Maryland Automobile Dealers Association

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NLRB Joint Employer Decision

On August 27, 2015, the federal National Labor Relations Board issued a 3-2 decision that the owner/operator of a California-based recycling facility is a "joint employer" for collective bargaining negotiations with employees of a temporary staffing company. The ruling supplants the NLRB's previous test that required the "actual exercise of control" over workers for a company to be deemed a joint employer. Under the new test, it is enough if the company has the right of "actual control whether direct or indirect".

We have already reported on a July 2014 memorandum from the NLRB general counsel that McDonald's would be a "joint employer" of workers employed by individual franchisees. The latest Board decision, with the general counsel's memorandum, points to a trend in the NLRB to extend liability under the National Labor Relations Act to companies not previously considered to be employers.

What does this mean for vehicle dealers?

1. Vehicle manufacturers are franchisors just as McDonald's is a franchisor for its individually-owned restaurants. McDonald's provided standards that franchisee employees must meet in its franchise agreement. That was enough for the NLRB general counsel to claim joint employer status for the franchisor. While dealer sales and service agreements in the vehicle business may not contain that level of detail, incentive plans announced by manufacturers sometimes provide specific standards for dealership employee

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Are you EMV compliant?

On October 1, 2015, changes in a retailer's liability for fraudulent credit card use will go into effect. Credit card issuers will reserve the right to shift liability for fraudulent credit card use to the retailer if the card used had new chip technology, but the retailer did not have updated processing equipment to read the chip.

This liability shift is designed to entice retailers, including automobile dealers, to change to processing devices that use the global security standard for cards with chip technologies known as Europay, Mastercard, and Visa (EMV) cards. Credit card issuers have already implemented these EMV cards in Canada, Europe, Asia, and Latin America, and they have seen credit card fraud rates drop significantly.

What is the difference between EMV cards and traditional magnetic strip cards? EMV chip cards provide stronger security features than traditional cards. Traditional magnetic

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The FTC's New Weapon

For more than a decade, the FTC's Information Safeguard Rule has provided a basis for FTC action against a business that did not develop a plan to protect non-public private information of its customers obtained in a finance, lease, or insurance transaction. A business that did not take adequate steps could be subject to FTC action for violation of that rule.

However, what about information breaches not covered by the Rule? What if the business has customer information not covered by the FTC Safeguards Rule? Or what if the business suffers a data breach despite having in place an Information Safeguards plan but its actual practices were deficient? The FTC's answer is to use its basic authority. The original charge to the FTC when it was formed was contained in Section 5 of the FTC Act. This authorized the FTC to take action against unfair or deceptive acts or practices. That is broad authority, and the limits have been tested over the years in various court decisions.

The latest court test arose from the FTC's use of Section 5 authority to sanction a business that had several data breaches. The FTC charged that failing to provide adequate security was an unfair practice. The FTC legal action involved a hotel chain that suffered three security breaches from 2008 through 2009 that allegedly affected 600,000 consumers and resulted in over $10 million in fraudulent charges. The agency charged that the hotel chain's security was so deficient that it was unfair in violation of Section 5.

The hotel chain challenged the authority of the FTC to sanction it for security breaches. The United States Court of Appeals for the Third Circuit (which covers Delaware, New Jersey, and Pennsylvania) on August 24, 2015 ruled that the FTC has that authority. This decision approves use of another FTC weapon to sanction businesses who do not take adequate measures to protect the security of customer information.

What does this mean for motor vehicle dealers?

For some time, we have warned that the FTC may come looking to determine whether dealers have adequately reviewed and updated the plans developed under the FTC Information Safeguards Rule and the FTC's Red Flags Rule. These rules require the protection of non-public personal information of consumers and require dealers to take steps if they are involved in a finance or lease transaction where there are red flags of identity theft. A dealer's Information Safeguards plan must be regularly reviewed and updated and its Red Flags plan must be annually reviewed, updated, and approved by the dealership's board of directors or the dealer. Now, with federal court blessing, the FTC can use its basic authority to charge a dealer with unfair practices for not protecting customer information when that failure may not be a violation of the Information Safeguards Rule or the Red Flags Rule.

These are formidable weapons against any dealer who does not take care to protect the information of its customers. Besides losses a dealer may suffer because of doing business with a thief, a dealer can find itself on the wrong end of a complaint by the FTC.

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cards store static information that makes them easy targets for hackers. Thieves steal data from the magnetic cards and copy the data onto a cloned card to make purchases and withdraw cash. EMV cards have a small computer chip hard to counterfeit. EMV cards generate a unique encrypted code for each transaction when read using a EMV-compliant processing device.

