WHO'S WHO: EMPLOYER, EMPLOYEE, OR OTHER?

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I. INTRODUCTION

This paper will briefly address two recent efforts by the government to expand the joint-employer doctrine. First, the recent NLRB *Browning-Ferris* decision adopting a broader joint-employer standard under the NLRA will be discussed. Second, the Department of Labor's interpretation of the joint-employer standard under the FLSA will be summarized.

II. NLRB'S NEW JOINT-EMPLOYER STANDARD

On August 27, 2015, the National Labor Relations Board ("NLRB" or "the Board") issued its decision in *Browning-Ferris Indust. of California, Inc.*, 362 NLRB No. 186 (2015), in which the Board adopted a broader standard for assessing joint-employer status under the National Labor Relations Act ("NLRA"). Under this new standard, a company that retains the right to exercise indirect control or potential control over the working conditions of another company's employees – even if not actually exercised – can be deemed a joint-employer for purposes of the NLRA and be subject to collective bargaining with those employees and liable for unfair labor practices.

A. The Old Standard

Prior to *Browning-Ferris*, the Board adhered to the joint-employer standard set forth in *TLI, Inc.*, 271 NLRB 798 (1984), enf'd mem. 772 F.2d 894 (3rd Cir. 1984) and *Laerco Transp.*, 269 NLRB 324 (1984). Under this standard, two separate companies could be joint-employers with respect to the same group of employees for purposes of the NLRA if they exert such direct and immediate control over the employees that they share or codetermine those matters governing the essential terms and conditions of employment. If the putative employer did not *actually* exercise control over the terms and conditions of employment, then no joint-employer status existed even where the contractual language granted the putative employer the right to dictate the terms and conditions of employment. *TLI*, 271 NLRB at 803 (contract language stating that the putative employer "at all times will solely and exclusively be responsible for maintaining operational control, direction, and supervision over drivers" was not relevant absent evidence that the putative employer actually affected the terms and conditions of employment).

Moreover, this standard required that the exercise of control be direct and immediate, and, thus, a finding of indirect control over the terms and conditions of employment was not sufficient. *Airborne Freight*, 338 NLRB 597, fn. 1 (2002) ("[t]he essential element in [the joint-employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate"). In addition, even direct, day-to-day supervision of employees was not sufficient if the supervision was "limited and routine" in nature. *TLI*, 271 NLRB at 799 (the Board concluded that the day-to-day supervision and direction exercised by the putative employer was "limited and routine" where putative employer instructed contract drivers as to which deliveries to make on a given day, filed incident reports with supplier regarding driver conduct, and maintained driver

logs); *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007) ("the Board has generally found supervision to be limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work").

B. *Ferris-Browning* – The New Standard

In *Ferris-Browning*, the Board revisited the joint-employer doctrine to account for current models of labor that heavily rely on the procurement of workers through subcontractors and staffing agencies. The case involved BFI, which operates a recycling facility, and Leadpoint Business Services, which subcontracted with BFI to provide laborers (sorters, screen cleaners, and housekeepers) to work at the facility. BFI solely employed 60 employees. Leadpoint provided 240 laborers. The union sought to represent the unit of Leadpoint workers and attach BFI as a joint-employer.

In removing the restrictions that narrowed the joint-employer status, the Board stated that it was restoring the standard as it existed prior to *LTI/Laerco*. Under the new standard, the NLRB held that two or more businesses will be considered joint-employers of a single workforce if: (1) there is a common-law employment relationship with the employees; and (2) the putative joint-employer possesses sufficient control over employees' essential terms and conditions of employment so as to permit meaningful collective bargaining. With respect to "control," whether the putative joint-employer actually exercises any sufficient control over the employees' employment is immaterial. If the putative joint-employer *could* exercise, through a contractual reservation of rights or otherwise, such control is sufficient to give rise to a joint-employer relationship. Further, it was no longer required that the authority to exercise control over the terms and conditions of employment be direct, immediate, and not "limited and routine" in nature.

