

2016 HOSPITALITY LAW CONFERENCE

FEBRUARY 22-24, 2016

NLRB's Joint Employer Decision Could Uproot Hotel and Restaurant Franchise Model

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WHY COMPANIES USE NON-EMPLOYEE WORKERS

Operational Needs

- Flexibility/temporary work increase
- Special project work
- Need expertise in specialized area
- Work secondary to business
 - Janitorial
 - Security
 - Landscaping
 - Valet



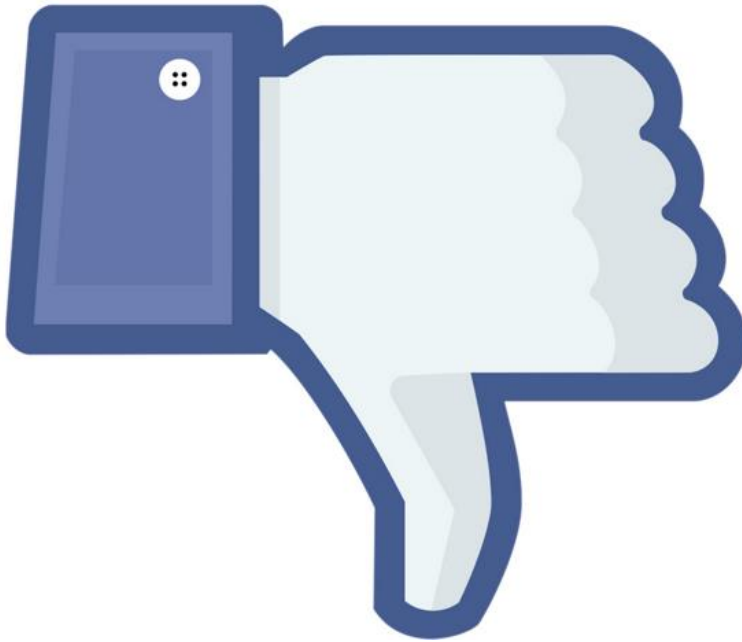
WHY COMPANIES USE NON-EMPLOYEE WORKERS

Financial Incentives

- Treated as capital, not headcount
- Less paperwork
- No withholding, no employer FICA
- Avoid providing health & welfare benefits
- Avoid providing pension benefits/ 401(k) match
- Avoid workers compensation payments
- Avoid unemployment compensation
- Avoid Affordable Care Act



WHY THE GOVERNMENT DISLIKES THE USE OF NON-EMPLOYEE WORKERS



- **Government Losses**
 - Under-the-table payments/ Underpayment of taxes
 - Withholding
 - FICA (Medicare, Social Security)
 - FUTA (Unemployment)
- **Workers Lose**
 - No health benefits provided by employer
 - No 401(k) or pension contributions
 - No Social Security Account Contributions
 - No unemployment benefits
 - No workers' compensation if injured



WHY THE NRLB DISLIKES THE USE OF NON-EMPLOYEE WORKERS

Cannot Unionize Unless
“Employees”



BROWNING-FERRIS INDUSTRIES OF CALIFORNIA (BFI) CASE BACKGROUND

- BFI hired Leadpoint
- Temporary labor services agreement—Leadpoint was required to:
 - Evaluate and terminate employees
 - Determine pay rates & scheduling
 - Provide job training
- **Leadpoint:**
 - Determined which workers to send to recycling sites
 - Employed:
 - An on-site manger
 - Three shift supervisors
 - Seven line leaders to oversee its employees



BFI CASE BACKGROUND

- The Teamsters Local 350 represented 240 Leadpoint workers
- Browning-Ferris did little more than run its core business
 - Follow safety rules
 - Control assembly line speed
 - Pass drug test



BFI CASE BACKGROUND

- **August 27, 2015 Result:** The NLRB determined that BFI and Leadpoint should be considered joint employers
 - Leadpoint had no input into shift schedules
 - Leadpoint workers were abiding by BFI's safety policies
 - Leadpoint could not negotiate with workers without BFI
- **For 30 years, the traditional joint employer test focused on:**
 - Governance
 - Wage
 - Supervision decisions
 - Control



NLRB – JOINT EMPLOYMENT

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA (BFI)



The National Labor Relations Board (NLRB) revised its test for the joint employer doctrine

- Dramatically easing the criteria for a company to be considered a joint employer



BROWNING-FERRIS INDUSTRIES OF CALIFORNIA (BFI)

- Test excluded “limited and routine” oversight and supervision
 - “Hiring, firing, discipline, supervision, and direction” not considered essential or meaningful
- Joint employment is much broader
 - Only requires that a business exercise “indirect” (or potential) control
- Companies may not only be held liable for labor violations, but also for those of the other entity



NLRB JOINT EMPLOYMENT

Impact?

- Unit containing employees of both companies
- Subjects Browning-Ferris to ULP charges
- Who sits at bargaining table?
- What if company & staffing agency disagree?
- What if BFI changes staffing agencies?
- What if new staffing firm has other clients & other units?



