With?

Do you hire other companies to complete jobs in your workplace? Did you realize that you could be liable for labor violations that the company commits while working there? There are two pending and one recently decided case that will alter how ...

Richard D. Alaniz, JD • Jun. 27, 2017

Do you hire other companies to complete jobs in your workplace? Did you realize that you could be liable for labor violations that the company commits while working there? There are two pending and one recently decided case that will alter how franchisees, general and sub-contractors, and other companies operate. These

cases will impact whether employers are responsible as joint employers for

In the case, Browning-Ferris directed the overall operation, including facility hours, number of employees, and quality standards. They were authorized to reject workers from the staffing company and to examine the staffing company's books and records. The staffing company had sole control over recruitment, interviewing, hiring, orientation, and counseling. The staffing company also paid wages/benefits (cost-plus arrangement), scheduled employees' shifts, supervised employees, and disciplined and terminated employees. Ultimately, Browning-Ferris was found to be a joint employer with the staffing company under the NLRB's new standard.

Under the new standard, companies are joint employers when they share or codetermine essential terms and conditions of employment. Direct, indirect, and even an unexercised right of control is sufficient. The NLRB will look at "totality of the circumstances" on a "case by case basis."

Currently, this standard is being challenged in the United States Court of Appeals for the District of Columbia. There is speculation that the Court will overturn the decision. During oral argument, two of the judges expressed concern about the decision. One of the judges, appointed by President Obama, stated that the NLRB "dropped the ball" in issuing the 2015 decision. The judge stated that the NLRB issued little guidance on how indirect control would be applied. These remarks about the standard are not a guarantee that the Court will overturn the decision, but they show that the Court may be willing to rule against the NLRB.

Salinas v. Commercial Interiors

In January 2017, the Fourth Circuit issued a decision in Salinas v. Commercial Interiors that promises to greatly impact the way that employers work with other companies to fill various needs at their worksites. The standard expands the definition of joint employer under the Fair Labor Standards Act (governing the minimum wage, overtime, recordkeeping and other issues) and presents a robust

challenge to contractors and other business arrangements. One of the joint

The court stated that the fundamental question to determine whether companies are joint employers is whether the companies are "not completely disassociated." The court examined these factors to determine whether the parties met this element:

1. Whether the companies jointly determine or have the ability "to direct, control, or supervise the worker";
2. Whether the employers jointly determine or have the ability to "hire or fire the worker or modify the terms or conditions of the worker's employment";
3. How long the relationship between the employers has existed and how permanent it appears to be;
4. Whether one employer controls the other joint employer;
5. Whether the work is done on a premises controlled by one of employers; and
6. Whether the employers jointly handle duties that are ordinarily carried out by one employer such as providing tools or handling payroll.

Furthermore, one factor alone may be sufficient for a court to find a joint employer relationship.

The court listed several factors that led it to conclude that the general and subcontractor were joint employers including: 1) the general contractor provided the tools, material, and equipment to perform the job, 2) the general contractor supervised the subcontractor's work on a daily basis, and 3) the foremen from the general contractor ordered the Plaintiffs to redo unsatisfactory work by telling the subcontractor supervisors about the issue who then relayed it to the Plaintiffs.

To comply with the statute, general contractors within this district (South Carolina, North Carolina, Virginia, West Virginia, and Maryland) should work to disassociate themselves from their subcontractors by limiting their control over the key terms and conditions of employment. General contractors should not set the work hours

for the employees, make subcontractors wear the uniforms of the contractor, and

franchised restaurants in California for $3.75 million. If the NLRB rules against McDonald's, then it could be responsible for violations of federal labor laws that are brought against franchisees. A loss would drastically change how franchisees operate. The amount of control over the procedures and operations that franchisors (like McDonald's) have over their franchisees would be dramatically altered. A ruling against McDonald's could cause many franchisors to limit the number of franchisees with which they do business.

What should employers do?

The outcome of these cases will significantly affect how employers will work with franchisees, sub-contractors, and other businesses. At present, the Browning-Ferris and McDonald's decisions are not resolved. A pro-employer decision in either or both of these cases will enable businesses to maintain their current business relationships.

To best avoid potential liability as a joint employer companies should:

- Review any contracts with subcontractors or staffing agencies with outside counsel to determine whether any of their actions could create joint employer liability.
- Carefully consider which staffing agencies or companies you have contracts with to determine whether they have adequate policies in place to avoid liability. Examine their history to determine whether they are frequent labor law violators.
- Assess the risks and rewards of working on a contract. You may be getting the liability from the other parties.
- Consider an indemnification requirement in the contract that the other company you contract with will compensate you for damages that they cause. Make sure that your insurance coverage is sufficient.

- Be prepared to change your policies if the McDonald's and Browning-Ferris cases

employment law and conducts frequent seminars to client companies and trade associations across the country. Questions about this article, or requests to subscribe to receive Rick's monthly articles, can be addressed to Rick at (281) 833-2200 or ralaniz@alaniz-schraeder.com.

Payroll