Client Alert

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March 14, 2016

Court and Administrative Action Raises Joint Employer Concerns with/for Staff Agencies

The United States Court of Appeals for the Third Circuit's recent decision in *Faush v. Tuesday Morning, Inc.* highlights a growing trend in favor of finding that businesses and their staffing companies are joint employers of the temporary employees the staffing company places at the business. A joint employer finding can be highly problematic for both entities, as it can lead to shared liability for employment discrimination, wage and hour violations, immigration failings, and other issues.

The *Faush* Decision

The plaintiff in *Faush* was an African-American temporary employee of Labor Ready, a large international staffing firm, who was assigned to work at a retail location of Tuesday Morning, Inc., a closeout home goods retailer. Faush filed a discrimination action against Tuesday Morning, Inc., after the manager of the Tuesday Morning, Inc. location where he was assigned terminated his assignment (and that of another African-American employee) after ten days, due to concerns about "loss prevention." Faush also alleged that a Tuesday Morning, Inc. employee prevented him from speaking to management and directed racial slurs at Faush.

The trial court granted summary judgment to Tuesday Morning, Inc., finding that it was not the common-law employer of Faush, and that it was not liable for the alleged employment law violations of Faush's true employer, Labor Ready. On appeal, the Third Circuit disagreed, finding that sufficient evidence existed for a reasonable jury to conclude that Tuesday Morning, Inc. and Labor Ready were joint employers of Faush. The Third Circuit based its ruling on the following factors:

- Faush's time card for Labor Ready was signed and approved by a manager employed by Tuesday Morning, Inc.
- Tuesday Morning, Inc. was responsible for supervising and directing Faush's activities once he reported to work. Faush worked under the direct supervision of Tuesday Morning, Inc.'s management.
- The agreement between Tuesday Morning, Inc. and Labor Ready provided that Tuesday Morning, Inc. was to evaluate the "skill, competency, license, experience, and other requirements" for employees provided by Labor Ready, and to assign them to duties consistent with their skills and abilities.
- Faush performed the same duties as Tuesday Morning, Inc. employees.

- The agreement between Tuesday Morning, Inc. and Labor Ready provided that Tuesday Morning, Inc. had responsibility for "ensuring complete and accurate compliance with all local, state and federal laws relating to prevailing wages." Both companies pledged to comply with "all applicable federal, state and local laws and regulations concerning employment."
- Tuesday Morning, Inc. managers trained Faush to assemble shelves (one of his primary tasks at Tuesday Morning, Inc.)

The appellate court found that Faush's evidence was "more than sufficient to preclude summary judgment" for Tuesday Morning, Inc.

Administrative Action

Separate and apart from the *Faush* decision, recent years have seen significant action on joint employer issues by federal administrative agencies. Businesses and their staffing companies have already had to take steps to avoid joint liability for providing health insurance under the Patient Protection and Affordable Care Act, and immigration-related exposure has long been a concern as less than three years ago, the operator of a Northeastern Pennsylvania staffing agency was sentenced to a year in prison for harboring illegal immigrants and mail fraud. In 2014, the Occupational Safety & Health Administration released Recommended Practices for staffing agencies and host employers. We were fortunate to host an OSHA representative who gave a presentation on these Recommended Practices at our Balls & Strikes Seminar that same year.

In August of this year, the National Labor Relations Board issued its decision in *Browning-Ferris Industries of California*, which simplified the NLRB's test for finding the existence of a joint-employer relationship. Under the simplified standard, the Board may find that two or more businesses are joint employers of the same employees if they "share or codetermine those matters governing the essential terms and conditions of employment." In determining whether a joint employer relationship exists, the NLRB will initially decide whether there is a common-law employment relationship with the employees in question. If a common-law employment relationship exists, the NLRB will then review whether the putative joint employer possesses sufficient control (direct and indirect) over employees' essential terms and conditions of employment to permit meaningful collective bargaining. The NLRB applied the simplified test to find that Browning-Ferris Industries and its staffing agency, Leadpoint, were joint employers of the employees Leadpoint supplied to work Browning-Ferris' Newby Island recycling facility.

Most recently, in late January, the Wage and Hour Division of the U.S. Department of Labor (DOL) issued an Administrator's Interpretation on joint employment under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act. In the Interpretation, the DOL indicates that it will focus its inquiry on whether a worker is "economically dependent" on the putative joint employer, focusing on whether (1) the putative joint employer directs, controls or supervises the work and (2) controls employment conditions; (3) the permanency/duration of the employment relationship; (4) the repetitive/rote nature of the work; (5) whether the work is integral to the business; (6) whether the work is performed on the employer's premises; and (7) whether the putative joint employer performs administrative functions relative to the worker of a type commonly performed by employers.

Best Practices

In light of these concerns, there are a few recommended best practices that a business and its staffing company can take to minimize the likelihood of a joint employer finding:

- *A host employer should not directly supervise the work of a temporary staffer*. Best practice is to have the staffing company place its own on-site supervisor at the host company to supervise the work of staffing company employees.
- *Temporary staff should generally not perform the same work as host company employees*. If staffing company employees work next to host company employees, performing the same work as host company employees, it will be a significant negative factor in most joint employer inquiries.
- *The staffing company should be responsible for determining whether its employees have the requisite skills to perform the assigned work at the host company*. The host company should provide a list of work to be performed to the staffing company, but best practice is to delegate responsibility to the staffing company to determine which of its employees have the necessary skills to perform that work.
- *Limit the duration of a temporary staffer's assignment*. Keeping temporary staffers in place for long periods of time (periods greater than 6-12 months) can blur the distinction between temporary staffers and permanent employees, and will be a significant negative factor in most joint employer inquiries.

This list is not exclusive – the existence of a joint-employer relationship is a highly fact-sensitive question. If you have concerns about joint employer issues, and would like to review the potential risk to your business, please do not hesitate to contact us.

This Client Alert provides a general summary of new legal developments, and is not meant to provide legal advice. If you have any questions or concerns about this Client Alert, please do not hesitate to contact us at (570)341-8800.