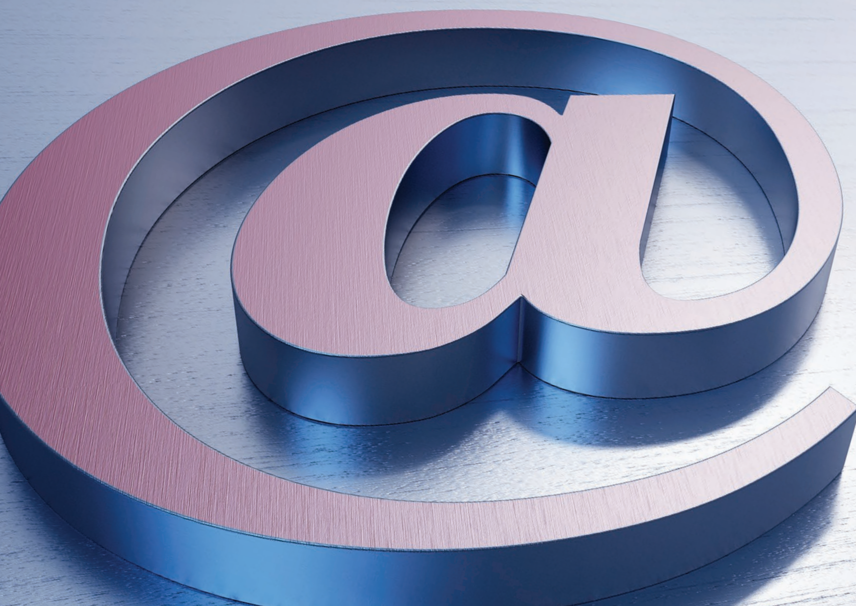

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Your HR and Employment Law Update

September 2015

In *Browning-Ferris*, Businesses Lose as the Board Crafts a Solution in Search of a Problem

Christopher J. Lalak

Marking a sea change in labor law and a departure from decades of settled precedent, the National Labor Relations Board formulated a new joint employer standard in the August 27, 2015, *Browning-Ferris Industries of California, Inc.* decision.

For the past three decades, whether a joint employer relationship existed turned on the "single employer" test, that is, whether "two nominally separate entities are part of a single integrated enterprise so that, for all purposes, there is in fact a 'single employer.'" [*NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1112-23 (3d Cir. 1982); adopted by the Board in *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation*, 269 NLRB 324 (1984).] Under the settled framework, an entity could only be found to be a joint employer if it exercised *actual* control over the terms and conditions of employment of another entity's employees.

Last week's decision injects a great deal of uncertainty into an area of labor law that was, up until now, quite predictable. Under the new rule, an entity that maintains *any degree* of *indirect* or *reserved* control over *any* of the terms or conditions of employment (such as wages, hours, hiring, firing, discipline or direction of work) of another entity's employees may suffice to trigger joint employer status.

This change is not to be understated, and will have immediate impacts in some industries:

- **Franchisors.** Although the Board has traditionally *not* held franchisors to be joint employers with franchisees, many (if not all) franchisors may be found to be joint employers with franchisees under the new rule.
- **Staffing Agencies and Contractors.** Although staffing agencies and contractors did not have the indicia of control over employees placed with their customers to be considered joint employers, many staffing agencies and contractors may now be considered joint employers under the new standard.

This is, however, by no means the full extent of the new rule. As the Board's dissenting members pointed out, the Board's new standard "appears to be virtually unlimited" and may also apply to a host of other scenarios, such as **insurance companies** that require employers to maintain safety or security standards, **banks or other lenders** who require performance measurements in their financing terms, **consumers or small businesses** who dictate the time, manner or some method of performance of contractors, or indeed, "**[a]ny**

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Home health care workers eligible for minimum wage and overtime?—get the answer in "D.C. Circuit Court Sides With the DOL's Decision to Make Home Health Care Workers Eligible for Minimum Wage and Overtime"

Unionized workplaces and withdrawal liability—learn about this threat to your business, along with some best practices in "Pension Plan Withdrawal Liability—A Ticking Time Bomb"

Foreign STEM students faced with prospect of leaving the country—get up to date on the imminent threat to existing visa extensions in "Court Invalidates 17-Month Training Extension for Foreign Students in STEM"

Most Workers Are Employees, DOL Says

Rick Hepp

Most workers should be classified as employees, not independent contractors, and be paid minimum wage and overtime, the U.S. Department of Labor (DOL) said in a recently issued Administrator's Interpretation. The pronouncement clearly signals the government's intent to step up an already aggressive campaign against employers it believes are trying to skirt wage laws.

