Possible Expansion of Joint Employer Status Would Impact Businesses With Contracted Workers

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As businesses are increasingly using labor contractors and staffing agencies to supply workers, the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC) are seeking to expand the definition of a "joint employer," to ensure companies are held responsible for the labor and employment practices applied to such contracted workers. If successful, this effort will have significant implications for businesses that subcontract or outsource any function.

In a case currently pending before the NLRB, *Browning-Ferris Industries of California, Inc. v. Sanitary Truck Drivers and Helpers Local 350*, Case No. 32-RC-109684, the NLRB is reconsidering its longstanding joint employer standard. Under the NLRB's current test, in order to be a joint employer a legally separate entity must exercise significant and direct control over another entity's employees and their essential terms and conditions of employment (e.g., hiring, firing, discipline, supervision and direction of employment). In *Browning-Ferris*, the NLRB's regional director applied the established standard and found a waste management company did not exert sufficient control over recycling sorters directly employed by a subcontractor to be considered their joint employer, as the company did not control the sorters' pay or benefits; did not have authority to recruit, hire or fire them; and gave them only routine instructions. The Teamsters union appealed the decision to the full NLRB, arguing the company was a joint employer because it controlled the sorters' hours and working conditions and set their productivity standards. The NLRB granted the union's request for review and on May 14, 2014, extended an invitation for interested parties to file amicus briefs addressing whether the NLRB should maintain the existing joint-employer standard or adopt a new one.

The NLRB general counsel submitted an amicus brief proposing the adoption of a new test that would broaden the reach of the joint employer doctrine by eliminating the requirement of direct control through "hiring, firing, discipline, supervision and direction" of the other companies' employees, and making indirect and potential control sufficient to establish a joint employer relationship. According to the general counsel, indicia of such control include: setting and policing employee work schedules, tracking wage reviews, tracking time needed for employees to fill customer orders, acceptance of employment applications through company systems, reimbursement of wages, retention of right to approve employees, requiring the company and its employees to follow safety rules, and making recommendations during the collective bargaining process or retaining the right to provide such input. If adopted by the NLRB, the general counsel's theory would increasingly make upstream entities liable for the violations of law committed by their contractors, vendors, licensees and other parties with which they do business, and thus compel the upstream entities to monitor the employment practices of downstream entities.

In a similar vein, on July 29, 2014, the NLRB general counsel issued its opinion that McDonald's USA, LLC is a joint employer with its franchisees, asserting that under a "totality of the circumstances" standard, McDonald's USA, LLC exercises sufficient control over its franchisees to make it liable for the franchisees' unfair labor practices. Subsequently, on December 19, 2014, the general counsel issued 13 consolidated complaints against McDonald's USA, LLC and certain franchisees as joint employers, alleging that McDonald's

and the franchisees violated rights of restaurant workers by making statements and taking actions against them for participating in nationwide protests and other activities to improve their wages and working conditions. Absent settlement, the complaints will be considered by administrative law judges beginning in March 2015; the decisions can be appealed to the five-member NLRB and ultimately to federal courts. It is uncertain at this point how *Browning-Ferris* or the McDonald's cases will be decided and whether the general counsel's theory will become law. Nevertheless, since August, unfair labor practice charges are being filed against other businesses under this new joint employer theory.

The EEOC also is a proponent of a broad joint employer standard. The commission was victorious in *EEOC v. Skanska USA Building, Inc.*, 550 F. App'x. 253 (6th Cir. 2013), in which the Sixth Circuit reversed a district court's decision to dismiss the EEOC's racial discrimination suit against a general construction contractor. The EEOC argued and the Sixth Circuit agreed that, although the alleged discrimination affected a subcontractor's employee, the general contractor was the de facto employer.

Because of the increasing trend toward broadly defining joint employer status, businesses should take actions to minimize the control they exert over other entities, especially with respect to matters concerning wages and hours; payroll practices; and hiring, discipline and termination decisions.