WHO'S THE BOSS?

joint employers in retail & hospitality industry

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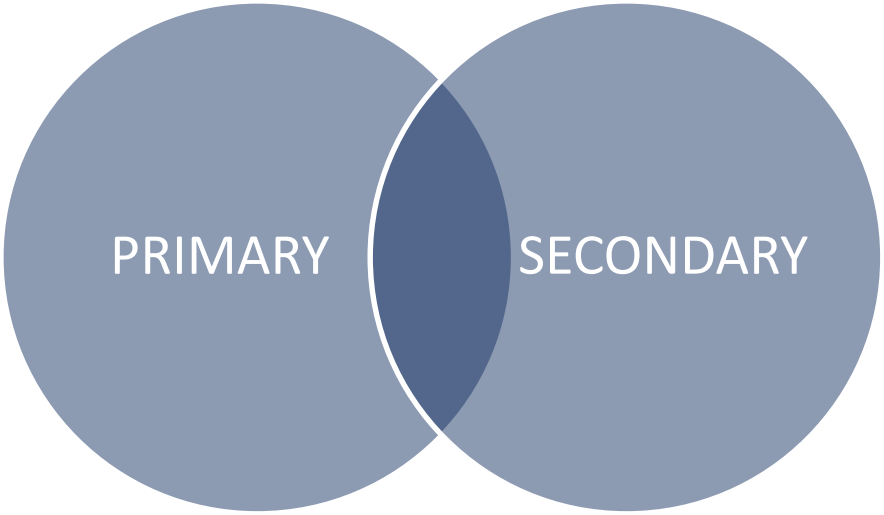
JOINT EMPLOYER STANDARD

JOINT EMPLOYERS?



Exists when one employer (the "primary") is so related to another employer (the "secondary") that employees of the secondary are also deemed employees of the primary

FRANCHISES

EMPLOYEE FRANCHISOR FRANCHISEE

STAFFING AGENCIES

EMPLOYEE STAFFING AGENCY AGENCY CLIENT

CONTRACTORS

EMPLOYEE CONTRACTOR SUBCONTRACTOR

JOINT EMPLOYER LIABILITY

Joint Employer Status

Why It Matters

- As an employer of a joint employee, you **MAY BE RESPONSIBLE FOR ANOTHER COMPANY'S EMPLOYMENT LIABILITIES**
- The test for joint employment varies
  - Statute at issue
  - State involved

JOINT EMPLOYER LIABILITY

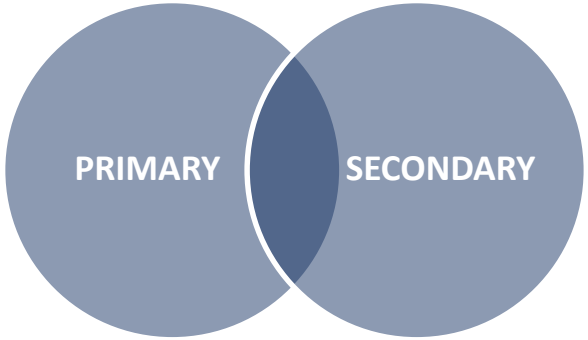
What Could Joint Employer Status Affect?

- **Violations of Labor & Employment Laws**
  - **FLSA - Wage and Hour**
  - **Title VII - Discrimination**
  - **OSHA - Safety**
  - **FMLA - Leave**
- **Collective Bargaining**

JOINT EMPLOYER LIABILITY

Wage And Hour	• Under FLSA, primary may be held liable for secondary employer's failure to pay minimum wages or overtime
Discrimination	• Various state and federal laws govern discrimination in the workplace • Primary may be held liable if the secondary unlawfully terminates or harasses one of its own employees on account of a protected characteristic
Safety	• Under OSHA's multi-employee policy, an employer can already be cited for hazards to other employers' employees • However, a joint employer finding could render a primary liable for the secondary's safety violations on a separate worksite

WHO IS A JOINT EMPLOYER?



