

Texas employment relations symposium

JOINED At the Hip? New Legal Challenges for
Staffing & Franchise Relationships

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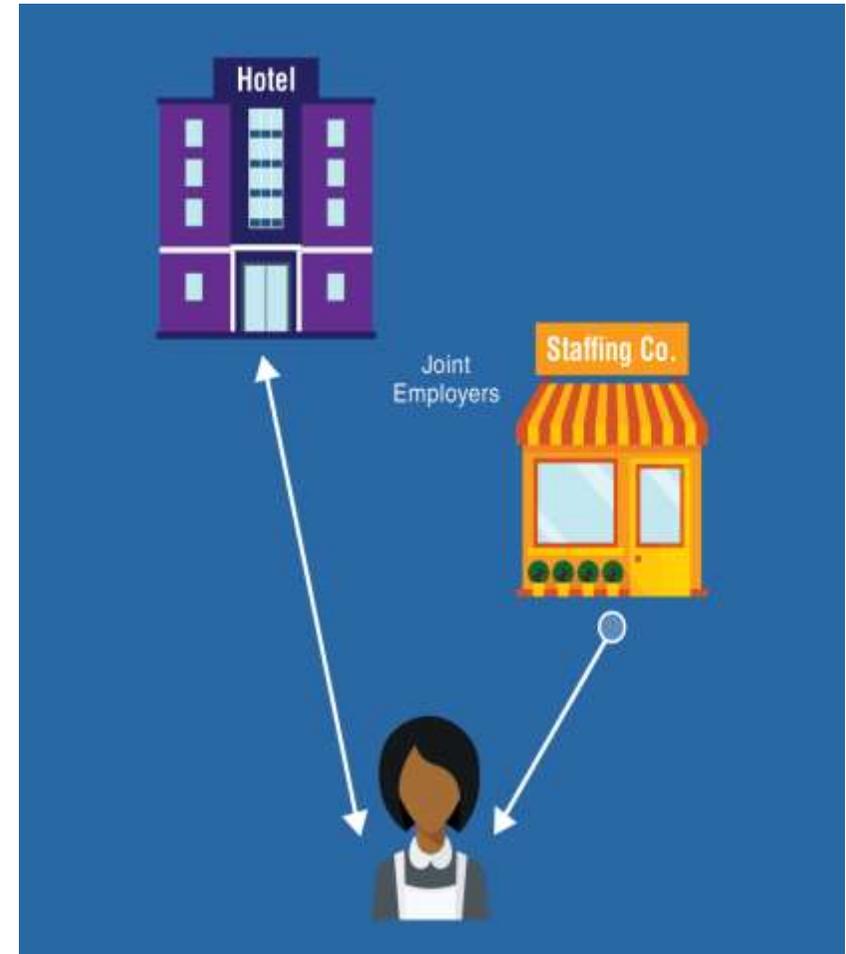
What is Joint Employment?

Joint employment occurs when a single individual has an employment relationship with two or more distinct business entities as to the same work.

The joint employment doctrine is distinct from the single employer or integrated employer doctrine in which a parent company and its subsidiary can be considered a single employer.

VERTICAL RELATIONSHIPS

- Temporary Staffing Agency & Client Business
- Managed Services Company & Client Business
- Professional Employer Organization (PEO) & Client Business
- Subcontractor & General Contractor
- Franchisee & Franchisor



American staffing Association

“[E]very day staffing businesses send three million employees to work in America’s offices, factories, hospitals, warehouses and other worksites – virtually every place that people work, staffing employees are on the job.”



National Association of Professional Employer Organizations

“PEOs provide services to between 156,000 and 180,000 small businesses, employing between 2.7 and 3.4 million people.”



INTERNATIONAL FRANCHISE ASSOCIATION

Franchise Employment:

2015: 8,833,994

2016: 9,111,945*

* estimated



Remember *Vizcaino v. microsoft*

Scenario:

Claimants brought a federal class action alleging improper denial of benefits under the software company's Employee Stock Purchase Plan ("ESPP"). The claimants were not regular employees of Microsoft. Instead, the potential class was made of thousands of workers classified by the company as independent contractors (aka freelancers) or temporary agency employees (aka temps).



Remember *Vizcaino v. microsoft*

Outcome:

Protracted litigation resulted in a court opinion that the freelancers and temps were common law employees of Microsoft, which was sufficient to be participants in the company's ESPP. In 2000, Microsoft agreed to pay \$97 million to settle the class action.



Joint employment under federal employment laws

Most federal employment laws purport to cover joint employers by either:

- Agency interpretive regulations, or
- Judicial construction of laws.



Joint Employment under federal employment laws

Why is joint employment determination important?

- Joint and several liability for violations.
- Threshold coverage determinations which are dependent upon a number of employees.
- Whether a putative employer must fulfill obligations to employees of another employer.



