EPLiC™

Employment Practices Liability Consultant

"Your quarterly guide to exposures, coverage, and loss control"

Revisiting the NLRB's Joint Employer Standard: What Is the Franchisor Impact and What Can You Do?

By Sean Jordan, CPCU

Last year was a big year for determining a company's potential liability based on its status as an employer. This is especially true, given the National Labor Relations Board (NLRB) recent rulings that define the term "joint employer."

As discussed in "The Potential Impact of the NLRB's Efforts To Redefine the 'Joint Employer' Standard," an article by John F. Dickinson and Charles Roberts in the Spring 2015 edition of *EPLiC,* two major cases have served to illustrate the NLRB's main thrust in its attempts to modify the traditionally accepted concept of joint employment. One of those cases, *Browning-Ferris Indus. of Cal., Inc.,* 362 NLRB No. 186 (Aug. 27, 2015) (Case No. 32–RC–109684), has since been decided. The other, *McDonald's USA, LLC,* 362 NLRB No. 168 (Case No. 02–CA–093893, et al.), began its trial before an NLRB administrative law judge in March of 2016 and will now likely be impacted by the revised standard put forth in the *Browning-Ferris* decision.

The concept of joint employment is significant in terms of its impact on employment practices liability insurance (EPLI) exposures. Two companies that are deemed to be joint employers can each be held liable for the employment practices of the other. This can impact many types of companies, including those that use professional employment organizations, staffing agencies, or contractors for recruiting, hiring, and performing work.

This article recaps the main facts surrounding these two cases and examines the ruling handed down in *Browning-Ferris.* The article also provides an update on key developments since the Spring 2015 article analyzing these cases and concludes by discussing coverage options currently available for franchisors that, as a result of such rulings, may now be more likely to be considered joint employers.

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From the Editors ...

Welcome to the Winter 2016 issue of *Employment Practices Liability Consultant (EPLiC)*.

In this issue's lead article, "Revisiting the NLRB's Joint Employer Standard: What Is the Franchisor Impact and What Can You Do?" Sean Jordan, CPCU, assistant research analyst, analyzes the main facts surrounding two key National Labor Relations Board cases involving Browning-Ferris and McDonald's USA, LLC. Both involve a potential change in the heretofore well-established joint employer liability standard, which could vastly increase the exposure of franchisors as well as other types of businesses to employment-related claims and litigation. The article also discusses coverage options currently available for franchisors that, as a result of such rulings, may now be more likely to be considered joint employers.

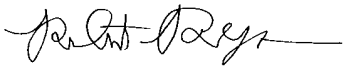
In "Trying To Do the Right Thing: When HR Managers Observe Unethical or Illegal Behavior," *EPLiC* coeditor Don Phin explains how human resources (HR) managers can deal effectively with circumstances involving unprincipled or even illegal corporate actions. The article also points out ways in which the wording of both the Family and Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA) can create these kinds of dilemmas. Don concludes by examining several real-life predicaments with which HR managers must regularly contend and provides a dozen recommendations on how to successfully cope with these seemingly "no-win" situations.

EPLiC Editorial Board member Dick Clarke's article addresses the problems faced by businesses when they ask questions of applicants pertaining to their past criminal history. In "'Ban-the-Box' Legislation: Another Potential Insurance Headache for Employers," he describes how these laws create complications and uncertainties for employers. Fortunately, Mr. Clarke reveals a handful of little-known but highly effective endorsements, applicable to several types of common insurance policies, which may reduce some of these new legal exposures.

In "Aon Completes Third Successful Year of Its Wage and Hour Indemnity Program," *EPLiC* coeditor Bob Bregman presents an annual update on the program's major coverage features and also analyzes recent legal and legislative developments that impact wage and hour insurance coverage options and exposures.

May all of your risks be profitable!

Donald A. Phin, Esq.



Robert Bregman, MLIS, CPCU, RPLU

The *Browning-Ferris* Case: A Brief Recap

As discussed in our previous analysis in *EPLiC,* the issue at hand in *Browning-Ferris* was whether Browning-Ferris Industries of California, Inc. (BFI), was a joint employer with its contractor, Leadpoint Business Services, which supplied certain employees to BFI. At stake in the case, among other things, was whether BFI and Leadpoint were required to bargain jointly with the union representing employees who work under control of both companies. BFI, of course, would also be exposed to significantly more liability from employment practices if deemed to be a joint employer.

