a joint employer relationship.

The union subsequently prevailed in an election, with the Board certifying it as the collective bargaining representative of those employees. Browning-Ferris then refused the union's request to bargain. An unfair labor practice charge resulted, alleging that the refusal to bargain was unlawful. On January 12, 2016, the Board found that BFI and Leadpoint, as joint employers, had violated the Act. On February 26, 2016, BFI appealed to the District of Columbia Court of Appeals. In its "Statement of Issues to Be Raised" Browning-Ferris contended that the Board's new joint employer standard was defective for several reasons: (i) it was contrary to the definition of "employee" established by Congress in the 1947 Taft-Hartley amendments; (ii) improperly relies on a "economic realities" standard; (which was prohibited by Congress in the 1947 Taft-Hartley amendments); (iv) fails to promote stable collective bargaining relationships as required by the Acts; and (v) it is arbitrary and capricious because it is "hopelessly vague."

In July, 2014, the NLRB turned its attention to the joint employer concept in connection with franchising. It's general counsel authorized the filing of consolidated complaints against multiple McDonald's franchisees and their franchisor, McDonald's USA LLC ("McDonald's"), as joint employers. On December 19, 2014, the Regional Directors from six Regions issued Complaints or Consolidated Complaints based on charges that a multitude of franchisees were joint employers under the Act. Sixty-one separate unfair labor practice charges were filed between November 28, 2012 and September 22, 2014, involving 21 separate and distinct Independent Franchisees and a single McDonald's-owned restaurant. The NLRB alleged 181 unrelated alleged violations against McDonald's occurring at 30 separate restaurants, each with its own ownership, management, supervision, and employees, located in five states, and spanning the entire continental United States.[16]

On December 19, 2015, the NLRB's General Counsel commenced litigation alleging that McDonald's USA and its franchisees violated the rights of employees working at its restaurants around the country by, *inter alia*, "making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions, including participating in nationwide fast food worker protests about their terms and conditions of employment."[17] The Board's General Counsel transferred the cases from 5 Regions to the Regional Director for Region 2, here in New York on January 5, 2015. The following day the Regional Director for Region 2 consolidated the transferred cases for a hearing with previously consolidated cases from Region 2.

In this current McDonald's case, the focus is on franchising and the "economic realities" attendant to that business relationship. As a result, McDonald's (and its individual franchisees) must defend these 61 unfair labor practice charges involving the 31 franchisees from 30 different locations in one proceeding.

On March 9, 2016, the NLRB's counsel argued that McDonald's uses business consultants—who monitor staffing and business practices and conduct periodic reviews of implementation of those practices—to exert control over its franchisees. Pointing to McDonald's operating manual and point-of-sale and scheduling systems, the NLRB concluded that franchisees' actual control over the terms and conditions of their workers' employment is limited. NLRB counsel viewed McDonald's as the true puppet master, arguing that McDonald's set the times in which a burger should be served, the job classifications of workers, and instituted a uniform computer scheduling system across the restaurants. It thus concluded that McDonald's co-determines the working conditions of franchisees' employees thereby making it a joint employer under the NLA. McDonald's made seven requests to obtain special permission to appeal the Administrative Law Judge's procedural rulings in connection with subpoenas served by both sides, including a severance motion it filed, arguing that the joint employer allegations alone could not justify consolidation where the unlawful conduct alleged in each charge is separate and distinct, involving individual restaurants, separate actors and wholly unrelated entities. McDonald's posited that the defenses to the joint employer allegations as well as the underlying unfair labor practice charges will invariably vary from case to case. Thus far, the motion practice has not found favor with the Administrative Law Judge or the Board.[18]

McDonald's counter argument is that it is essentially doing its due diligence as a franchisor. It further stated that the company does not tell business owners whom to hire or when to schedule its employees. Rather, its counsel maintained that McDonald's exerts the level of control that any franchisor would expect in order to maintain a uniform customer experience across all franchisees, adding, "[a]ll franchisors, if they're successful, do precisely the same thing."

At this point, the NLRB's general counsel has not outlined in detail the specifics supporting his view that McDonald's USA should be deemed a joint employer. However, assuming an approach consistent to that applied in *Browning-Ferris*, the impact of what the Administrative Law Judge and, eventually, what the Board decides, cannot be understated. In addition to holding franchisors liable for unfair labor practices committed by franchisee owners across the country, the franchisors may be responsible for Workers' Compensation claims, unemployment insurance, OSHA compliance, wage and hour violations, and liability under state and federal discrimination statutes.

