The Insurance Industry's Approach to Joint-Employer

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The last year and half was a big year for determining a company's potential liability based on its status as an employer. This is especially true, given the National Labor Relations Board's recent rulings that define the term "joint employer."

Two major cases have served to illustrate the NLRB's main thrust in its attempts to modify the traditionally accepted concept of joint employment. One of those cases, Browning-Ferris Indus. of Cal., Inc., has since been decided.

The other, McDonald's USA, began its trial before an NLRB administrative law judge in March and will now likely be impacted by the revised standard put forth in the Browning-Ferris decision.

The concept of joint employment is significant in terms of its impact on insurance, particularly employment practices liability insurance exposures. Two companies (franchisor and franchisee) that are deemed to be joint employers can each be held liable for the employment practices of the other. This has a significant impact EPLI exposures, including underwriting and pricing. Although these cases affect many industries, none as profound as the franchise industry.

The court's decision that an agency relationship could exist if a third party reasonably believed the franchisee is the agent of the franchisor.

NLRB "KEY THEMES" OF JOINT EMPLOYMENT

A review of the NLRB's decision in Browning-Ferris quickly reveals some key themes that accompany the revised joint employer standard. The following is a summary of the thought process that the NLRB described in its publication of the majority decision in Browning-Ferris. The NLRB's decision found two main distinctions that characterize the "traditional" standard previously used to determine joint employment: possession of control versus use of control and; indirect control versus direct control. Until the early 1980s, the NLRB deemed the possession of control over employees as sufficiently indicative of a joint employer relationship rather than requiring any use of that control.

As stated in the BFI decision: … the Board typically treated the right to control the work of employees and their terms of employment as probative of joint-employer status. The Board did not require that this right be exercised … (emphasis in original).

The implication here is that the "traditional" standard gave much more reliance to contractual relationship when it came to deciding whether a company was a joint employer. Indirect control was treated as a sufficient indicator of joint employer status rather than requiring direct supervision or other more formal arrangements. To provide some examples of the type of indirect control that traditionally established a joint

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employer relationship, the BFI decision cited situations in which employers ... inspected their [employees'] work, issued work directives through the other firm's supervisors, and exercised its authority to open and close the plant based on production needs.

What happened to that standard? The McDonald's USA case centers around claims of reported wage and hour violations and other workplace torts allegedly committed by McDonald's franchisees, for which the NLRB ruled that McDonald's could be held jointly liable as a franchisor.

The prospect of a favorable outcome for the franchisor seems increasingly less likely, in light of the Browning-Ferris decision. Up to this point, it has typically been the franchisee that faces the legal repercussions if laws are violated. But Browning-Ferris may very well significantly expand the employment practices liability exposure that franchisors like McDonald's face. It may also force them to take on expanded interactions with unions and other worker groups. Any further unfavorable rulings against McDonald's will likely be appealed all the way up to the Supreme Court and the trial process along the way will continue to offer important insight into the evolving views of franchisor liability. Many are predicting that this is only the first domino to fall, and if successful will be followed by OSHA, HIPPA, ERISA, etc. "joint" rulings.

FRANCHISORS ON "HIGH ALERT"

Regardless of the opinion one might have on the NLRB's Browning-Ferris decision, the fact remains that franchisors have essentially been put on high alert. Wage and hour claims, workplace torts, and other types of exposures traditionally thought of as more applicable to franchisees now have the legal foundation to be seen as franchisor wrongdoings, for which a franchisor could also be held liable. From the perspective of an employment practice insurance underwriter, do you now underwrite all 3,000 franchisees' employees or the historical 50 franchisor employees? How does one underwrite the exposure at 200 franchisees without underwriting each location with their own application/information?

Looking at the issue from a different angle, franchisors are also in the undesirable position of having to toe the line between their unwillingness to develop controls for employment relationships (for fear of showing characteristics of joint employment and incurring greater liability) and, on the other hand, their desire to be proactive about potential exposure under the NLRB's revised standard by implementing appropriate tools to assist their franchisees' management training and store policies.

Standard employment practices liability policies are not designed to cover joint employment matters. One only needs to review the definition of insured.

The EPL insurance companies, with one exception, has been silent on the joint employer situation. This is attributable to a number of reasons. Chiefly among them is the overall lack of profitability in EPL insurance. Both the frequency and severability has underwriters running away. Because of this insurance companies are not looking for opportunities to enhance coverage. Lastly, and possibly most important is the insurance industry, with rare exceptions, lack expertise in the franchise industry and its understanding of underwriting joint employer or vicarious liability for the franchise industry. Due to the EPL policy's wording, including but not limited the definition of insured, underwriters' positions of doing nothing has been their best defense.

One carrier that is specifically committed to the franchise industry has taken a completely different approach. That insurance company recognized the high level of anxiety among franchisors arising out of the NLRB position and is offering explicit coverage. Although the hope is that one-day insurance for joint employer will not be necessary, their commitment is to provide a solution for as long as necessary.

In light of the NLRB's Browning-Ferris decision, vicarious liability coverage and joint employer are important exposures to have covered in the event that a court judges a franchisor to be responsible for the negligent acts of a franchisee. Given the evolving interruptions on franchisor-franchisee relationships, both joint employer and vicarious insurance should be considered.

What should a presumed joint employer do to protect itself?

Franchisors should ask if their carrier is willing to provide coverage for joint employment matters to address their exposure to EPL suits. Franchisors should also require franchisees to carry EPL coverage if they do not already and require their franchisees to name the franchisor as an additional insured on their EPL policy. Having one EPL insurance company for the franchisor and all of its franchisees is best and avoid common pitfalls, such as allocation issues between two insurance companies and the confusion of the "other insurance" provision when two different carriers are involved in overlapping claims. This exposure needs to be addressed at both the franchisor and franchisee level. Franchisors should also reexamine the EPL limits they carry and the limits of their franchisees to see if it would be prudent to purchase additional limits in light of this increase in exposure.

While the risk to a joint employer is large, it can and should be addressed through insurance and proper employment practices risk management (in some situations less control might be advantageous, but there are other business ramifications beyond

risk that need to be considered). The best advice is for companies is to consult with both its outside counsel and trusted insurance advisors with specific EPL and franchisor liability experience to determine the best course of action. ■

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