Applying the new standard to the case, the Board held that BFI was a joint-employer with respect to the Leadpoint laborers. The Board found that BFI possessed significant control over who Leadpoint could hire to work at the facility by requiring that applicants undergo and pass drug tests and prohibited the hiring of workers deemed by BFI to be eligible for re-hire. BFI also retained the right to reject any worker assigned by Leadpoint "for any or no reason." Further, BFI managers assigned specific tasks to be completed, specified where workers were to be positioned, and exercised constant oversight over work performance. The fact that directives were indirectly communicated by BFI through Leadpoint supervisors to Leadpoint workers did not disguise the fact that BFI was solely making the decisions. Last, the Board found that BFI played a significant role in determining wages for Leadpoint workers. Under the contract, Leadpoint determined pay rates, administered all payments, retained payroll records, and was solely responsible for providing benefits, but BFI specifically prevented Leadpoint from paying its employees more than BFI paid its employees for comparable work. This created a de facto wage ceiling for Leadpoint employees.

III. JOINT-EMPLOYMENT UNDER THE FLSA AND MSPA

A. DOL's Interpretation of the Joint-Employment Standard

In January 2016, the Wage and Hour Division of the Department of Labor issued Administrator's Interpretation ("AI") No. 2016-1 as a comprehensive guide of their liberal interpretation of the joint-employer standard applicable to the Fair Labor Standards Act ("FLSA") and, by extension, the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), which incorporates the FLSA's definitions pertaining to employment. In the AI, the DOL expresses the need for a broadened joint-employment standard to keep up with the changing labor environment where, more and more, companies share employees, contract with temporary staffing agencies, and utilize third-party management companies. The AI reflects the DOL's aggressive effort to expand employer responsibility, via the joint-employment doctrine, for wage and hour violations. The end result is that hours worked by an employee for multiple joint-employers in a workweek will be added together to determine whether overtime compensation is due, and if so, the joint-employers will be joint and severally liable for complying with the FLSA and paying overtime.

The DOL relies on the wording of the FLSA to lay the groundwork for its broad interpretation of the joint-employment standard. Under the FLSA, the definition of "employ" includes "to suffer or to permit to work" which the DOL describes as "the broadest definition that has ever been included in one act." 29 U.S.C. § 203(g). The FLSA regulations specifically cover joint-employment relationships and recognize that an employee may be employed by two or more employers at the same time. 29 CFR § 791.2. The DOL goes on to state that the concept of joint-employment should be defined expansively under the FLSA to go beyond the common-law concepts of joint-employment which focuses on the degree of control that an employer exercises over an employee. In other words, in the DOL's view, the broad meaning of the "to suffer or permit to work" phrasing justifies broadening the scope of the joint-employment relationship in a manner that deemphasizes the importance of who controls the workers.

B. Horizontal and Vertical Joint-Employment

The second part of the AI discusses the difference between horizontal and vertical joint-employment. Analysis under either or both types of joint-employment is dependent on the facts and circumstances of each case and the structure and nature of the relationships at issue.

1. Horizontal Joint-Employment

A "horizontal joint-employment" relationship exists in situations where two or more distinct employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee.

See 29 CFR § 791.2(a). Under the horizontal joint-employment analysis, the employee typically has an established employment relationship with each employer, and, therefore, the focus is the relationship between (or among) the employers to determine if it gives rise to a joint-employment relationship. An example of horizontal joint-employment given by the DOL is separate restaurants (Restaurant X and Restaurant Y) that share economic ties, have the same management controlling both restaurants, and share employees. A waitress who works 30 hours at Restaurant X and 20 hours at Restaurant Y in the same workweek would, thus, be entitled to 10 hours of overtime compensation for which both restaurants would be joint and severally liable.

In determining whether a horizontal joint-employment relationship exists, the DOL cited the following list of non-exhaustive factors as relevant to analyzing the degree of association between two or more joint-employers:

- Who owns the potential joint-employers (i.e., does one employer own part or all of the other or do they have any common owners);
- Do the potential joint-employers have any overlapping officers, directors, executives, or managers;
- Do the potential joint-employers share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs);
- Are the potential joint-employers' operations inter-mingled (e.g., is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless of which employer they work for);
- Does one potential joint-employer supervise the work of the other;
- Do the potential joint-employers share supervisory authority for the employee;
- Do the potential joint-employers treat the employees as a pool of employees available to both of them;
- Do the potential joint-employers share clients or customers; and
- Are there any agreements between the potential joint-employers