No single set of criteria for determining joint employer status

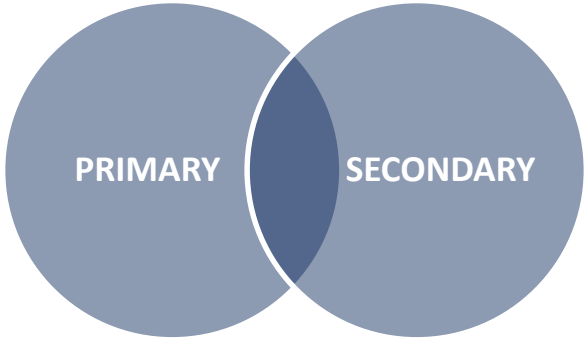
Tests vary among the laws and jurisdictions

GENERALLY:

"Right to control" the employee is the most important factor under many laws

Primary will be deemed a secondary's **joint employer** where the primary has "**direct and immediate control**" over another company's employees

WHO IS A JOINT EMPLOYER?



- Hires or Selects Workers
- Pays or Determines Compensation
- Directs Day-To-Day, Sets Schedule, Supervises Performance
- Authority To Discipline The Workers, Enforce Workplace Rules Or Terminate The Workers' Employment.

KEY FACTORS: Whether Primary...

WHO IS A JOINT EMPLOYER?

IT DEPENDS...

FLSA & JOINT EMPLOYERS

FLSA federal wage and hour law that applies to all 50 states

Federal courts in different states apply the law differently

FLSA does not define "joint employer"

Mostly Uses "Economic Realities" Test

Defines "employee" differently:

- ❑ The FLSA defines "employ" broadly, as meaning "to suffer or permit to work." 29 U.S.C. 203(g).
- ❑ This definition is more expansive than the common law definition of "employee," and it encompasses a broader set of relationships than the common law agency tests (i.e., the Right to Control tests).

FLSA & JOINT EMPLOYERS

Hall v. DirectTV, LLC, No. 15-1857 (4th Cir. 2017)

4th Circuit: test is whether the two putative joint employers are "not completely disassociated" with respect to the worker

Criticized the "economic realities" test

***Hall* approach involves a "two-step framework":**

- Determination of whether the two putative employers "codetermined the key terms and conditions of a worker's employment" and
- If yes, then ask whether "the two entities' combined influence over the essential terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor"

***Different Focus:* Looks at putative joint employers, not employer-employee**

***U.S. Supreme Court* (16-1449):** denied review on Jan. 8, 2018

TITLE VII & JOINT EMPLOYERS

3rd Circuit

Same test as for ERISA cases

Refuses to apply the FLSA standard

Applies about a dozen factors

No one factor is dispositive

4th Circuit

Applies a "hybrid test" that "combines aspects of the economic realities and control tests"

Identifies 11 factors, all but ensuring confusion

7th Circuit

Multi-factor "economic realities test"

No single factor is dispositive, but the broad focus is on whether the putative employer exercised sufficient control over the employee

Title VII of the Civil Rights Act of 1963

- ❑ Prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin
- ❑ Although federal employment discrimination law applies to businesses across the country, a business can be found liable on the West Coast but not the East Coast

BREACH OF CONTRACT & JOINT EMPLOYERS

11th CIRCUIT: *Garcia-Celestino v. Ruiz Harvesting, Inc.* (2018)
Decided that the proper test is the **Right to Control** test

There are different versions of the Right to Control Test, but they all try to determine whether a hiring party retains the right to control how the work is performed

Test involves 7 factors

1) right to control
2) provision of tools
3) location of work
4) employee benefits
5) right to assign additional work
6) discretion over duration of work
7) is the work part of hiring party's regular business

Interestingly, the Court ruled that the defendant was NOT a joint employer for breach of contract, but was a joint employer for the FLSA claim

WHY?: 11th Cir. – uses "economic realities test" for FLSA claims

JOINT EMPLOYER UNDER THE NLRA

NLRA & JOINT EMPLOYER LIABILITY

NATIONAL LABOR RELATIONS BOARD

Independent federal agency with responsibility for enforcing US Labor Law in relation to collective bargaining and unfair labor practices

COMPOSITION: **Governed by a five-person Board and a General Counsel, all of whom are appointed by the President with Advice and Consent of the Senate**

Board members serve 5-year terms, therefore policy and laws can change quite frequently

NLRA & JOINT EMPLOYER LIABILITY

NATIONAL LABOR RELATIONS BOARD

NLRA imposes **bargaining obligations** on unionized employers, and **legal liabilities on employers**—unionized or not—for violations of that law