The 15-page Interpretation, which is not legally binding but sets forth the DOL's position when construing the Fair Labor Standards Act's (FLSA's) definition of what it means to "employ" an individual, is so broad that almost every worker in the United States will be considered an employee. The Interpretation goes on to warn that agreements labeling workers as independent contractors are "not relevant to the analysis of the worker's status." Instead, according to the DOL, the determination of employee status comes down to whether the worker is "economically dependent on the employer or truly in business for him or herself." This question is to be determined by applying the familiar 6-factor "economic realities" test.

While the "economic realities" test is not new, the Interpretation has put a new gloss on how those factors should be analyzed. For instance, courts have long viewed the degree of control an employer exerts over a worker as a very important, if not the *most* important, factor. No longer. The Interpretation says that no one factor—and particularly not the control factor—is determinative. Instead, the emphasis now appears to be on whether the worker is an integral part of the employer's business, whether the worker has an opportunity for profit or loss, the relative degree of investment made by the worker when compared to the employer; and the extent of the worker's business and managerial skills. The following is the DOL's analysis of all 6 factors:

- **Is the work an integral part of the employer's business?** This answer hinges upon the degree to which the worker is performing a task that furthers the employer's main business purpose, and it does not matter if the work is performed at the worksite, at the worker's home or at the premises of the employer's customer. For example, a carpenter is integral to a construction company that frames residential homes because carpentry is central to that service. On the other hand, a software developer who creates a computer tracking system for that construction company is not integral to the business of framing houses.
- **Does the worker's managerial skill affect the worker's opportunity for profit or loss?** A worker's ability to manage a business will affect whether the business makes money or loses money beyond the current job. At the same time, a worker's ability to work more hours has nothing to do with his or her managerial skill and does little to separate an employee from an independent contractor. For example, a worker who provides cleaning services for corporate clients but does not endeavor to recruit more clients, hire and schedule help, advertise his or her services, negotiate contracts, or decide which jobs to perform and when to perform them is an employee, not an independent contractor.
- **How does the worker's relative investment compare to the employer's investment?** A worker's investment in tools and equipment is not determinative unless it is significant in magnitude compared with the employer's *overall business*, not just the job the worker is doing. For instance, in the cleaning services example, the worker is an employee if the employer provides insurance, a vehicle to use, and all equipment and supplies other than preferred cleaning supplies. In contrast, if the worker provides a vehicle that is not suitable for personal use, purchases her own equipment and cleaning supplies, and rents her own space to store these items, the worker is more likely to be an independent contractor.
- **Does the work performed require special skill and initiative?** This factor depends on the worker's business skills and judgment, and *not his or her technical skills in performing the job.* A highly skilled carpenter who does not make any independent judgment at the worksite, does not determine the sequence of work, does not order additional materials or think about bidding the next job is more likely to be an employee than an independent contractor.
- **Is the relationship between the worker and the employer permanent or indefinite?** Even if the working relationship lasts weeks or months instead of years, there is likely some permanence as an employee compared to an independent contractor, who typically works one project, not continuously or repeatedly. An editor who works for numerous publishing houses, has several projects at the same time, can turn down work for any reason, and negotiates rates for each project is more likely an independent contractor.
- **What is the nature and degree of the employer's control?** The worker must control meaningful aspects of the work such that it is possible to view the worker as a person conducting his or her own business. And the worker must actually exercise this control.

In sum, the DOL will likely label any worker an employee unless that worker is running an actual business and has an opportunity to expand that business through proper investment, making astute business decisions, hiring helpers and recruiting additional clients. This is a high bar. Consequently, employers whose business model relies to some extent on independent contractors should review the continued feasibility of these relationships with labor and employment counsel to make sure they are consistent with the new Interpretation, as there can be no doubt that the intended effect of this Interpretation is to limit the recognition of independent contractor status under the FLSA.

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HOME HEALTH CARE

D.C. Circuit Court Sides With the DOL's Decision to Make Home Health Care Workers Eligible for Minimum Wage and Overtime

Katie Tesner

The D.C. Circuit Court of Appeals issued its decision in *Home Care Ass'n of Am. v. Weil* and handed the U.S. Department of Labor (DOL) a major victory when it validated the DOL's new rules rendering employees of home health care agencies eligible for overtime compensation.

