

THE NLRB, FRANCHISEES, AND TEMPORARY EMPLOYEES: A CONFUSING MESS

Publication
Aug 31, 2016

The retail industry, due to the seasonal nature of its business, has often bolstered its workforces with temporary employees through employment agencies. This arrangement works as an efficient way for employers to manage the typical ups and downs of business both in stores and distribution centers. Several recent decisions from the National Labor Relations Board (NLRB), however, have cast uncertainty over the practice of retaining temporary workers, especially when it involves franchise operations.

One of the largest and growing segments of the retail sector is product and service franchises. In 2015, the U.S. had more than 100,000 retail franchise locations, not including food service operations. Many of these franchises were small employers with fewer than 15 employees, not even big enough for coverage by Title VII.

If there was union organizing activity, it was generally limited to the particular location of a franchise or perhaps locations of a franchise sharing common ownership. Franchisors were themselves rarely sufficiently intertwined with the operations of their franchisees to be considered employers under the National Labor Relations Act (NLRA).

A ONE-TWO PUNCH FROM THE LABOR BOARD

In August 2015, however, the NLRB changed the standards for determining whether two different companies could both be considered employers of the same group of employees for purposes of the NLRA [in a case known as *Browning-Ferris*](#). This concept is known as joint employment, and it

Related People



Edward F. Harold
Regional Managing Partner
[504.592.3801](tel:504.592.3801)

Service Focus

Labor Relations

Industry Focus

PEO

Retail

impacts retailers operating in a franchise environment as well as those who retain and use temporary workers.

While *Browning-Ferris* was not a decision in the retail sector, it raised significant concerns about the NLRB's intention to force more companies to the bargaining table with unions, which certainly could impact retailers. Those concerns have now borne out as the NLRB has filed more than 50 charges against franchises, including joint employer issues, since the *Browning-Ferris* decision.

The NLRB again addressed the issue of joint employment with regard to temporary workers in the recent *Miller & Anderson* decision. In that July 2016 case, the NLRB overturned precedent that generally prevented both the temporary employment agency and the user of the temporary employees from being considered employers of the same group of employees.

Together, *Browning-Ferris* and *Miller & Anderson* represent an important shift in the definition and consequences of joint employment and in the utility of a variable workforce. These decisions make it easier for unions to become the exclusive representatives of groups of employees who work for two different employers. When a union is elected to represent a bargaining unit that includes two different employers' workers, both employers have a legal obligation to bargain with the union regarding the terms and conditions of those employees' employment.

It requires little imagination to see how that could lead to conflicting interests between the joint employers and make it very difficult for the union and the two employers to negotiate a labor contract. This also exposes both employers to greater risk of liability for unfair labor practices.

Unfortunately, it does not stop there. The Department of Labor, the Equal Employment Opportunity Commission (EEOC), and other federal agencies are working together to redefine joint employment in the context of other laws – to hold more employers liable to more employees in more circumstances. This makes the distinction between regular and temporary employees narrower and less significant for a wide range of legal considerations.

WHAT DO THE DECISIONS SAY?

In the first case, Browning-Ferris (BFI) contracted with Leadpoint (a staffing company) to provide workers at BFI's recycling facility. Leadpoint had its own management and HR teams on site. The contract between BFI and Leadpoint provided that Leadpoint was the sole employer of the employees. Browning-Ferris, however, maintained the right to control several terms and conditions of employment, although it did not exercise this right on a regular basis or in any meaningful way.

Prior to this decision, the Board would consider two companies to be joint employers only if they "share or codetermine those matters governing the essential terms and conditions of employment." Significantly, the two companies must have actually exercised the right to control terms and conditions of employment, and the exercise of control must have been direct and immediate, not limited and routine.