APPEAL

- The NLRB Joint-Employer rule → likely heading for appellate review by a federal circuit court
- Leadpoint denied refusing to bargain with the local Teamsters
 - Claiming compliant was too vague and lacked any information about unfair labor practices
 - Company alleged that the union failed to demonstrate completion of a full investigation, violating NLRB rules
- The NLRB Board granted summary judgment



FRANCHISORS/FRANCHISEES



- 2015: NLRB decision concerning McDonald's
 - Board found the fast food chain to be a joint employer along with several of its franchisees in dozens of cases involving alleged labor violations
- Rulings are likely to change relationships with franchisees in future



FRANCHISORS/FRANCHISEES

On the Rise:

- Lawsuits seeking to hold corporate franchisors liable for the acts of their franchisees
- Claims against franchisors for labor violations
- Litigation surrounding misclassification of franchisees' employees



FRANCHISORS/FRANCHISEES

- The terms and conditions of franchisors' employment practices liability insurance (EPLI) may change
 - Should a corporate entity incur losses due to the joint employment relationship?
 - May end the small franchisee model
- Powers may be stripped from franchisees
 - If franchisors are held legally responsible for franchisee decisions
 - Hotel franchisors may be forced to consolidate
 - Putting many franchisees out of business



FRANCHISORS/FRANCHISEES

- 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



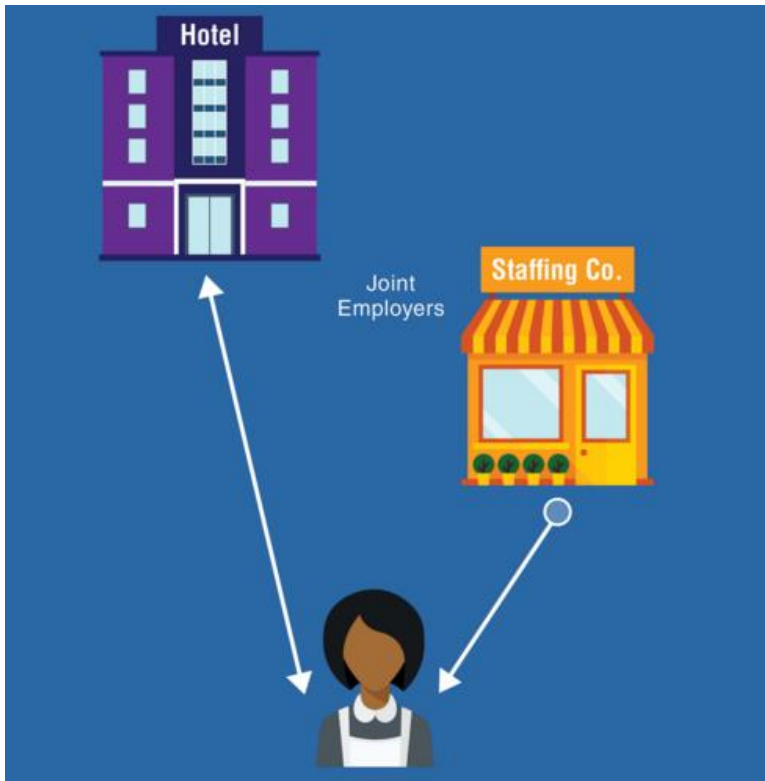
IFA OBJECTS



- **Robert C. Cresanti, President and CEO of the International Franchise Association (IFA)**
 - Drafted a letter to Congress regarding IFA concerns about 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.”*
- **Congress decided not to delay the new joint-employer ruling**



U.S. DEPARTMENT OF LABOR, 2016



Horizontal Joint Employment

- Two employees, but common ownership or management
- 25 hours x 2 employers =
40 hours reg. rate + 10 hours OT



U.S. DEPARTMENT OF LABOR, 2016

Horizontal Joint Employment

- Factors to consider:
 - Common ownership
 - Overlapping directors, officers and managers
 - Shared control over operations
 - Operations intermingled
 - Cross-supervision
 - Pool of employees
 - Share customers/clients
 - Agreements between companies



U.S. DEPARTMENT OF LABOR, 2016



Vertical Joint Employment

- Economic reliance, not level of control
- Question: Is the top-level contractor an employee?
 - If **yes**, all contractor's workers are employees (!)
 - If **no**, economic realities analysis



U.S. DEPARTMENT OF LABOR, 2016



Vertical Joint Employment

- Factors to consider:
 - Directing/supervising the work
 - Controlling employment conditions (Hire/Fire)
 - Permanency/duration of relationship
 - Repetitive nature of work (unskilled)
 - Integral to business
 - Work performed on premises
 - Administrative functions (Payroll, HR)



U.S. DEPARTMENT OF LABOR, 2016

Bottom Line:

- DOL is looking to find joint employment
- Effect:
 - Joint and several liability: Min. wage & OT
 - Easy to unionize
- Tips:
 - Be sure contractor is reliable
 - Contractual obligation to pay min. wage/OT
 - Indemnity
 - Financial stability



EEOC, 2016

Focus of Activities:

- Commissioner Barker: “expect a lot of activity...”
- Commitment by EEOC to focus on joint employer concepts
 - Likely aligned with NLRB views
 - Expect guidance on joint employer liability issues
- Focus on systemic litigation on behalf of groups of employees



HOW BAD OUTCOMES ARISE

- **Audit (IRS, DOL, State)**
 - DOL awards \$10.2M to 19 states to finance misclassification crackdown (9/15/14)
- **Worker complaint/ agency investigation**
- **ULP charge**
- **Lawsuit**
 - Individual
 - Class Action/collective action
- **Worker files for unemployment**
- **Worker files for workers' compensation**



BEING PROACTIVE IN YOUR REVIEW

Hotels and resorts should evaluate the following:

- EPLI policies
 - 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



THANK YOU

QUESTIONS?



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