Since 1974, the FLSA has covered workers who provide "domestic services" of a household nature such as housekeepers, babysitters and home health care workers, among others. However, the FLSA also provided for a "companionship services" exemption, exempting from minimum wage and overtime requirements certain domestic service workers employed to provide "companionship services" for an elderly person or a person with an illness, injury or disability.

On September 17, 2013, the DOL announced a revised rule narrowing significantly the "companionship services" definition and classes of workers eligible for the FLSA exemptions. The exemption would apply only to those caregivers employed by the individuals (or their families) for whom the caregivers provide their services. As a result, home health care agencies were no longer able to claim an exemption from minimum wage and overtime requirements for their workers. The D.C. District Court subsequently invalidated the regulations and the DOL appealed.

The Court of Appeals determined that Congress intended for the FLSA's protections to extend to workers employed by third parties as professional caregivers, and further that a change in the exemption was warranted due to a shift away from institutionalized care to in-home care—a shift that was not envisioned when the companionship-services regulations exempting these workers were previously promulgated nearly 40 years ago.

Barring further appeal, home health care agencies and other home health care employers who do not fit within the regulations' narrowed exemptions now will now be required to comply with the minimum wage and overtime requirements of the FLSA. Review by the U.S. Supreme Court—if sought—is discretionary. Consequently, the DOL's final rules could possibly become effective in mid-September.

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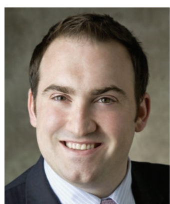
Pension Plan Withdrawal Liability—A Ticking Time Bomb

Patrick J. Egan


Shaylor R. Steele

If you are an employer with a unionized workforce, withdrawal liability is likely one of, if not *the*, largest threats to your business. Too often, employers do not focus on withdrawal liability issues until they receive their first demand notice—a point where options are limited. With some advance planning, employers can minimize, or eliminate, the impact of withdrawal liability on their businesses. This article will explain withdrawal liability, point out some warning signs that you may have a withdrawal liability problem, and suggest some best practices to manage withdrawal liability issues and protect your business going forward.

What is Withdrawal Liability?

Withdrawal liability is an employer's pro rata share of the unfunded benefits of a union pension fund—often referred to as a multiemployer pension fund. When an employer completely stops contributing to a multiemployer pension plan, or reduces its contributions beyond certain percentages over time, the employer is liable to the pension plan for its share of the plan's unfunded liabilities. Common business transactions can trigger assessments of withdrawal liability. For example, when a company closes a facility, sells a business, or even when it lays off a portion of its workforce, withdrawal liability is generally assessed. Withdrawal liability assessments are usually significant and often exceed the million-dollar threshold, even where the employer contributes on behalf of a small number of union employees.

To make matters worse, withdrawal liability assessments can be triggered without any action by the employer itself. If an employer is signatory to a collective bargaining agreement (CBA) that is maintained by an employer association, or any type of CBA where a third party is the master bargaining party, the employer could be a part of a "mass withdrawal" without knowing it. A mass withdrawal occurs when substantially all of the contributing employers to a multiemployer pension plan withdraw at the same time. If a master bargaining party controls the terms of the CBA, it can effectuate a mass withdrawal without the consent of the employers. To add insult to injury, withdrawal liabilities in a mass withdrawal setting are even higher than normal. In other words, you can get stuck with a higher withdrawal liability without taking any action. Mass withdrawals have historically been few

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Pension Plan Withdrawal Liability—A Ticking Time Bomb

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Warning Signs You May be Subject to Withdrawal Liability

Withdrawal liability is generally only applicable to employers who participate in a multiemployer defined benefit pension plan. However, if you do not participate in a multiemployer pension plan, you may still be at risk of a withdrawal liability assessment. To help you identify whether you may be at risk, answer the following questions:

1. Do you currently contribute to a multiemployer (union) pension plan?
2. Have you contributed to a multiemployer pension fund in the past six years?
3. Do any of the owners of your company also have an interest in a company that is contributing to, or has contributed to, a multiemployer plan?
4. Has your company acquired the stock or assets of a company that contributed to a multiemployer plan?
5. Does your company have a close business relationship with a company that contributes to, or has contributed to, a multiemployer plan?

and far between, but have been gaining traction in recent years and are now a real threat to union employers.

Finally, potential withdrawal liability—that is, withdrawal liability that has not been assessed—can have a real impact on your business. Creditors and sureties are becoming increasingly concerned about withdrawal liability, so your cost of capital, and ability to secure bonding, may be negatively impacted, even where you have not received an assessment of withdrawal liability. Additionally, FASB, the governing body of accounting standards, has focused on this issue in recent years and has made strides to make potential withdrawal liabilities more transparent on financial statements. While potential withdrawal liability is currently considered "off balance sheet," it is possible that employers will have to start booking these liabilities in the future.