2. Vertical Joint-Employment

A "vertical joint-employment" relationship exists where an employee is employed by one employer (the "intermediary employer") and the economic realities establish an economic dependence on another employer (the "potential joint-employer"). The vertical joint-employment standard usually applies where a company has contracted or arranged with the intermediary employer for labor. The workers are directly employed by the intermediary employer, but the work performed is typically for the benefit of the potential joint-employer. For example, the vertical joint-employment analysis is used to determine whether the employees of a subcontractor are also employed by the general contractor. Another example provided by the DOL is a nurse assigned to work at a hospital by a staffing agency. Unlike the horizontal joint-employment relationship which focuses on the association between the two potential joint-

employers, the vertical joint-employment analysis examines the economic realities of the relationship between the employee and the potential joint-employer.

A threshold issue is whether the intermediary employer is actually an employee of the potential joint-employer. For example, an individual, in an intermediary employer role, who is responsible for providing labor to the potential joint-employer and is also an employee of the potential joint-employer. In that situation, there is no need to conduct a vertical joint-employer analysis because all of the intermediary employer's employees are considered employees of the potential joint-employer as well.

The DOL refers to the following seven economic realities factors contained in the MSPA's regulations as a useful guide for determining whether an employee is economically dependent on the potential joint-employer:

- Directing, Controlling or Supervising the Work Performed: the degree of control or direction over the employee's work beyond a reasonable degree of contract oversight ;
- Controlling Employment Conditions: the power to hire or fire the employee, modify employment conditions, determine the rate of pay, etc.;
- Permanency and Duration of Relationship: indefinite, permanent, or long-term relationship suggests economic dependence;
- Repetitive and Rote Nature of Work: repetitive, unskilled work or work which requires little to no training indicates economic dependence;
- Integral to the Business: is employee's work integral to the potential joint-employer's business;
- Work Performed on the Premises: employee's performance of work on premises owned or controlled by potential joint-employer indicates economic dependence; and
- Performing Administrative Functions Commonly Performed by Employers: handling payroll, providing workers' compensation insurance, providing tools and materials required for work, providing housing or transportation, etc. suggests economic dependence.

29 CFR §500.2(h)(5)(iv). The DOL recognizes that courts do not all apply the same factors but, nonetheless conduct an economic realities analysis to determine the existence of a vertical joint-employment relationship. These factors are not to be applied mechanically but rather "in a manner that does not lose sight of . . . the expansive definition of employment under the FLSA and MSPA."

Example 1: ABC Drywall Co. is an independent subcontractor on a construction project and directly employs laborer. The General Contractor provides all of the training for the project, all the necessary equipment and materials, and workers' compensation insurance. The General

Contractor reserves the right to remove the laborer from the project, controls the laborer's schedule, and provides assignments on site. Both ABC Drywall and the General Contractor supervise the laborer's work. Last, the laborer has been continuously working on the General Contractor's constructions projects, whether through ABC Drywall or another intermediary. These facts indicate a vertical joint-employer relationship between the laborer and the General Contractor.

Example 2: A mechanic is employed by HVAC Company which has a short-term contract to test and replace HVAC systems at Condor Condos. The HVAC Company hired and pays the mechanic directly and directs his work and sets his hours for completing the project. Further, the HVAC Company provides the mechanic with the tools and material needed to complete the project and provides the mechanic with benefits including workers' compensation insurance. The mechanic checks in with Condor's property manager every morning, but his work is supervised by HVAC Company. In this scenario, there is no vertical joint-employment relationship between the mechanic and Condor Condos.

C. Takeaways

The DOL's interpretation of the joint-employment standard under the FLSA and MSPA is, yet, another effort to broaden the traditional employer-employee relationship and has the potential to expand employer responsibility (and liability) for workers, even if minimal control over the employee is exercised. This standard will be applied by the DOL in its investigations. Employers must re-examine their relationships with, staffing agencies, third-party contractors, subcontractors, and other businesses in regards to the sharing of employees, to determine their risk of being deemed a joint-employer. This may entail ending the practice of two distinct but related companies sharing employees or companies taking steps to minimize the economic dependence of workers employed by an intermediary employer.