If a **second employer is a joint employer alongside the first one**, it, too, can **incur those bargaining obligations and liabilities**

WHY IT MATTERS: once two employers are **joint employers**, they are **both vulnerable** to **strikes, picketing,** and other **economic protest activity** from unions

NLRA & JOINT EMPLOYER LIABILITY

NATIONAL LABOR RELATIONS BOARD

Union Obligations and Collective Bargaining

- Under NLRA, a joint employer finding can result in a primary being held responsible for unfair labor practices committed by the secondary, or being required to comply with the secondary's collective bargaining contract
- When a secondary's employees are involved in a labor dispute, a joint employer finding can forfeit the primary's right to avoid pickets and boycotting

HISTORY OF NLRB STANDARD

NLRB Joint Employer Standard Prior to *Browning-Ferris*

- The joint employer standard under the NLRA has been established over time through decisions made by the NLRB in administering the NLRA
- Prior to 1984, the NLRB had consistently found joint employer status where an entity exercised **direct or indirect control over significant terms and conditions of employment**, where it **possessed the unexercised potential to control** such terms and conditions of employment, or where "industrial realities" made it an essential party to meaningful collective bargaining

HISTORY OF NLRB STANDARD

NLRB Joint Employer Standard Prior to *Browning-Ferris*

- in 1984, the NLRB adopted a new standard for determining joint employer status under the NLRA. In two decisions—*TLI, Inc*., 271 NLRB 324 (1984), enfd. mem., 772 F.2d 894 (3rd Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984)—the NLRB narrowed the joint employer standard under the NLRA, reducing joint employer liability burdens
- These decisions created a more business-friendly environment for staffing agencies and contractors

NLRA & JOINT EMPLOYER LIABILITY

In 2015, Board set new standard in *Browning-Ferris Industries* that made it much *easier* to prove joint employer status

- Board held that **joint employment relationship** may exist even **when employer merely had day-to-day supervision** over employees' activities on site
- Joint employer may be found where employer had "**indirect control"** over **terms and conditions of employment**
- Joint employer relationship may also be found **where employer reserved right to make key employment decisions in contract** (hire, fire, set wages), but **didn't actually exercise** those rights

NLRA & JOINT EMPLOYER LIABILITY

12/2017: *In Hy-Brand Industrial Contractors*, the Board overturned *BFI* and held that joint employment exists *only* when both entities must have actually *exercised* joint control over essential employment terms

- Merely **reserving rights** in labor supply agreements likely **not sufficient** for joint employer determination
- **"Limited and routine"** supervision of a service provider's employees was i**nsufficient** to create a joint employer relationship
  - E.g., "**Supervisor's instructions** consist[ing] primarily of telling employees what work to perform, or where and when to perform it, but not how to perform it" was **not sufficient**

NLRA & JOINT EMPLOYER LIABILITY

In early 2018, the original charging parties in the ***Hy-Brand Industrial Contractors*** case requested that the NLRB **vacate** its decision on the basis that **Board member William J. Emanuel should have recused** himself because his former law firm represented an entity involved in the ***Browning-Ferris* case**

- **The NLRB granted the request and vacated the *Hy-Brand* decision, explaining:**

  "After careful consideration … we have decided to grant the Charging Parties' motion in part and to vacate and set aside the Board's December 14, 2017 Decision and Order"

In light of the decision, the Board further explained that, **"Because we vacate the Board's earlier Decision and Order, the overruling of the *Browning-Ferris* decision is of no force or effect"**

- **At least for the time being, *Browning-Ferris* will continue to control the joint employer issue**

NLRA & JOINT EMPLOYER LIABILITY

THE ONGOING PROBLEM

***Hy-Brand* has been vacated**

"Indirect Control" test from *BFI* remains (for now)