Potential Impact of an Evolving Joint Employer Standard

While far from settled, it is clear that courts were predisposed to identifying narrow factors in order to make the question of joint employment easier to determine. Courts often attempt to establish tests that can measure evidence with some precision in order to effectuate predictable outcomes. Predictability can serve both the courts and the litigants. If anything can be drawn from the Board's decision in *Browning-Ferris* and its stated goal of finding McDonald's to be a joint employer, it is that the NLRB eschews a formulaic approach to the issue. Almost any aspect of the relationship between the putative employer and the worker was fair game. In *Browning-Ferris*, while dismissing the dissent's position that the Board is reverting to an "economic reality test" rejected by the Supreme Court and Congress, the majority's commentary on the "diversity of workplace arrangements in today's economy" and its citation to statistics or the growth of the temporary help industry over the last two decades, seem to support the dissenters' view regarding the NLRB's motivation. Nevertheless, the Board's approach will most certainly make it easier for workers to maintain viable cases (if not win them outright) where they allege joint employment. Where in the past such cases might have been ripe for dismissal, they now may have new, longer, and more fruitful lives.

Moreover, there is no reason to think that only parties before the Board will be impacted. Indeed, the U.S. Department of Labor issued an "administrator's interpretation" on January 20, 2016, discussing the distinction between employees and independent contractors under the Fair Labor Standards Act. It emphasized the importance of whether an individual's services are an integral part of the company's business, and downplayed the importance of whether the business actually controls an individual's work—sounding very similar to the Board's approach in *Browning-Ferris*. It seems likely it will argue this in the McDonald's case.[19] Also, in a recently discovered draft of an Occupational Safety and Health Administration's (OSHA) internal memorandum, OSHA investigators advised that "a joint employer's standard may apply where the corporate entity exercises direct or indirect control of the work conditions, has the unexercised potential to control working conditions or based on economic realities."[20] The Board's actions in *Browning-Ferris* and the McDonald's case foreshadow how the court may view the issue of joint employment in a myriad of other types of cases, leaving employers and employees uncertain as to what the future holds.

Endnotes

1. *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 61 S.Ct. 908 (1941).
2. *Empresa Hondurena de Vapores, S. A. v. McLeod*, 300 F.2d 222 (2d Cir. 1962) judgment vacated 372 U.S. 10 (1963).
3. *Diaz v. Ulster Vegetable Growers Co-op.*, 282 A.D. 426, 123 N.Y.S.2d 321 (3d Dept 1953).
4. *Frankel v. Bally, Inc.*, 987 F.2d 86 (2d Cir. 1993).
5. *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961) citing United States v. Silk, 331 U.S. 704, 713, 67 S.Ct. 1463, 1468 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729, 67 S.Ct. 1473 (1947).
6. *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), *citing Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).
7. *Herman v. RSR Sec. Services Ltd.*, 172 F.3d 132 (2d Cir. 1999), *citing See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473 (1947) (whether an employer-employee relationship exists does not depend on isolated factors but rather "upon the circumstances of the whole activity").
8. *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003).
9. *See Superior Care*, 840 F.2d 1054 (2d. Cir. 1988) (citing, *inter alia, United States v. Silk*, 331 U.S. 704, 716, 67 S.Ct. 1463 (1947)).
10. *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235 (2d Cir.1995), *citing Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256, 85 S.Ct. 876 9 (1965) (per curiam).
11. *TLI, Inc.*, 271 N.L.R.B. 798 (1984), *enfd. mem.*, 772 F.2d 894 (3d Cir. (1984); *Laerco Transportation*, 269 NLRB 324 (1984).
12. *Airborne Express*, 338 N.L.R.B. 597 (2002); *Clinton's Ditch Co-op Co., Inc. v. N.L.R.B.*, 778 F2d 132 (2d Cir. 1985).
13. *BFI Industries of California, Inc.* and *FRR-II, LLC d/b/a Leadpoint Business Services* and *Local 350, International Brotherhood of Teamsters*, 32-RC-109684.
14. *Id.*
15. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964).
16. *McDonald's USA, LLC, a joint Employer, et al. and Fast Food Workers Committee and Service Employees International Union, CTW, CLE et al.* Cases 02-CA-09893 et al, 04-CA-125567, *et al.*, 13-CA-106490, *et al.*, 20-CA-132103 *et al.*, 25-CA-114819 *et al.*, and 31-CA-127447, *et al.*—Board Decision January 8, 2016.
17. https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against.
18. *Id.* Board Decision March 17, 2016.
19. U.S. Dep't of Labor, Wage and Hour Division Administrators Interpretation No. 2016-1 (www.dol.gov/whd/flsa/Joint_Employment_AI.htm.
20. http://edworkforce.house.gov./uploadedfiles/osha_memo.pdf.

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