NLRB's Joint Employer Decision Could Uproot Hotel Franchise Model

By: Dana Kravetz

The National Labor Relations Board (NLRB) has likely thrown a mammoth monkey wrench in the traditional hotel franchisor/franchisee model.

On August 27, 2015, in its highly controversial *Browning-Ferris Industries of California* (BFI) decision, the NLRB revised its test for the joint employer doctrine, dramatically easing the criteria for a company to be considered a joint employer. For many decades, the traditional joint employer test focused on governance, wage and supervision decisions, and control. The test excluded "limited and routine" oversight and supervision, because "hiring, firing, discipline, supervision, and direction" were not considered essential or meaningful to the employment relationship. Under the new standard, a finding of joint employment is much broader, and only requires that a business exercise "indirect" (or potential) control over workers. Hence, under the new test, a company may not only be held liable for its own labor violations, but also for those of the other entity.

BFI Case Background

In typical subcontracting fashion, BFI, a waste management company, Inc., hired Leadpoint, which supplied employees to perform work that included the cleaning and sorting of recycled products. In the temporary labor services agreement, Leadpoint was required to evaluate and terminate employees; determine pay rates; and provide job training. Leadpoint determined which workers to send to recycling sites, and employed an on-site manger, three shift supervisors and seven line leaders to oversee its employees at BFI's facilities. The Teamsters Local 350 sought to represent 240 Leadpoint workers through collective bargaining, and the NLRB ultimately determined that BFI and Leadpoint should be considered joint employers. The Board considered the fact that Leadpoint had no input into shift schedules—despite singly assigning its employees to shifts—and also pointed to the fact that Leadpoint workers were abiding by BFI's safety policies.

Franchisors/Franchisees

The BFI ruling should come as little surprise to anyone cognizant of last year's NLRB decision concerning McDonald's, in which the Board found the fast food giant to be a joint employer along with several of its franchisees in dozens of cases involving alleged labor violations. Hotel and resort franchisors would do well to take note of how the BFI and McDonald's rulings are likely to change their relationship with franchisees going forward.

Unfortunately, should the new standard stand there is certain to be major operational headaches for franchisors, and expand wage and hour liability. The hotel franchisor/franchisee model has historically relied on a franchisee's ability to supervise its own workers. However, the model could be uprooted if lawsuits seeking to hold corporate franchisors liable for the acts of their franchisees emerge as a result of the entities' new status as joint employers. Courts will likely see increased claims against franchisors for labor violations such as discriminatory labor practices, as well as litigation surrounding

misclassification of their franchisees' employees. The terms and conditions of franchisors' employment practices liability insurance (EPLI) may change as well, particularly if a corporate entity begins incurring losses due to the joint employment relationship. Should franchisors continue to be held legally responsible for franchisee decisions, those powers may be stripped from franchisees altogether. Further, to cover rising litigation costs, hotel franchisors may be forced to consolidate, putting many franchisees out of business.

Additionally, franchise owners are responsible for medical care under the Affordable Care Act even if they have fewer than 50 employees. Under the new ruling, those employees could be lumped in with thousands working at other independently owned franchises under the same franchisor.

IFA Objects

Robert C. Cresanti, President and CEO of the International Franchise Association (IFA), drafted a letter to members of congress, articulating the concerns the IFA had over the ruling. "The previous uncertainty generated by un-renewed tax extenders is dwarfed by the uncertainty caused by the new joint employer definition, which may result in companies being held liable for workers they do not employ," Cresanti wrote. However, despite the significant opposition, Congress has decided not to delay the new joint-employer ruling.

Appeal

The NLRB Joint-Employer rule is likely headed for appellate review by a federal circuit court. Through its own filings, Leadpoint denied refusing to bargain with the local Teamsters, claiming it lacked any information about unfair labor practices, and that the complaint was vague. Further, the company alleged that the union failed to demonstrate that it had done a full investigation, violating NLRB rules. The NLRB Board recently granted summary judgment, stating that the representation issues proffered by BFI and Leadpoint were, or could have been, litigated in the initial proceedings.

Being Proactive in Your Review

This could take years to make its way through the courts. For now, hotels and resorts should evaluate the following:

- EPLI policies, to ensure franchisees are covered
- Policies concerning which positions are filled by full-time or part-time employees
- Employee benefits, including holiday pay and sick leave
- How work is assigned and job duties are delegated

As the franchisor/franchisee relationship continues to evolve, hotels and resorts would be well advised to mitigate future risk of litigation by taking small steps today that could negate the need for drastic operational changes in the future.

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