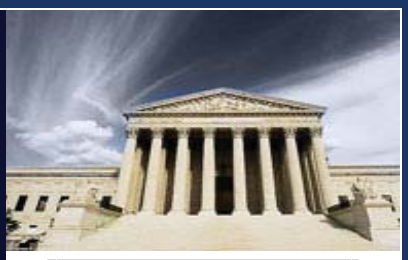
MassDLA

Newsletter

December 2016



Message from the President: Grace Garcia

Happy Holidays to all! Hopefully, everyone is enjoying a wonderful and relaxing holiday season! As we close out the year, many take this time to plan their upcoming year, both personally and professionally. As you make plans, we hope you not only plan to take an active role in our many activities, such as our substantive committees, but also calendar the MassDLA events. As a reminder, the MassDLA has the following Substantive Committees::

a. Trial Practice- *Chaired by Bill Keville of Melick & Porter, LLP*
b. Insurance - *Chaired by Bill Mekrut of Murphy & Riley, PC and Mike Aylward of Morrison Mahoney LLP*
c. Medical Malpractice- *Chaired by Chad Brouillard of Foster & Eldridge, LLP*
d. Product Liability- *Chaired by Jennifer Creedon of Martin, Magnuson, McCarthy & Kenney,*
e. Employment - *Chaired by Kate O'Toole of Conn Kavanaugh Rosenthal Peisch & Ford, LLP*
f. Construction *Chaired by Mark Lavoie, McDonough, Hacking & Lavoie, LLC*
g. Toxic Torts - *Chaired by Kyle Bjornlund of Cetrulo LLP*

Please contact any one of the chairs or our Executive Director Stephanie Giancola sgiancola@massdla.org to get involved. Also, please plan to attend our next social event, the Annual Mid-Winter Social at the BC Club on January 19, 2017, from 5:30pm-8:30pm. This is always a great opportunity to connect and start of the New Year with some cheer.

In This Issue

Upcoming Events:

Mid-Winter Social
January 19, 2017

Trial Tactics Seminar
March 23, 2017

Joint Event with MATA
April 27, 2016

Annual Meeting
June 2, 2017

Look for more information to come...

www.MASSDLA.org

MassDLA Volunteers

On October 15th, a group

Look forward to seeing you in 2017! Happy New Year to all!

President
Grace G. Garcia
Morrison Mahoney

of MassDLA Members along with some family members and friends volunteered at Boston's Cradles 2 Crayons to help provide children who otherwise can't afford them with supplies they need to succeed in school. ***Look for the next opportunity soon to be a MassDLA volunteer!***

~ *This Month's Article* ~

Defining Joint Employers: A Shifting Landscape

Kate O'Toole, Esq.
Conn Kavanaugh Rosenthal Peisch & Ford, LLP

The classification of two or more businesses as "joint employers" is extraordinarily important, because a joint employer can be liable under the National Labor Relations Act (NLRA), as well as under federal and state labor laws, for unfair labor practices committed by its co-employer. In recent years, the National Labor Relations Board (NLRB) and the Department of Labor (DOL) have issued decisions and guidance that have considerably broadened the definition of joint employer, which could have a considerable effect on employers. Any employers that could be considered a "co-employer" should be aware of the current state of the law.

This article provides a bird's eye view of the major developments in the joint employer analysis in recent years, as well as potential developments to monitor in the coming months and years.

Significant events since August 2014

In August 2014, the NLRB's Office of General Counsel announced that it was authorizing complaints against both McDonald's *franchisees* and McDonald's USA LLC, the corporate *franchisor*, as joint employers. McDonald's USA, LLC, a joint employer, et al., Case No. 02-CA-093893. The case is a consolidation of 61 unfair labor practices charges against McDonald's and 31 franchisees alleging 181 violations, and remains ongoing. See Order, March 17, 2016, p. 3. This case triggered concerns among businesses - especially franchisors - about the implications of a finding that the corporate McDonalds franchisor is a co-employer alongside its many franchisees.

In August 2015, the definition of "joint employer" was expressly expanded by the NLRB in Browning-Ferris Industries of California, Inc., et al., 362 NLRB No. 186, August 27, 2015. Browning-Ferris held that a recycling facility (BFI) and a temporary staffing firm (Leadpoint) were joint employers where both businesses had the ability to exercise control over the essential terms and conditions of the employees' employment, or had reserved the authority to do so. The NLRB held that it would "no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority." Id. at 2. This is a change from the prior "direct control" standard, which

dictated that two or more employers would be deemed joint employers where both employers *actually* exercised direct control over the employees. The decision also remarked that the previous standard, which focused more on "direct" control by the employer, "[left the] Board's joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships." Id. at 1.