How does this implementation affect dealers? Dealers will need a new processing device to read the information in the EMV chip cards by October 1, 2015. The EMV compliance implementation on that date shifts the liability to the retailer who processes an in-store payment by an EMV card and does not use an EMV compliant processing device to read the EMV card. Therefore, if your dealership has no EMV processing device, your dealership can be held liable for in-store fraudulent payment transactions using an EMV credit or debit card. Traditionally, card issuers have accepted all liability for counterfeit payment card transactions, but that will change with the EMV compliance implementation on October 1, 2015.

There is no federal law requiring merchants to be EMV compliant. However, the major credit card companies (Visa, Mastercard, Discover, and American Express) plan to incentivize card issuers and retailers to migrate to EMV by shifting the liability to retailers if they do not institute EMV compliance by October 1, 2015. If your dealership accepts an in-store payment with a chip card and processes the transaction using a magnetic-only card reader, the dealership may be responsible for the fraud losses, not the card issuer.

This implementation shift does not change liability for online purchases, or for in-store transactions by customers using cards with only magnetic strips. If your customers use EMV cards for in-store transactions, be prepared to have an EMV processing device or risk suffering losses for fraud.

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appearance, activities, or performance. Sometimes, manufacturers create performance plans for dealership employees and pay them directly. Given the NLRB trend, vehicle manufacturers may be at risk as joint employers. The more they try to impose controls that affect dealer employees, the more likely they can be held jointly liable for violations of the National Labor Relation Act. This may be a useful thing to remind the factory in any discussions about increasing efforts by the factory to control dealer practices.

2. Sometimes, a manufacturer will provide temporary marketing personnel in a dealership. These may be manufacturer employees or temporary staffing company employees. To the extent the dealer and the manufacturer have the right of control over the activities of the workers, the manufacturer, the dealer, and any staffing company involved could all be joint employers under the National Labor Relations Act.

3. From time to time, dealers may have to contract with F&I service companies to provide "specialists" to close deals and sell finance and insurance. To the extent the dealer may oversee and control the worker's activities and performance, this increases the possibility that the dealer can be liable under the National Labor Relations Act with the F&I service company.

The trend of decisions by the NLRB indicates that it will broaden its interpretation of the law to become involved and protect concerted action by personnel regardless of whether they are considered "employees" under state law. This requires greater knowledge of the consequences and greater diligence by dealer management.

Independent Contractor or Employee?

We have written often about the federal government's push for businesses to consider their workers as employees rather than independent contractors. Recent developments show there is no hotter personnel button for the federal government.

The spotlight is on companies that pay workers on a piece-work basis. As an example, The Washington Post recently ran an article discussing this practice used by car detailing services. There have been two recent federal lawsuits in Northern Virginia against these companies that classified workers as independent contractors and paid them based on the number of cars washed, but underpaid them under the Fair Labor Standards Act because the lawsuits allege they should have been classified as employees. The workers banded together to sue their employers seeking overtime wages, punitive damages and attorney's fees.

While it is common practice for companies to properly and legitimately use independent contractors for certain work, some categorize workers as independent hoping they are correct and will avoid numerous obligations owed to employees. The government's strong presumption that workers should be employees absent clear evidence to the contrary make this a wish that may not come true. Designating a worker as independent, even in a contract, does not mean an employer is free from the requirements of withholding taxes or paying minimum and overtime wages under the Fair Labor Standards Act. The label is not determinative – it is the reality of the employment relationship that is determinative.

Courts employ the 'economic realities' test to determine whether the independent contractor designation is appropriate. The 'economic realities' test is a consideration of various factors used by courts to determine whether a worker is economically dependent on the employer and, therefore, an employee, or is in a separate business as an independent contractor. Such factors include:

- Is the work performed integral to the employer's business? If yes, then it is more likely that the worker is dependent economically on the employer.
- Do managerial skills affect the worker's opportunity for profit or loss? If the worker hires and supervises other workers, or invests in equipment, and in doing so affects the opportunities for both profit and loss, then the worker is not likely to be dependent economically on the employer.
- Has the worker made some investment, thereby bearing some risk, compared to the employer's investment? If so, that demonstrates that the worker is an independent contractor.
- Does the worker's skills indicate that he or she exercises independent business judgment? If so, that suggests independent contractor status.
- Is the worker's relationship with the employer permanent/indefinite? If yes, that would indicate employee status.
- What degree and nature of control does the employer have over the worker? If the employer controls the pay amount, work hours, how the work is performed, and whether the worker may take on other work outside of the employer, that would indicate employee status.

For businesses, properly classifying employees at the beginning is important – not only to avoid costly litigation – but to avoid scrutiny of the overall business model. Uber – the well-known ride-sharing service – classifies its drivers as independent contractors. In California, Uber recently received an unfavorable ruling by a federal judge allowing Uber drivers to form a class in a lawsuit claiming employee status and seeking reimbursement for expenses such as fuel and insurance, and unpaid tips. In that litigation, if those drivers are ultimately determined to be employees and not independent contractors, they will also be entitled to unemployment coverage and workers' compensation. And this will no doubt open the company to further litigation in other states beyond California.