CORPORATE COUNSEL

Does Browning-Ferris Mean the End of Traditional Contract Worker Arrangements?

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On August 27, 2015, the National Labor Relations Board (NLRB) issued a long-awaited decision in the case of Browning-Ferris Industries of California Inc. (BFI) that reset the standard for determining whether two or more entities are joint employers of a single workforce. Since millions of workers are employed through temporary agencies (with the number increasing annually), the new standard will impact many industries, from hotels to law firms.

Employers are now asking whether steps can be taken or procedures revised to avoid a joint employer determination. The answer is probably no, at least based upon most of the staffing agreements that I have reviewed. This is because many of the factors considered by the NLRB to establish a joint employer relationship are simply a “must” for any company that wants to have reasonable control over the people being sent to provide services at the company’s place of business.

BFI runs a waste recycling facility and was party to a temporary staffing agreement with Leadpoint, a temporary staffing agency. Leadpoint, in turn, provided contract workers to sort recycled materials at BFI's facility. The NLRB ruled that joint employer status will be found where employers (i) both fall within the definition of an employer under common law; and (ii) codetermine matters governing essential terms and conditions of employment. Here are the factors that the NLRB used to find that BFI and Leadpoint were joint employers:

Management Structure Leadpoint employed a manager, three shift supervisors, seven line leads plus a human relations manager, all of whom were on-site at BFI's facility. However, the NLRB found that Leadpoint was essentially a go-between, because BFI had the sole right to control the speed of the materials sorting lines to which the contract workers were assigned and, therefore, productivity. I am unable to think of a situation where a company does not exert some indirect control over contract workers.

Hiring BFI required Leadpoint to ensure that workers were qualified for the general duties of the assigned position, including certifications and training required by law. It also had to subject the workers to a drug screening. BFI instructed Leadpoint not to assign any workers to the facility who had been previously employed by BFI and deemed ineligible for rehire. So, while BFI did not participate in the day-to-day hiring process, it did codetermine hiring decisions via the conditions it place on Leadpoint. I would not advise my clients to sign a staffing agreement that did not, at least, require the staffing agency to provide qualified workers.

Wages BFI had a cost plus markup wage structure that was preapproved in the staffing agreement, which was amended when the minimum wage was increased. It is simply good business practice to include the cost of services in a contract.

Discipline and Termination The NLRB found it relevant that BFI had the right to reject or discontinue the use of any workers. Although

some agreements I have reviewed place a time limit on this right, i.e. a two-day evaluation period, this provision is pretty typical. In addition, although BFI did not directly discipline or terminate the contract workers, workers were terminated or reassigned by Leadpoint at BFI's request after BFI observed drinking on the job and property destruction. BFI should have just informed Leadpoint of conduct and allowed Leadpoint to determine the discipline. The Leadpoint agreement was also terminable at will, which is customary.

Scheduling and Hours Although BFI did not have the right to assign specific workers to specific shifts, it alone had the ability to set the working hours of the facility, including the need for overtime and breaks. However, BFI, like many employers, also employed fulltime workers at the facility so it necessarily had to coordinate the efforts of all workers. BFI was also required to sign the workers time cards each week. This is also a typical requirement, especially where staffing agency supervisors are not on-site.

Work Processes BFI decided which conveyor belts would run each day and how many workers were needed on each belt. There was really no way for BFI to avoid making these decisions because they depended upon the volume of materials to be processed by the facility. However, BFI did cross the line and act more like an employer when it told workers where to stand, what materials to prioritize and dictated whether workers should be left-handed or right-handed. Also, before each shift, BFI supervisors would meet with Leadpoint supervisors to outline the specific tasks to be completed during the shift.

Training and Safety Although Leadpoint was responsible for safety and training, BFI occasionally provided training directly to the workers. It was also noted that BFI required Leadpoint to ensure that its workers complied with BFI's safety, procedures and training requirements. For workers in safety-sensitive positions, Leadpoint was also to obtain their written acknowledgement of BFI's safety policies. Requiring a staffing agency to educate workers about a company's policies is also a standard provision.

Other Terms The staffing agreement also stated that workers could not be assigned to the facility for more than six months and that BFI had the right to audit Leadpoint's books and records to ensure compliance with the agreement. Neither provision was enforced or triggered. The six month time limit on a worker's assignment seems unnecessary and just gave the NLRB more ammunition to find a joint employer relationship when workers were kept on the job longer. The audit right was broad, but an audit right related to I-9 verifications is not unusual and in some cases is just good business.

Other Issues While not specifically mentioned as a factor in favor of finding BFI a joint employer, the NLRB did note that all of the contract workers were employed inside the facility and that BFI's direct employees worked outside and were unionized.

Although BFI may have overstepped the employer boundary on a few points, in general, the terms of the staffing agreement with Leadpoint were not unusual. And, if the terms that the NLRB relied upon to find joint employer status are all removed from the staffing agreement, Leadpoint would have essentially been running the entire facility. So, while much has been made about Browning-Ferris sounding the demise of franchisor-franchisee relationships, I think it's more likely to have ended traditional contract worker arrangements.

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