In sum, withdrawal liability is an epidemic that can have catastrophic impact on an employer. The key is to recognize the issue early and develop a strategy to minimize the withdrawal liability that is in line with your long-term business goals. The "Warning Signs You May be Subject to Withdrawal Liability" at left should help you identify whether withdrawal liability is a threat to your business. If it is, then you should address the issue soon—you will have more options the sooner you start.

If you answer "yes" to any of the questions, you may have exposure to a withdrawal liability assessment and should start developing a strategy to insulate your company from that liability should it be assessed.

What Should You Do?

The first step to addressing withdrawal liability is to fully understand where assessments could come from, the amounts of any potential withdrawal liabilities, and the theories under which you may be liable. To do this, an expert in withdrawal liability should review your collective bargaining agreements, analyze your company's organizational structure, and assess the amount of your exposure. At that point, you can develop a short-term, mid-term and long-term strategy to minimize, or in some cases eliminate, withdrawal liability threats. The key is to make sure that any strategy to mitigate withdrawal liability is also in line with your short-, mid- and long-term business objectives. With enough advanced planning, this can almost always be accomplished.

For more information or to discuss any concerns you may have regarding the possible impact of withdrawal liability on your company, please contact **SHAYLOR R. STEELE** at ssteele@beneschlaw.com or (216) 363-4495 or **PATRICK J. EGAN** at pegan@beneschlaw.com or (216) 363-4433.

In *Browning-Ferris*, Businesses Lose as the Board Crafts a Solution in Search of a Problem

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company that is concerned about the quality of the contracted services."

In their newfound capacity as joint employer, affected companies may now be held responsible for unfair labor practices committed by a contractor. In the collective bargaining context, the joint employers' employees may be included in the bargaining units of employees of a contractor. Furthermore, litigation unfolding around the uncertainty created by the amorphous newly crafted test will prove costly.

An appeal of the Board's decision is likely forthcoming, and it is still possible Congress may weigh in. If the decision stands, maintaining economic viability in the wake of *Browning Ferris* for some companies may require nothing short of a fundamental change to their business models. For others, changes to certain terms in contracts between putative joint employers may be necessary to limit this new area of potential liability. For now, all businesses should carefully examine their contractual relationships with customers and contractors to stay informed of how this change in the law may apply to their operations.

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TECHNOLOGY

Court Invalidates 17-Month Training Extension for Foreign Students in STEM

Rick Hepp

Foreign students with degrees in science, technology, engineering and math (STEM) who are working for U.S. companies on extended student visas may be forced to leave the country early next year, thus creating the potential for major problems for employers in technology and other industries.

U.S. District Court Judge Ellen Segal Huvelle ruled earlier this month that a 2008 regulation extending the Optional Practical Training (OPT) program that allows foreign students with STEM degrees to work for up to 29 months post-graduation is invalid because it was issued by the Department of Homeland Security (DHS) without first allowing for public comment.

While the ruling vacated the regulation, Judge Segal Huvelle gave DHS until Feb. 12, 2016, to submit the rule again in compliance with appropriate notice and comment requirements. "The Court sees no way of immediately restoring the pre-2008 status quo without causing substantial hardship for foreign students and a major labor disruption for the technology sector," the judge wrote.

It is unclear yet how DHS will respond or proceed. Failing to act before the February deadline would result in the immediate termination of existing OPT extensions, giving visa holders just 60 days to pack up and go. The Obama Administration, however, announced plans this past November to further expand OPT as part of the president's executive action on immigration. Presumably, therefore, new regulations are already in the works.

The OPT program, which permits foreign students to engage in training in the U.S. after completing their bachelor's, master's or doctoral degree, has been in existence in one form or another since 1947.

Prior to 2008, students were limited to just 12 months of OPT. In 2008, DHS issued regulations extending training time for STEM students by 17 months—for a total of 29 months—to alleviate the competitive disadvantage faced by U.S. high-tech industries and add jobs in STEM occupations to the economy.

Given that DHS has more than five months to cure the procedural defects, there does not appear a need for immediate panic. That said, now is the time to review potential contingency plans with immigration counsel so that preparations can be made in the event DHS does not react prior to the expiration of the deadline or appeal Judge Segal Huvelle's decision to the D.C. Circuit.

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