Browning-Ferris was generally celebrated as a victory for labor advocates, while causing concern for businesses that rely on staffing agencies to manage duties such as hiring, firing, and payroll, as well as businesses that engage in contractor/subcontractor relationships with respect to labor (e.g., construction). Browning-Ferris also elevated concerns among franchisors already concerned about the impact of the McDonald's litigation.

Five months after Browning-Ferris, the DOL's Wage and Hour Division (WHD) (which operates wholly independently from the NLRB) issued guidance on joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act. Like the NLRB's commentary in the Browning-Ferris decision, the bulletin expresses concern about the growth of joint employer relationships and its impacts on workers. It puts employers on notice: "In an effort to ensure that workers receive the protections to which they are entitled and that employers understand their legal obligations, the possibility of joint employment should be regularly considered in FLSA and MSPA cases." The bulletin provides guidance for both horizontal joint employment, where there is a sufficient association between two employers (e.g., multiple business locations with common ownership), and vertical joint employment, where the employee has an employment relationship with one employer, but is economically dependent on another (e.g., a staffing agency, subcontractor, or other intermediary). David Weil, the administrator of the DOL'S WHD since 2014, previously was a professor at Boston University. During his tenure as the WHD administrator, he has been particularly focused on the issue of the "fissured workplace," as he describes it, and has prioritized the protection of workers who are employed under joint employer scenarios.

The application of the joint employer analysis has trended in favor of employees over the last several years. As such, business clients should be advised of the consequences of being deemed a joint employer by virtue of their relationships with their employees and other associated businesses, and should prepare adequately (e.g., clear indemnification language in contracts among potential "joint employers" to shift the risk). However, practitioners should also closely monitor developments in the upcoming years, as the landscape could shift again, as noted below.

More changes on the horizon?

First, the U.S. Court of Appeals for the District of Columbia Circuit will be taking up Browning-Ferris. The matter has been briefed, and oral arguments are expected to take place in the first half of 2017. Of interest, the Equal Employment Opportunity Commission (EEOC) filed an amicus brief in favor of the NLRB, while more than a dozen business associations and organizations - including Microsoft Corporation, the National Association of Manufacturers, the American Staffing Association, and the International Franchise Association - filed briefs in support of the petitioner, Browning-Ferris. The case will be heard by a three-judge

panel, which has not yet been announced.

Second, legislation has been introduced in the House and Senate - the "Protecting Local Business Opportunity Act" - which would amend the NLRA's definition of "employer" to its narrower, pre-Browning scope. The bill states: "This bill amends the National Labor Relations Act to allow two or more employers to be considered joint employers for purposes of the Act only if each employer shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate." H.R. 3459 and S.2686 were introduced during the 114th Congress, but did not pass. The legislation will be worth watching in 2017.

Third, the NLRB, which typically has five members, presently has only three. While Democrats now have a 2-1 majority, the incoming Republican administration will fill the remaining vacancies. Also, the term of the current general counsel, Richard F. Griffin, Jr. (who spearheaded the 2014 classification of the McDonald's corporate franchisor as a co-employer), expires on November 4, 2017.

Lastly, with respect to the DOL WHD regulations, there is a growing consensus among commentators that the incoming Trump administration will reverse the course paved by David Weil. President-elect Trump's choice for Secretary of Labor, Andrew Puzder, is an attorney and the chief executive of CKE Restaurants, Inc., the parent company of fast food chains Hardee's and Carl's Jr. He is a board member of the International Franchise Association, and has spoken out against the NLRB's revision of the joint employment standard.

Of course, the changes in the composition of the NLRB members and in the executive leadership at the DOL will likely cause ripple effects throughout the employment arena far beyond solely the joint employer question. Employment practitioners would be well-advised to keep a close eye on developments in the coming months.

Join a Committee!

Contact Stephanie Giancola to join...

Employment Law
Kate O'Toole
Conn Kavanaugh

Construction Law
Mark Lavoie
McDonough, Hacking & Lavoie LLC

Insurance and Bad Faith Law
Michael Aylward
Morrison Mahoney LLP