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A Joint-Employment Refresher in the Wake of New Sexual Harassment Lawsuits and New NLRB Proposed Rulemaking

September 14, 2018 – In the wake of another recent sexual harassment lawsuit — this time, accusing prominent law firm Cleary Gottlieb Steen & Hamilton LLP ("Cleary") and its outsourcing company, Williams Lea, of sexual harassment and retaliation — employers using staffing agencies should be mindful that they may still be deemed a "joint-employer" under the law regardless of how they have classified themselves.

By way of background, the Fair Labor Standards Act ("FLSA") defines an "employer" broadly to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. §203(d). On December 14, 2017, the National Labor Relations Board (the "NLRB" or "Board") overruled the Board's 2015 decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015) ("*Browning-Ferris*") and announced that two or more entities will be deemed "joint employers" *only* if there is "proof that one entity has exercised control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so directly and immediately (rather than indirectly) in a manner that is not limited and routine." Press Release, National Labor Relations Board – Office of Public Affairs, *NLRB Overrules Browning-Ferris Industries and Reinstates Prior Joint-Employer Standard* (Dec. 14, 2017), available here.

On September 13, 2018, the NLRB further announced a proposed rule (a "Notice of Proposed Rulemaking") aimed at codifying the December 14, 2017 decision and definitively overturning the "indirect control" test previously established in *Browning-Ferris*. *See* Press Release, National Labor Relations Board – Office of Public Affairs, Board Proposes Rule to Change its Joint-Employer Standard (Sept. 13, 2018), available here. The Notice of Proposed Rulemaking, which is set for publication in the Federal Register on Friday, September 14, 2018, proposes that "an employer may be found to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine." *Id.* Public comments on the proposed rule may be submitted within 60 days of the Notice's publication in the Federal Register, or through November 13, 2018.

Federal courts in New York (traditionally outside the purview of organized labor and the NLRB), however, have identified different sets of relevant factors to be considered. Initially, the Second Circuit Court of Appeals established a four-part "formal control" test in *Carter v. Dutchess Cnty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984), to determine the "economic reality" of an employment relationship, specifically, whether the alleged joint employer: (i) had the power to hire and fire the employees; (ii) supervised and controlled employee work schedules or conditions of employment; (iii) determined the rate and method of payment; and (iv) maintained employment records. Then, almost two decades later, in *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71-72 (2d Cir. 2003), the Second Circuit took a more expansive view of this "formal control" test, taking into consideration the following six factors: (i) whether the company's premises and equipment are used for the employee's work; (ii) whether the contractor has a business that can or does shift as a unit from one putative joint employer to another; (iii) the extent to which the employee performs a discrete line-job that is integral to the company's process of production; (iv) whether responsibility under a contract between the contractor and the company could pass from one contractor to another without material change; (v) the degree to which the company or its agents supervise the employee's work; and (vi) whether the employee works exclusively or predominantly for the company.

Thereafter, in *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 141-43 (2d Cir. 2008), the Second Circuit warned that there is "no rigid rule for the identification of an FLSA employer," and instead applied the "nonexclusive and overlapping [*Carter* and *Zheng*] factors to ensure that the economic realities test . . . is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA." (internal quotation marks and citation omitted). Yet, and in a somewhat surprising twist, state court judges applying the New York City Human Rights Law ("NYCHRL") have adopted the more narrow view of the joint-employer concept as outlined by the NLRB. Indeed, to determine whether a defendant is a joint-employer under the NYCHRL, an "immediate control" test has been applied, which considers whether the potential employer "had immediate control over the other company's employees," specifically in connection with "setting the terms and conditions of the employee's work." *Brankov v. Hazzard*, 142 A.D.3d 445, 445-46, 36 N.Y.S.3d 133 (1st Dep't 2016) (quotation marks omitted). The *Brankov* court noted, however, that the "right to control the means and manner of the worker's performance is the most important factor to be considered. If such control is established, other factors are then of marginal importance." *Id.* (quotation marks omitted).

Regardless of the standard applied—the "immediate" or the "functional" control test—New York employers must consider and appreciate that liability could result in connection with personnel provided to them by staffing agencies. The complaint filed against Cleary in New York state court entitled *Ramona G. Simon v. Cleary Gottlieb Steen & Hamilton LLP et al.* (Case No. 157058/2018), emphasizes this point. In *Simon*, a conference coordinator, who was on Williams Lea's payroll but worked in Cleary's Manhattan offices, alleged that she was the victim of sexual harassment and retaliation at the hands of her supervisor who she alleged was also employed by Williams Lea. Despite being paid by Williams Lea, the plaintiff contends that Cleary was her joint employer because she used Cleary equipment and facilities, had a Cleary email address, and was controlled and trained directly by others employed by Cleary. The plaintiff's complaint further details alleged retaliatory behavior she suffered as a result of

reporting the harassment, leading to her purported constructive discharge where a senior account director also on Williams Lea's payroll "made it clear" she was unwelcome at Cleary.

Whether or not Cleary is ultimately found to have exercised the "immediate control" over the essential terms of the plaintiff's employment and is deemed to be her joint-employer, employers should be mindful that their relationships with staffing agencies alone may no longer insulate them from potential liability. Rather, in order for businesses to protect against potential liability, they need to limit their control over outsourced employees in order to distance themselves from liability. When in doubt, businesses should be vigilant in addressing employment issues that are reported by or about those personnel being provided by staffing agencies, especially as they relate to sexual harassment claims (where prompt and appropriate investigation and response is critical for avoiding potential liability). Businesses using outsourced personnel should also maintain an open line of communication with their staffing agencies so that they, as potential joint-employers, remain informed of any complaints being raised directly to the staffing agency. In fact, businesses using outsourced labor should consider implementing reporting guidelines into their contracts with staffing agencies to make sure they are made aware of these issues promptly. Regardless of how a complaint is received, as a potential joint employer, businesses should work with their staffing agencies to ensure potential claims are handled appropriately and that no adverse consequences are taken for those who have engaged in protected activity regardless of where they are ultimately deemed to be employed. Businesses using staffing agencies will also want to ensure that appropriate indemnification is in place to cover these types of potential claims and that appropriate insurance coverage is in place to safeguard against liability arising from joint-employer claims.

If you currently utilize the services of a staffing agency to provide personnel to your business and are uncertain about any of the issues addressed herein, or have any other legal questions pertaining to employment law, please feel free to contact us.

Jeffrey P. Englander
(212) 735-8720
jenglander@morrisoncohen.com

Keith A. Markel
(212) 735-8736
kmarkel@morrisoncohen.com

Christopher W. Pendleton
(212) 735-8783
cpendleton@morrisoncohen.com

Basil C. Sitaras
(212) 735-8849
bsitaras@morrisoncohen.com