KEMP SMITH LAW

150 YEARS

WHO'S WHO: EMPLOYER, EMPLOYEE, OR OTHER? – NLRA/FLSA

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NEW JOINT-EMPLOYMENT STANDARD UNDER THE NLRA

- Prior Standard for Joint-Employment Liability
  - *NLRB v. Browning-Ferris Indust. of Pennsylvania* (3rd Cir. 1982)/*TLI Inc.* (NLRB 1984)/*Laerco Transport.* (NLRB 1984)
    - Two separate entities are joint-employers if they "share or codetermine those matters governing the essential terms and conditions of employment"
      - Hire, fire, set wages, set working hours, dictate manner and method of work performance, promotions, discipline, etc.
    - Must exercise actual control; mere retention of right to control was not enough
    - Control must be direct and immediate; indirect control was not enough
    - Even if direct control, no joint-employment status if supervision was "limited and routine" in nature
      - Tell workers what work to do or where to do it but not how to do it

NEW JOINT-EMPLOYMENT STANDARD UNDER THE NLRA

- In August 2015, the NLRB issued its decision in *Browning-Ferris Indust. of Calif., Inc.* adopting a broader joint-employment standard
  - New Standard: Two or more employees are joint-employers over the same group of employees if they "share or codetermine those matters governing the essential terms and conditions of employment"
  - A common-law employment relationship must exist – necessary but not sufficient to constitute joint-employment
    - Master/Servant: Right-to-control principles
    - Control *or* right to control is probative of joint-employer status
  - "[T]he putative joint-employer [must] possess sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining"

NEW JOINT-EMPLOYMENT STANDARD UNDER THE NLRA

- Actual exercise of control immaterial
  - Reserved authority to control terms and conditions of employment, even if not exercised, is relevant
- Authority to control can be direct or indirect
  - Ex: Both types of control exist where the user firm owns and controls the premises, dictates essential nature of the job (what the job is), and imposes broad operational contours of the job (how it should be done) AND supplier firm, following user firm's guidance, makes specific personnel decisions and administers job performance
- Authority could be limited and routine

NEW JOINT-EMPLOYMENT STANDARD UNDER THE NLRA

- Dissent
  - By removing those restrictions, employers have no guidance to employers on degree of control
  - New standard has no limiting principles -- any slightest degree of control may be determinative
- Majority's Response
  - "Mere service under an agreement to accomplish results to use care and skill in accomplishing results" is not evidence of a joint-employer relationship
  - "We do not suggest today that a putative employer's bare rights to dictate the results of a contracted service or to control or protect its own property constitute probative indicia of employer status."
  - "All incidents of the relationship must be assessed"

NEW JOINT-EMPLOYMENT STANDARD UNDER THE NLRA

- Application of new joint-employer test in *Browning-Ferris*
- Facts:
  - BFI (user firm) operates a recycling facility and employs 60 employees (forklift operators, loader operator, equipment operators)
  - Leadpoint (supplier firm) contracted with BFI to provide 240 laborers (screen cleaners, sorters, and housekeepers) who work at the facility
  - Services agreement says Leadpoint is sole employer of its workers
  - Union sought to represent unit of Leadpoint workers and claimed BFI was a joint employer

NEW JOINT-EMPLOYMENT STANDARD UNDER THE NLRA

- The Board found that BFI was a joint-employer b/c it codetermined terms and conditions of employment for workers:
  - BFI controlled Leadpoint's hiring practices: required drug testing: prohibited hiring of workers that BFI deemed ineligible for rehire; must meet or exceed BFI's standard selection procedures and tests; BFI possessed unqualified right to reject any worker assigned by Leadpoint "for any or no reason"
  - BFI controlled the pace of work for Leadpoint workers, set productivity standards, and assigned specific tasks to Leadpoint workers that took precedence over work assigned by Leadpoint, held meetings to discuss customer complaints -- done both directly and indirectly
  - BFI prohibited Leadpoint from paying its workers more than BFI pays its workers -- in effect created a wage ceiling for Leadpoint

NEW JOINT-EMPLOYMENT STANDARD UNDER THE NLRA

- Post-*Browning-Ferris* Case: Regional Director finds that user employer was NOT a joint-employer under new standard
- *Green Jobworks, LLC/ACECO, LLC,* Case No. 05-RC-154596 (Oct. 21, 2015)
  - ACECO is a demolition and environmental remediation contractor
  - ACECO supplements its workforce with workers from GJW, a temp staffing agency also engaged in demolition, environmental remediation, asbestos removal
  - Union sought to represent unit of all jointly-employed employees

NEW JOINT-EMPLOYMENT STANDARD UNDER THE NLRA

- GJW recruits own employees, drug tests, give them safety tests for demolition work, provides training, informs workers of available assignments which can be rejected or accepted, has evaluation process for increasing wages based on length of service and performance
- ACECO can request particular employees by name, but GJW not obligated to comply
- ACECO is a subcontractor, and the general contractor (GC) typically sets the work schedules and is responsible for safety at work sites
- In event of unplanned work stoppage, GJW and ACECO are responsible for re-assigning their own employees

