Who Do You Work For? Redefining the Employment Relationship

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Body

Employment law does not adhere to the biblical injunction that "No servant can serve two masters ..." Under many regulatory schemes the law recognizes that two (or more) employers may owe legal duties to a single employee. Many businesses have decreased their direct employee head count by relying upon staffing firms to provide temporary employees, or outsourcing certain functions entirely. The National Labor Relations Board, or NLRB, and the Wage Hour Division, or WHD, of the United States Department of Labor have announced new rules applicable to their review of the joint employment issues created by these changes. These new rules will expand application of traditional labor and employment laws to businesses that do not consider themselves to be the "employer" of temporary or contracted employees.

NLRB's Treatment of Joint Employers

In *Boire v. Greyhound, 376 U.S. 473, 481 (1964)*, the state Supreme Court held that common law concepts of employment were intended to define the employment relationship under the National Labor Relations Act, and endorsed the NLRB's theory that two statutory employers could jointly employ a single workforce if both "possessed sufficient control over the work of the employees." At a later stage of the case, the NLRB held that joint employer status was demonstrated by proof that two separate employers "shared, or codetermined, those matters governing essential terms and conditions of employment ...." The U.S. Court of Appeals for the Third Circuit ultimately endorsed the NLRB's Greyhound joint employer analysis in *NLRB v. Browning-Ferris Industries of Pennsylvania, 691 F.2d 1117 (3d Cir. 1982)*, enf'g, *259 NLRB 148 (1981)*. There, the court stated that: The basis of the [joint employer] finding is simply that one

employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer... Thus, the "joint employer" concept recognizes that the business entities involved are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment.

Although its approach to joint employer relationships had received judicial endorsement, the NLRB over time strayed from strict application of the standard, eventually causing the Board itself to conclude that its cases in actual practice required that the actual exercise of control to be "direct, immediate, and not 'limited and routine,'" as in *Browning-Ferris Industries of California (BFI of CA), 362 NLRB No. 186, 204 LRRM (BNA) 1154, 1167 (2015)*(quoting *AM Property Holding Corp., 350 NLRB 998, 1001 (2007))*.
In BFI of CA, decided in August 2015, the NLRB criticized itself for relaxing its approach to the joint employer issue just as "the diversity of workplace arrangements in today's economy has significantly expanded." Id. The NLRB determined to return to the traditional test it had adopted in Greyhound, as endorsed by the Third Circuit in Browning-Ferris: The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may "share" control over terms and conditions of employment or "co-determine" them, as the board and the courts have done in the past.
There has been much alarm raised in response to the BFI of CA decision. Most temporary employee and contractor arrangements entered into during this period have been structured in reliance of the NLRB's emphasis on the actual exercise of control as the determinative factor in the creation of a joint employer relationship. Those arrangements are now all suspect under the rejuvenated joint employer standard.
WHD's Interpretation of Joint Employer Obligations

The Wage and Hour Division issued enforcement guidance on joint employment under the Fair Labor Standards Act (FLSA) on Jan. 16. The interpretation purports in part to clarify the WHD's existing regulations addressing joint employer relationships, which were last amended in 1961. The guidance addresses the enforcement issues raised by employers "sharing employees or using third-party management companies, independent contractors, staffing agencies or labor providers." It reiterates WHD's expansive view of the employment relationship under FLSA and introduces the concepts of "horizontal" and "vertical" joint employment, which are nowhere found in the current regulations.
· Employment under the FLSA.

The FLSA's definition of employer is different from that used by the NLRB, and far more expansive: employ is defined to include "to suffer or permit to work." That definition has been described as "'the broadest definition that has ever been included in any one act,'" as in *S. v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945)*. In contrast to the NLRB's adoption of the common law "right to control" test, the WHD defines the term employee with reference to a broad "economic realities" test: Unlike the common law control test, which analyzes whether a worker is an employee based on the employer's control over the worker and not the broader economic realities of the working relationship, the "suffer or permit" standard broadens the scope of employment relationships covered by the FLSA. The test for joint employment under the FLSA ... is thus different, for example, than the test under other labor statutes, such as the National Labor Relations Act, *29 U.S.C. 151 et seq.* Thus, where the NLRB might conclude that an entity is not a joint employer, the WHD might determine that it is.

· Horizontal joint employment.

The interpretation states that the "structure and nature of the relationship(s) at issue determine whether a particular case should be analyzed under horizontal or vertical joint employment, or both." The existing regulations define what the WHD now terms "horizontal joint employment": "if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act." The focus of the inquiry is on the "relationship between the two (or more) employers." The interpretation provides an example of horizontal joint employment two restaurants with common ownership who interchange employees, and lists several other factors significant to the analysis.

· Vertical joint employment.

"Vertical joint employment" analysis focuses on "the economic realities of the relationships" between two nominally separate employers "to determine whether the employees are economically dependent on those potential joint employers and are thus their employees." It is intended to capture both parties in the traditional "temp agency" model: In vertical joint employment situations, the other employer has typically contracted or arranged with the intermediary employer to provide it with labor and perform for it some employer functions, such as hiring and payroll. There is typically an established or admitted employment relationship between the employee and the intermediary employer. That employee's work, however, is typically also for the benefit of the other employer.

· Impact of joint employer determination under the FLSA.

The WHD states plainly that in joint employer situations, all hours worked for both employers must be counted for purposes of overtime, and "all of the joint employers are jointly and severally liable for compliance with the FLSA ...." In a circumstance where WHD finds joint employers, an employee of both may be entitled to overtime compensation even though the employee did not work more than 40 hours in a week for either of them.

For any business party to a temporary staffing or contracting arrangement, whether as the customer or the supplier of labor, it would be prudent to examine the arrangement in light of the changed approaches announced by the NLRB and WHD. Existing indemnity arrangements may have to be restructured, and the financial terms might have to be reconsidered in light of the "economic realities" of the changed regulatory climate. ·

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