In *Browning-Ferris*, the Board abandoned the actual-exercise-of-control standard in favor of a "right-to-control" standard. The Board held that a company's contractual right to control, even if not exercised, indicated joint employer status. It further concluded that indirect control indicated joint employment status, which included routine actions such as BFI setting schedules and machine run times, and telling Leadpoint management what to do with employees, costs-plus contracts, etc. Despite the fact that BFI played no role in hiring, supervising, directly controlling work hours, or dictating wages paid to Leadpoint employees, it was found to be a joint employer.

The more recent case, *Miller & Anderson*, involved a petition seeking an election in a proposed unit of sheet metal workers employed by Miller & Anderson, Inc. (the traditional employer) and Tradesmen International (a temporary employer). Under prior Board precedent, such a combined unit could only be approved if the employers consented. The union appealed seeking to overturn this precedent.

The Board held in favor of the union and eliminated the employer consent requirement. It concluded a multi-employer bargaining unit would be appropriate in the presence of a "community of interest" among employees within the proposed unit. To determine whether the employees share a community of interest, the Board examined a variety of factors. They included common functions and duties; shared skills; functional integration;

temporary interchange; frequency of contact with other employees; commonality of wages, hours, and other working conditions; permanent transfers; shared supervision; common work location; bargaining history; and extent of union organization.

WHAT DO THESE DECISIONS MEAN FOR THE RETAIL SECTOR?

It is important to recognize that the factors that led the Board to find a joint employer relationship in *Browning-Ferris* are common in many contracts between direct employers and staffing agencies in the retail sector. This new standard greatly increases the chance that a company using contract labor could be deemed a joint employer with any of its staffing agencies or onsite service providers.

The consequences of such a conclusion could include being held liable for potential unfair labor practice charges filed by a discharged staffing agency employee. A company using contract labor might also have a duty to bargain if the staffing agency employees decide to organize. Finally, if the company using contract labor is found to be a joint employer, it could make terminating a contract with a staffing agency or onsite service provider more difficult if those employees were involved in union activity or organizing.

Although the *Browning-Ferris* case is now up on appeal, a decision will probably not be reached until 2017 and you would be wise to prepare for the worst, acting under the assumption that this standard will be applied for the foreseeable future.

With respect to *Miller & Anderson*, the key takeaway is recognizing that many of the factors that suggested a community of interest between the two businesses in that case also exist in many modern workplaces employing both traditional and temporary workers. Therefore, now that unions do not need employer consent to establish multi-employer units, they will have more discretion to decide the composition of the bargaining units targeted for organizing. The composition of the unit is important to both sides, as each attempts to include or exclude employees in an effort to create a unit most likely to vote in its favor. The new standard likely will make it easier for unions to win elections.

If the union wins an election including both traditional and temporary employees in the same bargaining unit, the two employers will be required to bargain with one another and the union. Traditional and temporary employers often have very different, and sometimes conflicting, interests. Consequently, they may desire different outcomes in bargaining. This fragmentation could pit the two employers against each other and give the union greater bargaining power.

In the larger picture, changing the standard for multi-employer bargaining units will require companies to question the use of temporary employees. That, in turn, may lead to the hiring of more direct employees (which is a goal of the Board and unions).

WHAT SHOULD RETAILERS DO?

In light of these decisions, retailers would be prudent to take stock of their relationships with temporary staffing agencies and other labor vendors to identify their risk of being considered a joint employer or being subjected to a union election through temporary employees. The realities of these relationships in the modern economy will make it difficult to avoid all risk.

Most retailers that turn to staffing agencies to supplement their workforces during peak periods, whether in the store or the distribution center, will direct these individuals' daily activities. Likewise, retailers often provide some specific direction about tasks to be performed when using vendors for conducting inventory, merchandising, cleaning, and other routine in-store maintenance.

Given that business necessity for using temporary employees may well outweigh the risks, retailers may want to consider working with their vendors on implementing traditional union-free strategies with the non-traditional work force. If the staffing agency listens to its employees, responds to their concerns, and is considered a fair employer, the likelihood that the staffing company employees will seek third-party representation decreases.

For more information, contact the author at EHarold@fisherphillips.com or 504.592.3801.

