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"I Hired That Individual Through a Staffing Agency, Are They My Employee or Not?"

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The National Labor Relations Board is grappling with the scope of the joint employer doctrine. The doctrine holds that an individual working in a single role can be simultaneously/jointly employed by more than one employer. For example, an employee working at a location for a restaurant that is a national franchise may be considered an employee of both the restaurant where they work and the franchisor. Additionally, subcontractors could be considered employees of not only the company they work for but the employer, where they work on a daily basis, that controls their working environment.

The key question in the analysis is whether the franchisor or the entity receiving services that are provided by an "independent contractor" exercises sufficient control over the working individual, such that the individual is considered an employee. The question becomes how much control is too much control? In the landmark case of Browning–Ferris Industries, the National Labor Relations Board examined "all of the incidents of the [employment] relationship" and the Board held that even "reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint – employment inquiry." This is a broadening of the joint-employer test. The Browning-Ferris case was appealed, in January 2016 to the D.C., Circuit Court of Appeals.

The EEOC submitted a brief in support of the broad test. The EEOC uses a multi factor approach to determine if there is a joint employment relationship. They consider factors such as: whether the employer has the right to control the "means and manner" of the work; whether the employer furnishes the equipment used to perform the work and the work site itself; whether the work performed is an integral part of the employer's business; and the parties' respective rights and obligations should either wish to terminate the relationship. It is important to note that the list of factors is not exhaustive and no one factor is more determinative then another. However, the more factors to which a company says "yes," the greater chance the individual is an employee.

The appeal is pending and debate over what constitutes a joint employer will continue. For the time being, the case of Browning-Ferris remains the law under the NLRB and the standard is the broader "indirect control." Although, it is also imperative to monitor the other governmental agency standards like the EEOC standard mentioned above.

TAKEAWAY: Are you a joint employer?

Attorney

- Tracy Armstrong