The NLRB's regional director originally ruled that BFI was not involved with Leadpoint in establishing "essential terms and conditions of employment" and therefore was not a joint employer. However, the Teamsters Local 350 Union responded by appealing the decision to the NLRB. It is here that we left off in our Spring 2015 edition of *EPLiC*.

Details of the Appeal

When the union appealed to the NLRB, it presented two separate arguments. As Bernard J. Bobber, Foley & Lardner LLP, discussed in an August 31, 2015, article in the *National Law Review* ("NLRB's New Joint Employer Standard Creates Enormous Uncertainty"), the first of these arguments simply asked for a reversal of the regional director's decision. A successful reversal would have resulted in the classification of BFI as a "joint employer" but only within the framework in which the concept has been traditionally understood (for about the last 30 years).

The second, and what has proven to be more significant, alternative presented in the appeal was that the NLRB completely reconsider its standard for classifying companies as "joint employers." In a decision with what is sure to be far-reaching impact, the NLRB chose this alternative, thereby establishing a far different and much broader understanding of joint employment. As Mr. Bobber stated, the NLRB "gave the Union (and all other unions throughout the country) everything it could have dreamed of…."

Changes to the Joint Employer Standard: Important Takeaways

A reading of the NLRB's decision in *Browning-Ferris* (or *BFI*) quickly reveals some key themes that accompany the revised joint employer standard. Chief among these is the NLRB's belief in the need to return to a previous standard rather than turn to what many are describing as a "new" standard. Following is a summary of the thought process that the NLRB described in its publication of the majority decision in *Browning-Ferris*.

The NLRB's "Traditional" Treatment of Joint Employers

In the NLRB's decision, we find two main distinctions that characterize the "traditional" standard previously used to determine joint employment: (1) possession of control versus use of control and (2) indirect control versus direct control.

Up until the early 1980s, the NLRB deemed the possession of control over employees as sufficiently indicative of a joint employer relationship rather than requiring any use of that control. As stated in the *BFI* decision:

> … the Board typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status. The Board did not require that this right be exercised … (emphasis in original)

The implication here is that the "traditional" standard gave much more relevance to contractual terms when it came to deciding whether a company was a joint employer, regardless of whether such terms were actually acted upon in the working arrangement.

Furthermore, indirect control was treated as a sufficient indicator of joint employer status rather than requiring direct supervision or other more formal arrangements. To provide some examples of the type of indirect control that traditionally established a joint employer relationship, the *BFI* decision cited situations in which employers

> … inspected their [employees'] work, issued work directives through the other firm's

supervisors, and exercised its authority to open and close the plant based on production needs.

To summarize: at one time, there was a traditional NLRB standard that allowed for the mere possession of indirect control to show joint employment. So, what happened to that standard?

The Current "Narrowed" Understanding of Joint Employment

According to the NLRB, two cases in 1984 (*TLI, Inc.,* 271 NLRB No. 798 (1984) (Case No. 4–CA–13033), and *Laerco Transp.,* 269 NLRB No. 324 (1984) (Case No. 21–RC–17087)) started us on the path away from the traditional standard, and it is a path we still find ourselves on today. The *BFI* decision laments how the NLRB "—without any explanation or even acknowledgment and without overruling a single prior decision—imposed additional requirements that effectively narrowed the joint-employer standard." More specifically, the decision explains that reserved and indirect control are no longer being given weight, and the focus has shifted to *actual exercise of direct and immediate control,* rather than limited and routine control.

In light of this, it is the NLRB's belief that the defining characteristics of joint employers have been excessively narrowed in a way that unjustifiably goes beyond what the U.S. Court of Appeals for the Third Circuit had ruled (prior to the above-referenced decisions in 1984).