Joint employment under federal employment laws

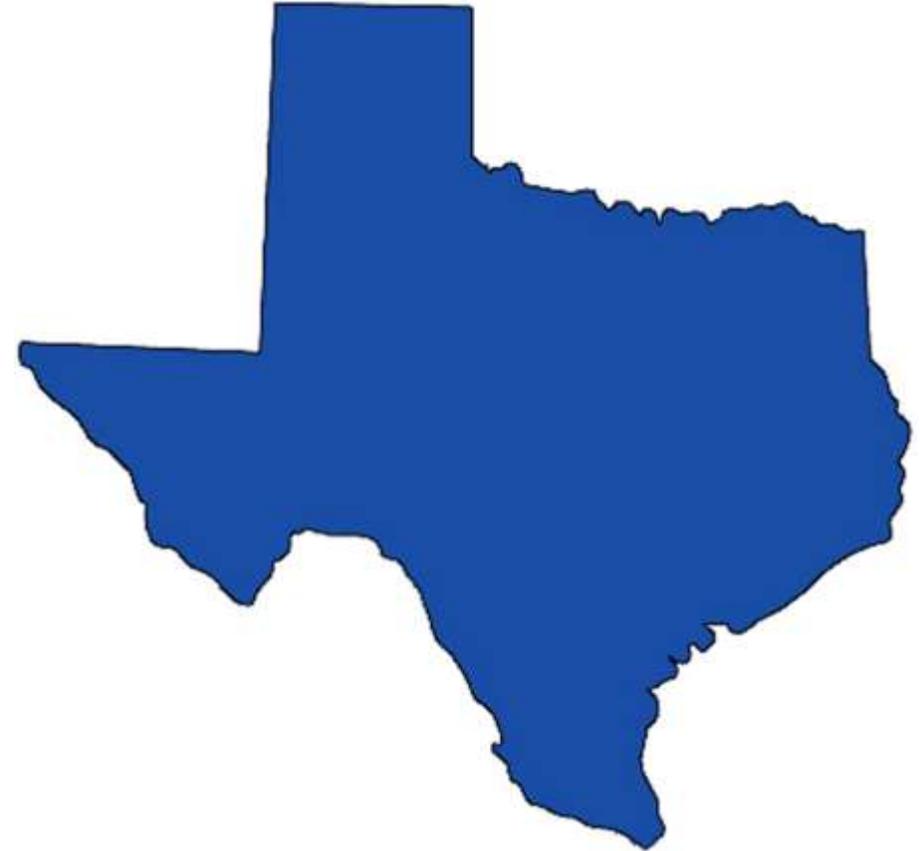
Differing legal Standards:

- Did putative employer exercise actual control over the employee?
- Did putative employer have direct or indirect right of control over employee?
- Was employee economically dependent upon putative employer?
- Hybrid of one or more of the foregoing questions.



2014 Deaths of Temporary Employees in Texas

- 31-year old assigned to garbage collection died on the 3rd day of work due to heat stroke.
- Employee assigned to Bacardi Bottling died on the first day of work.
- Employee assigned to work at industrial piping company suffocated.
- Employee assigned to a scaffolding company fell to his death on the first day of work.



Occupational Safety & Health Administration

Temporary Worker Initiative

Launched on April 29, 2013 as part of “a concerted effort using enforcement, outreach and training to assure that temporary workers are protected from workplace hazards.”



OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION

Temporary worker initiative

“While the extent of responsibility under the law of staffing agencies and host employers is dependent on the specific facts of each case, staffing agencies and host employers are jointly responsible for maintaining a safe work environment for temporary workers – including, for example, ensuring that OSHA’s training, hazard communication, and recordkeeping requirements are fulfilled.”



February 2, 2016 OSHA Citations

Scenario:

Construction contractor Kinsey Corp. was contracted to install sanitary sewer, storm sewer, and other underground utility lines at a housing development in Pittsburgh. Kinsey contracted Gillman Services to provide temporary employees for pipe installation work.

FINED!

February 2, 2016 osha citations

Inspection:

OSHA found temporary workers working in a trench as deep as 19 feet without cave-in protections.

Citations:

Kensey – Willful and serious violations and proposed penalty of \$37,600.

Gillman – One serious violation for failure to provide excavation training and a proposed penalty of \$7,000.

FINED!

National Labor Relations Act

When is Joint Employment Significant?

- Joint liability for unfair labor practices
- Determination of who is responsible for collective bargaining as to a unit of workers



*Browning-Ferris indus. of
California, Inc.*

On August 27, 2015, National Labor Relations Board (NLRB”) announced a new joint employer standard which makes it easier to show that client companies are joint employers of workers supplied and paid by staffing agencies. The standard paves the way for joint collective bargaining obligations for a client company and staffing agency as to contract workers.