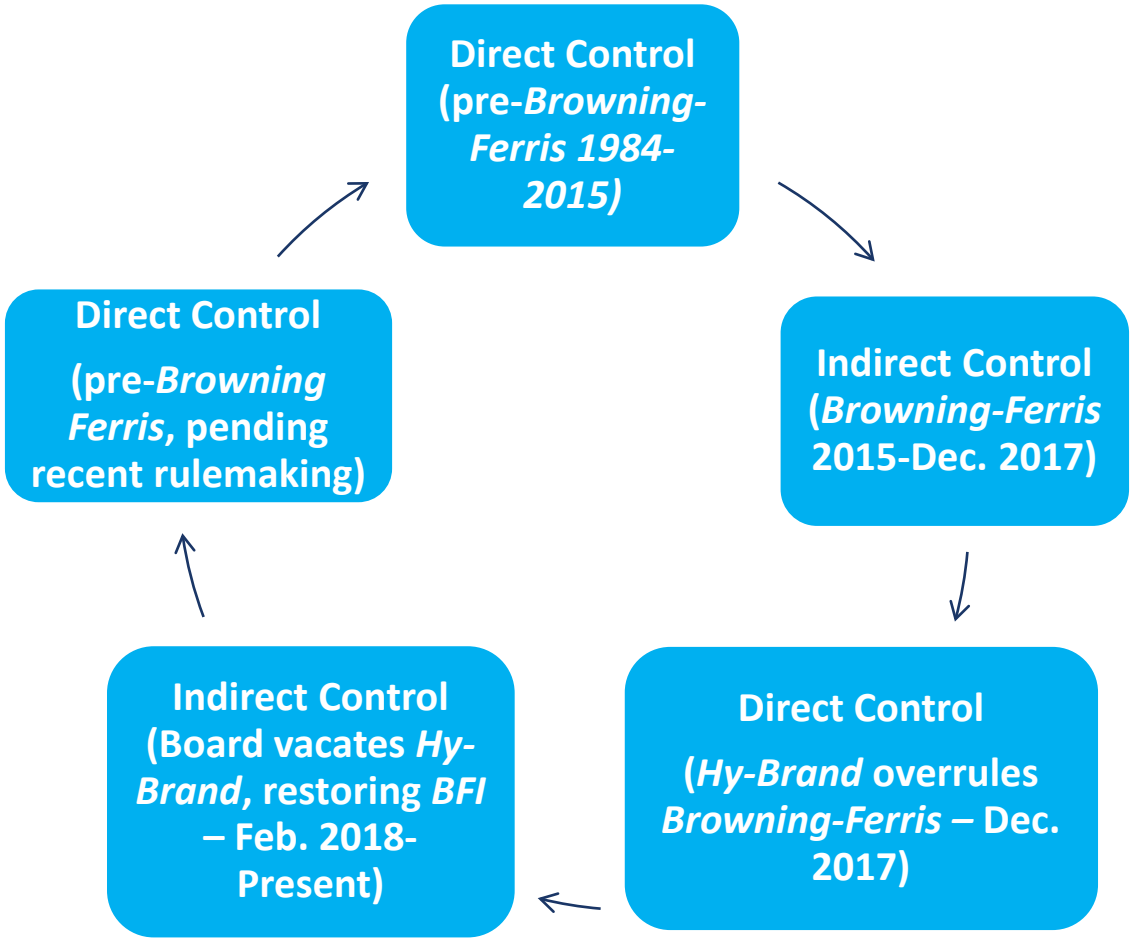
Uncertainty about potential liability

NLRA & JOINT EMPLOYER LIABILITY

RECENT BOARD ACTION

- On **September 14, 2018,** the Board proposed a **new regulation** dealing with joint employer status
- Under the **proposed regulation:** an employer may be considered a joint employer of a separate employer's employees **only if** the two employers **share or codetermine the employees' essential terms and conditions of employment**, such as hiring, firing, discipline, supervision, and direction
- A putative joint employer **must possess and actually exercise substantial direct and immediate control** over the employees' essential terms and conditions of employment in a manner that **is not limited and routine**

CYCLE OF JOINT EMPLOYER LIABILITY UNDER NLRA



PENDING NLRB RULE

IF THE PROPOSED RULE PASSES

PENDING NLRB RULE

Under NLRA: A business that hires another company to perform work but has no direct control over employees:

Will no longer be obligated to collectively bargain

Will no longer be held jointly liable for unfair labor standards

Will no longer be drawn into collective bargaining disputes

JOINT EMPLOYER LIABILITY

WHAT'S AHEAD?

- There is a 60-day period for comment
- Board will then have the opportunity to review the comments and revise or reject the proposed rule
- The soonest the new rule will be implemented will be late 2018, but more likely early 2019
- Even with the *Hy-Brand*, the joint employer standard under the NLRA is extremely broad, as set forth in the 2015 *Browning-Ferris* decision

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QUESTIONS