What Does Joint Employer Liability Mean to EPLI?

Until relatively recently companies could easily protect themselves from being brought into a joint employment matter by avoiding the exercise of direct control over their employees when relying on staffing agencies, general contractors and franchisors. This was not only good risk management but also just good business as companies wanted to transfer employment issues. A recent National Labor Relations Board (NLRB) ruling has removed much of that protection, with deep implications for EPLI policies.

Background

The NLRB is the agency that regulates and implements the National Labor Relations Act, the act that covers labor laws. Under the Reagan administration, the Board defined what constitutes a joint employer. The "standard" focused on the degree of control. To be considered a joint employer, there must be **direct control** over operations, hours, working conditions, and the like.

The landscape of joint employment liability has drastically changed as the NLRB recently ruled that joint employment would be determined on a case - by - case basis. In Browning – Ferris Industries of California, the NLRB overturned a standard that had been used for over 30 years. The new NLRB "standard" is that the company needs only to assert **"indirect control"** over the terms and conditions of employment, to be found to be a joint-employer. Now, 'employers' that use staffing agencies and/or independent contractors and/or franchisors have EPL risk that they did not have before.

It gets worse - McDonald's has now been charged by the NLRB as a joint – employer, based on the new NLRB standard. The NLRB has pointed to McDonald's comprehensive computer systems, which tracks labor usage and costs, as one of the ways it controls the franchisees operations.

Implications for Joint Employers, Including Franchisors

This means that franchisors will not know for sure if they have inadvertently created joint employment status for themselves, unless and until an action is brought against them. This NLRB decision jeopardizes the risk avoidance strategy most franchisors employed and increases their potential liability beyond what can be reasonably measured.

Standard Employment Practices Liability policies are not designed to cover joint employment matters. One only needs to review the definition of Insured. For example, Company A hires Company B to manage its employees. An employee of Company B sues Companies A and B. Company A has to demonstrate it had no "indirect control" over Company B's employee (even though Company B employee was based in Company A office). This is also true for a Franchisor (company A) and its franchisees (Company B).

The NLRB has the power to influence the Department of Labor and other federal agencies that

cover employment law. This has many worried. Many carriers are trying to decide if they need an overt exclusion or if being silent will allow them to avoid being pulled into joint-employer litigation. This is especially true with EPL for franchisors. I expect that as this issue comes to the forefront we will see a proliferation of joint employment exclusions.

What Should a Presumed Joint Employer do to Protect Itself?

Franchisors should ask if their carrier is willing to provide coverage for joint employment matters to address their exposure to EPL suits against the franchisee that names the franchisor as well. Franchisors should also require franchisees to carry EPL coverage if they do not already and require their franchisees to name the franchisor as an additional insured on their EPL policy. This exposure needs to be addressed at both the franchisor and franchisee level. Franchisors should also reexamine the EPL limits they carry and the limits of their franchisees to see if would be prudent to purchase additional limits in light of this increase in exposure.

While the risk to a joint employer is large, it can and should be addressed through insurance and proper employment practices risk management (in some situations less control might be advantageous, but there are other business ramifications beyond risk that need to be considered). The best advice is for companies to consult with both its outside counsel and its insurance advisors with specific EPL and franchisor liability experience to determine the best course of action.

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