Why the NLRB Insists on a Return to the Previous Standard

Chief among the NLRB's reasons to return to the traditional joint employment standard, as touched on above, is the belief that the narrowing of the definition is not supported by any common law. The published decision makes numerous references to this issue, portraying the shift in recent years as arbitrary and baseless.

To recap, the "traditional" standard (before the two cases in 1984) only required the following.

- *Possession* of control and
- *Indirect* control

The "narrowed" standard, used from 1984 until the recent *BFI* decision, required the following.

- *Use* of control and
- *Direct* control

The "new" desired standard, as described in the *BFI* decision, actually seeks a shift from the "narrowed" back toward the "traditional."

Additionally, the NLRB cites a mismatch between the narrowing view of joint employment and the expanding diversity of workplace arrangements. Readers of the decision are reminded that the NLRB is tasked with the responsibility, from the U.S. Supreme Court itself, "to adapt the Act to the changing patterns of industrial life." Whether a return to a "traditional" standard can really be seen as an adaptation to the evolving workplace is, at the very least, up for debate.

The *McDonald's* Case

McDonald's USA, LLC, centers around claims of reported wage and hour violations and other workplace torts allegedly committed by McDonald's franchisees, for which the NLRB ruled that McDonald's could be held jointly liable as a franchisor. As mentioned in the beginning of this article, the trial began in March of 2016. The prospect of a favorable outcome for the franchisor seems increasingly less likely, in light of the *Browning-Ferris* decision. Up to this point, it has typically been the franchisee that faces most of the legal repercussions if laws are violated. But *Browning-Ferris* may very well significantly expand the employment practices liability exposure that franchisors like McDonald's are faced with. It may also force them to take on expanded interactions with unions and other worker groups.

Going forward, the *McDonald's* case will be one to keep an eye on, for the purpose of understanding franchisors' potential status as joint employers of their franchisees' workers. Although any further unfavorable rulings against McDonald's will likely be appealed all the way up to the Supreme Court, the trial process along the way will continue to offer important insight into the evolving views of franchisor liability.

Emerging Coverage Options

Regardless of the opinion one might have on the NLRB's *Browning-Ferris* decision, the fact remains that franchisors have essentially been put on high alert. Wage and hour claims, workplace torts, and other types of exposures traditionally thought of as more applicable to franchisees now have the legal foundation to be seen as franchisor wrongdoings, for which a franchisor could also be held liable. Looking at the issue from a different angle, franchisors are also in the undesirable position of having to toe the line between, on one hand, their unwillingness to develop controls for employment relationships (for fear of showing characteristics of joint employment and incurring greater liability) and, on the other hand, their desire to be proactive about potential exposure under the NLRB's revised standard by implementing appropriate franchisee management training and store policies. Accordingly, securing coverage for a franchisor's exposures as a joint employer has suddenly become a high priority.

One unique product addressing this exposure, which was analyzed the Spring 2015 issue of *EPLiC,* is the FranchisorSuite policy offered by specialty broker FranchisePerils. To summarize our previous analysis, FranchisorSuite is currently the only product combining directors and officers liability, employment practices liability, fiduciary liability, and franchisors errors and omissions liability into one policy. Two components of this product are of particular interest in light of the NLRB's *Browning-Ferris* decision: vicarious liability coverage and the recent joint employer coverage extension.

While coverage for vicarious liability is excluded virtually across the board in franchisors errors and omissions policies, FranchisorSuite affirmatively covers the exposure with a $250,000 sublimit, which may be increased depending on the insured. Given the NLRB's evolving stance on franchisor-franchisee relationships, this is an important exposure to have covered in the event that a court judges a franchisor to be responsible for the negligent acts of a franchisee. As mentioned on the FranchisorSuite website, think of the spilled coffee allegation back in 1992 that resulted in litigation against McDonald's Corporation and ultimately an out-of-court settlement for a confidential amount.

Additionally, FranchisorSuite offers a joint employer coverage extension, a new feature that was added since the Spring 2015 *EPLiC* article. The extension provides a $150,000 sublimit for legal action against the insured franchisor claiming joint employer liability. Specifically, the extension adds "Joint Employer Codefendant Liability" to the Insuring Agreements, providing defense costs coverage for a joint employer wrongful act in the event that a claim is jointly made against both an insured and a franchisee. With this extension, the insured franchisor is covered up to the sublimit for actual or alleged wrongdoings committed against (a) employees of a franchisee and (b) applicants for employment with a franchisee. See the "FranchisorSuite Joint Employer Extension" on the next page for the specific wording provided in the extension.