NEW JOINT-EMPLOYMENT STANDARD UNDER THE NLRA

- RD found evidence insufficient to support joint-employer status
- Case was distinguishable from *Browning-Ferris*
  - ACECO and GJW signed a new contract in 2015 which gave GJW "exclusive right" to recruit, hire, assign, discipline, discharge, and determine wages
  - GJW required to assign lead workers responsible for documenting and tracking hours worked, determining breaks, removal of workers from site
  - Some GJW workers were sent home by GC not ACECO
    - However, contract gave ACECO right to send home GJW workers for "safety reasons" or "any reasonable objections"
  - GJW workers could negotiate wages – ACECO not involved
  - Minimal supervision between ACECO and GJW workers
    - GC had more supervisory authority over worksite than ACECO

DOL INTERPRETS JOINT-EMPLOYER STANDARD BROADLY UNDER FLSA

- Joint-employer status under the FLSA imposes joint-and several liability on both employers for OT violations and other violations
- Hours worked at both joint-employers in the same workweek are aggregated for purposes of calculating OT

DOL INTERPRETS JOINT-EMPLOYER STANDARD BROADLY UNDER FLSA

- In January 2016, DOL issued Administrator's Interpretation No. 2016-1
  - Broadly interprets joint-employer status under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA")
    - MSPA incorporates FLSA's definitions
  - Expands circumstances under which companies can be deemed a joint-employer
  - FLSA's definition of "employ" = "includes to suffer or permit to work"
    - DOL: "broadest definition ever included in any one act"
    - Therefore, joint-employer status should be defined "expansively"
    - Less emphasis on degree of control
  - Horizontal vs. Vertical Joint-Employment

DOL INTERPRETS JOINT-EMPLOYER STANDARD BROADLY UNDER FLSA

- Horizontal Joint-Employment
  - Two or more employers each separately employ an employee and are sufficiently associated with or related to ach other with respect to the employee
  - Example: Restaurant X and Restaurant share economic ties, same management controls both restaurants, and share employees. If waitress works 30 hours at Restaurant X and 20 hours at Restaurant, then she is entitled to 10 hours of OT – both restaurants are jointly and severally liable

DOL INTERPRETS JOINT-EMPLOYER STANDARD BROADLY UNDER FLSA

- Horizontal Joint-Employment: Focus is on relationship between both employers:
  - Who owns the potential joint-employers? Same owner?
  - Overlapping offices, directors, executives, or managers?
  - Share control over operations? (hiring, firing, payroll)
  - Are potential joint-employers' operations inter-mingled? Same person pay and schedule employees regardless of which employer they work for?
  - Does one potential joint-employer supervise the work of the other joint-employer?
  - Is supervisory authority over employees shared by potential joint-employers?
  - Is there a pool of employees available to both potential joint-employers?

DOL INTERPRETS JOINT-EMPLOYER STANDARD BROADLY UNDER FLSA

- Do potential joint-employers share clients or customers?
- Are there any agreements between the potential joint-employers?

DOL INTERPRETS JOINT-EMPLOYER STANDARD BROADLY UNDER FLSA

- Vertical Joint-Employment
  - Focus is on the relationship between employee of an "intermediary employer" and the potential joint-employer
    - e.g., employee of subcontractor's relationship to general contractor
  - An employment relationship exists between employee and intermediary employer but work performed is typically for the benefit of the other employer
  - Analysis to determine whether economic realities support a finding of "economic dependence" by employee on potential joint-employer

DOL INTERPRETS JOINT-EMPLOYER STANDARD BROADLY UNDER FLSA

- DOL borrows economic realities factors from MSPA regulations, in the context of a farm labor contractor acting as intermediary for grower to determine economic dependence:
  - Directing, controlling or supervising the work performed
  - Controlling terms and conditions of employment (hire, fire, pay)
  - Permanency and duration of relationship
  - Repetitive and rote nature of work (unskilled)
  - Work is integral to the business
  - Work performed on the employer's premises
  - Administrative functions performed by potential joint-employer (payroll, provide workers' comp, provide safety equipment)

DOL INTERPRETS JOINT-EMPLOYER STANDARD BROADLY UNDER FLSA

- Example: ABC Drywall Co. is a subcontractor on project and directly employs Joe Laborer. The GC provides training, all equipment and materials for the job, workers' comp, reserves right to move Joe from project, and controls schedule. Joe has worked continuously on the project through different intermediaries. These facts indicate vertical joint-employment.
- Example: Mechanic is employed by HVAC Co. which has a short-term contract to repair units at Condor Condos. HVAC Co. hired and pays Mechanic directly, sets hours for completing project, provides tools, and provides benefits. Mechanic checks in with Condor's property mgr every morning but only HVAC Co. supervises work. No vertical joint-employment relationship.