*Browning-Ferris Indus. Of
California, Inc.*

Old Standard:

Does the putative employer actually exercise direct and immediate control over another employer's workers?

New Standard:

Does the putative employer have a right to exercise control over another employer's workers?



*Browning-ferris indus. Of
California, inc.*

Temporary Labor Services Agreement:

- Leadpoint provided workers to BFI at its recycling facility.
- Leadpoint was the sole employer of personnel supplied to BFI.
- No employment relationship between BFI and Leadpoint employees.
- Agreement was terminable at will.



*Browning-ferris Indus. Of
California, Inc.*

Hiring:

- Leadpoint recruited, interviewed, tested, selected and hired workers.
- Leadpoint had to ensure workers met BFI qualifications.
- BFI had right to request that Leadpoint workers met or exceeded its own selection procedures.
- Leadpoint limited in hiring former BFI employees.
- Leadpoint workers subject to drug screen requirement.



Browning-Ferris Indus. Of California, Inc.

Management Structure:

BFI and Leadpoint employed separate supervisors and lead workers.

Discipline and Termination:

- Leadpoint had the sole responsibility to counsel, discipline, review, evaluate and terminate workers.
- BFI had authority to reject any Leadpoint worker and to discontinue the use of any personnel for any or no reason.



*Browning-ferris Indus. Of
California, Inc.*

Tenure:

* Leadpoint workers contractually prohibited from working at BFI for longer than 6 months but this was rarely enforced.

Scheduling and hours:

- BFI established work hours.
- Leadpoint alone determined which workers would work each shift.



Browning-ferris indus. Of California, Inc.

Work processes:

- BFI determined which tasks needed to be performed.
- BFI determined which material streamed each day.
- BFI determined number of Leadpoint workers needed.
- BFI determined speed and productivity standards for each stream.



*Browning-ferris Indus. Of
California, Inc.*

Training & Safety:

- Leadpoint workers received orientation and job training from Leadpoint supervisors.
- Periodically, Leadpoint workers received substantive training and counseling from BFI Managers.
- Areement mandates that Leadpoint require its workers to comply with BFI's safety rules.



*Browning-Ferris Industries of
California, Inc.*

NLRB Decision:

BFI's role in sharing and codetermining the terms and conditions of employment for Leadpoint's workers establishes that it is a joint employer with Leadpoint.

Appeal:

The NLRB's decision is on appeal before the D.C. Court of Appeals.



McDonald's USA, LLC

December 19, 2014:

Office of the General Counsel issued 13 Consolidated Complaints in Regional Offices Across the country alleging McDonalds USA, LLC and franchisees are joint employers responsible for 78 unfair labor practices allegedly committed by the franchisees.



McDonald's USA, LLC

Complaints provide little detail about General Counsel's basis for asserting joint employer liability against McDonald's USA, LLC. Complaints allege only:

- The existence of a franchise agreement between McDonald's USA, LLC and each franchisee.
- The general allegation that McDonald's USA, LLC "possessed and/or exercised control over the labor relations policies of [such franchisee] at the restaurant."



Fair labor Standards Act

When is joint employment significant?

- Where joint employment exists, all of the employers are jointly and severally liable for FLSA compliance.
- In other words, each joint employer is individually responsible for the entire amount of wages due. If one employer cannot pay the wages because of bankruptcy or other reasons, the other employer must pay the entire amount of wages; the law does not assign a proportional amount to each employer.



J&J snack foods corp.

Scenario:

J&J hired two staffing firms, Sebastian & Sebastian, LLC & Pennpak, to provide temporary production line workers.

DOL Investigation:

677 temporary workers were denied minimum wage and/or overtime pay.

Outcome:

In October 2015, J&J agreed to pay \$2.1 million in back wages and liquidated damages.



Department of labor
wage & Hour division

January 20, 2016 Administrator's
Interpretation:

The interpretation identifies common scenarios in which two or more employers jointly employ an employee and are thus jointly liable for compliance under FLSA.



Department of Labor Wage & Hour Division

Skidmore v. Swift & Co., 323 U.S. 134
(1944):

“We consider the rulings, interpretations and opinions of the Administrator under the [FLSA], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”



DEPARTMENT OF LABOR WAGE & HOUR DIVISION

Why Now?

- * New Enforcement Priority for DOL.
- Clarification that the joint employer analysis under FLSA – economic dependence - is not the same as that applied by the NLRB in *Browning – Ferris*.
- Clarification that DOL is not yet focusing on franchise relationships.



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

As early as 1997, the EEOC published guidance as to the application of federal employment discrimination laws to contingent workers placed by temporary employment agencies and other staffing firms.

This guidance was updated by the EEOC in 2000 to address the unique issues presented by the Americans with Disabilities Act.



Risk management for putative joint employers!

Host Employers

Franchisors

General Contractors



Risk management for staffing agencies

Temporary Employees

Contract workers



Questions?

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