Although this product is available only for privately held franchisors, it remains an intriguing and unique coverage format, especially in light of the NLRB's return to a "traditional," more far-reaching approach toward characterizing joint employer relationships. Not only will it be prudent to monitor the pending McDonald's case for hints on how the NLRB's joint employer standard will be applied going forward, but it would also be wise to stay abreast of coverage developments that address growing franchisor concerns. While FranchisorSuite is providing a new model for privately held franchisors, it will be interesting to see if a similar policy format is adopted by Arch Insurance Company (the underwriter of the FranchisorSuite program) and/or other insurers, to address the exposures confronted by larger, publicly held franchisors. *EPLiC*

Sean Jordan, CPCU, *contributes material to several IRMI references, including* Employment Practices Liability Consultant (EPLiC) *and* Professional Liability Insurance. *Mr. Jordan holds Texas personal lines property and casualty insurance and life insurance agent licenses. He has earned the Chartered Property Casualty Underwriter (CPCU) designation and received his bachelor of arts degree from the University of North Texas. Prior to joining IRMI, Mr. Jordan was a commercial insurance analyst with a Dallas-based insurance broker and, previous to that, a personal lines sales representative with a leading national insurer. He can be reached at* sean.j@irmi.com.

FranchisorSuite Joint Employer Extension

It is agreed that:

1. Section 1. Insuring Agreements is amended to add:

C. Joint Employer Codefendant Liability

The **Insurer** shall pay **Defense Costs** on behalf of an **Insured** resulting solely from a **Claim** first made against such **Insured** during the **Policy Period,** if applicable, for a **Joint Employer Wrongful Act** committed on or after the **Retroactive Date** shown below, provided that such **Claim** is jointly made and continuously maintained against both an **Insured** and a **Franchisee.**

This Insuring Agreement shall be subject to a Sublimit of Liability of $150,000. Such Sublimit of Liability shall be the maximum aggregate amount that the **Insurer** shall pay under this Insuring Agreement. Such Sublimit of Liability shall be part of, and not in addition to, the Limit of Liability applicable to this Coverage Part. A Retention of $_____ shall apply to this Insuring Agreement.

2. Section 2. Definitions is amended to add:

"Joint Employer Wrongful Act" means any actual or alleged:

1. wrongful dismissal, discharge or termination of employment, including constructive dismissal, discharge, or termination;

2. employment discrimination based on age, gender, race, color, national origin, religion, creed, sexual orientation or preference, marital status, gender identity or expression, pregnancy, disability, health status, HIV status, military or veteran status, genetic makeup, political affiliation, or any other protected status specified under federal, state or local law;

3. sexual or other workplace harassment, including, without limitation, hostile work environment, bullying, or quid-pro-quo;

4. wrongful deprivation of a career opportunity, demotion, failure to employ or promote, discipline of employees, or failure to grant tenure;

5. breach of any oral, written, or implied employment contract or agreement including, without limitation, any obligation arising out of any employee manual, handbook, or policy statement;

6. retaliation;

7. violation of the Family and Medical Leave Act or any similar law; or

8. provided that the following conduct relates to matters described in paragraphs 1 through 7 above:

a. invasion of privacy;

b. infliction of emotional distress or mental anguish;

c. employment related defamation, including, without limitation, a negative or defamatory employment reference;

d. employment related misrepresentation;

e. failure to provide or enforce adequate or consistent corporate employment policies and procedures; or

f. negligent hiring, retention, supervision, evaluation or training of a **Franchisee** or employee of a **Franchisee,**

committed or attempted: (i) against any employee of a **Franchisee,** or applicant for employment with any **Franchisee;** and (ii) by any **Insured** solely in their capacity as a joint employer of such employee or applicant for employment.

Source: FranchisorSuite program. For more information, see the FranchisePerils website.