A Cloudy End-of-Summer For the Gig Economy: What Does the NLRB's Labor Day Gift Mean?

by Molly Lee Kaban

On August 27, 2015, the National Labor Relations Board ("NLRB") issued *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186, a sweeping decision that expands the definition of "joint employer" for purposes of the National Labor Relations Act ("NLRA"). Abandoning 30 years of precedent that required "direct" and "immediate" control over employees' working conditions for a finding of joint employer status, the NLRB held instead that "indirect" or "potential" control is sufficient. Moreover, no longer does the employer have actually to exercise any control for a finding of joint employer status. Rather, as long as some degree of direct or indirect control is reserved for the putative joint employer in the contract with the labor provider, that alone is sufficient to establish joint employment. Because this new standard will subject many entities to new bargaining obligations, strike and protest activity by unions and potential liability for the unfair labor practices of other entities, any company that utilizes the services of another entities employees' (such as subcontractors, franchisees, staffing agencies and technology platforms) must be aware of this decision.

In the decision, Browning-Ferris Industries of California, Inc. ("BFI") contracted with a labor supplier, Leadpoint, for workers to perform a variety of tasks at its waste management facility. BFI required that Leadpoint's employees meet certain qualifications and pass drug tests, but it was not directly involved in hiring Leadpoint's employees. Leadpoint provided supervisors on site as well, and while there was some evidence that BFI directed Leadpoint employees' work from time to time, Leadpoint had "sole responsibility to counsel, discipline, review, evaluate, and terminate personnel who [were] assigned to BFI." The contract between BFI and Leadpoint, however, reserved for BFI the right to reject or discontinue using any worker that Leadpoint referred to its facility “for any or no reason."

The Regional Director of Region 32 found these facts insufficient to establish that BFI was a joint employer of Leadpoint's employees because the evidence of BFI's control was only limited and routine. On appeal, the NLRB did not specifically disagree with that finding. Rather, it took issue with past NLRB precedent that held that "indirect" control was insufficient to establish joint employer status. Noting the changing economy

due to the rapid growth of contingent workforces, ***the NLRB reversed that precedent and held that indirect or even "potential" control over working conditions may now support a finding of a joint employment relationship, even if that control is not actually exercised by the putative joint employer.***

Other Important End-of-Summer NLRB Rulings

In *On Assignment Staffing Services*, the NLRB turned its attention to mandatory arbitration agreements that require workers to waive their right to pursue class action claims. The *On Assignment* case involved an arbitration agreement that provided that all employment claims were limited to individual arbitration. It also gave employees 10 days to "opt out" of the agreement. The employer argued that the 10-day opt out provision meant the agreement was voluntary and not a condition of employment. The NLRB rejected the employer's argument, finding that the arbitration agreement was unlawful because it required workers to prospectively give up their right to engage in protected activity, bringing claims as a class action. By prohibiting class claims, the arbitration agreement violated the workers' ability to band together for mutual benefit. This decision contrasts with federal court decisions that generally have been more protective of arbitration agreements.

Next, *GVS Properties LLC* affects businesses that are legally required to retain workers in the acquisition of a new business. In the case, GVS Properties acquired several new buildings in New York City. In doing so, it was required by a local worker retention statute to retain the predecessor's employees for a 90 day transition period. These employees were represented by a union, which argued that GVS was a "successor employer" and was thus required to recognize the union and bargain with it for a new collective bargaining agreement. GVS contended that because it did not intend to retain the workers beyond the 90 day transition period, it had not hired a majority of the workforce required to be considered a "successor employer" under the NLRA. The NLRB agreed with the union, finding that GVS was a successor employer at the point it assumed control of the predecessor's business and hired, pursuant to the local statute, a majority of the predecessor's workforce for the transition period. The majority believed that the NLRA's aim to preserve industrial peace was best served by considering GVS to be a successor when the employees were hired as required by law as opposed to delaying employee bargaining rights until the end of the statutory transition period. Thus, GVS was required to recognize the union and bargain with it over the terms and conditions of employment.

Virtual Organizing Has Arrived – Technology Makes it Easier to Unionize

Finally, on September 1, 2015 the NLRB's General Counsel issued guidance advising that unions may submit electronic signatures to satisfy the 30% showing of interest requirement in a representation case. Actual signed union authorization cards are no longer necessary. The requirements for petitions containing electronic signatures are minimal. Submissions must include (1) the signer's name, (2) the signer's email address or other known contact information (e.g., social media account), (3) the signer's telephone number, (4) the language to which the signer has agreed, (5), the date the electronic signature was submitted, and (6) the name of the employer of the employee.

This guidance will make obtaining a representation election easier and faster for unions.

Misclassification Class Actions – Courts Also Scrum with the Gig Economy

Class action attorneys also are attacking how on-demand companies characterize their workers, and San Francisco is ground zero for these suits. Most recently, on September 1, 2015, a U.S. District Judge

decided that workers for a transportation technology platform could collectively challenge the company on whether they should be considered employees under the law, rather than independent contractors. While the case has appealed to the Ninth Circuit, other on-demand companies face similar threats, e.g., Lyft (transportation), Caviar (food delivery), Postmates (food delivery), Homejoy (home cleaning – shutdown following lawsuit), Instacart (in-store – converted workers to employees), Shyp (on demand courier service – converted workers to employees), Washio (dry cleaning and wash-and-fold service delivery).

Impact – Will the New Sharing Economy Collide with Old-School Traditional Labor Law?

The sharing economy and its gig-based workforces are still new. On the other hand, labor's roots in the Bay Area date back to 1860, with workers fighting for a 10-hour workday more than 155 years ago. Today, by using an on-demand workforce, gig-based employers save on payroll taxes (Social Security and Medicare), workers compensation insurance, overtime, reimbursements, and the like. More and more, however, they are facing wage-and-hour litigation and labor organizing threats.

Simply put, the NLRB's end-of-summer decisions expanded the definition of employer, with the NLRB finding that: (1) a company is a joint employer so long as it has the ability to exercise control over the workforce, even if that control is not exercised; and (2) the employer need not exercise direct and immediate control to be considered a joint employer. Moreover, the General Counsel's opinion on electronic signature gathering makes it easier to organize and get to an NLRB election.

In light of these decisions, tech companies with on-demand workforces should develop union strategies. If joint employer status is found, unions will be able to impose a duty to bargain, embroil the companies in labor disputes (including picketing, strikes and boycotts) and subject the companies to liability for the unfair labor practices.

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