

## Temporary Employment Relationships: Review of the Joint Employer Doctrine under the NLRA

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The face of the American workforce has changed, with employers of all sizes increasingly relying on temporary employment relationships to fulfill their staffing needs. During the past decade, the number of temporary employees provided by agencies to American companies mushroomed from 500,000 to 2 million, or nearly 1.5 percent of the workforce of the United States.<sup>1</sup> For numerous reasons—including flexibility, a desire to lower direct and indirect labor costs, convenience, and a desire to return to core business operations—employers have embraced the use of temporary employment relationships wholeheartedly and will continue to do so well into the future.<sup>2</sup>

Whether referred to as the contingent workforce, temporary employment, coemployment, employee leasing, staff leasing, day-labor, or contract labor,<sup>3</sup> the temporary employment relationship presents both the provider of the temporary services ("temporary service provider") and the purchaser of the services ("client employer") with various issues under the National Labor Relations Act (NLRA).<sup>4</sup> Under certain circumstances, temporary service providers and client employers may be found to be "joint employers" of the temporary employees. If joint employer status is found, a party to the temporary employment relationship could be held vicariously liable for violations of Section 8(a)(3) of the Act arising out of the other parties unlawful discipline or discharge of a temporary employee.<sup>5</sup> Additionally, when temporary employees are represented by a union, a finding of joint employer status will, under certain circumstances, subject the client employer to collective bargaining obligations under Section 8(a)(5) of the Act.<sup>6</sup> Joint employer status also may provide the parties with the opportunity to object to the appropriateness of a proposed bargaining unit combining the jointly employed temporary employees with regular employees employed solely by either of the joint employers or another client employer.

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This column first reviews the factors examined by the National Labor Relations Board (NLRB) and the courts in determining "joint employer" status under the NLRA. It then examines the potential liability to which temporary service providers and client employers may be exposed in the context of discipline and discharge actions; the collective bargaining obligations that may arise when temporary employees are represented by a union; and issues relating to unit appropriateness in representation proceedings involving temporary service providers and client employers. Finally, the column offers suggestions for shifting liability and managing risk in a manner that is mutually beneficial to both parties to the temporary employment relationship.

### **Establishing Joint Employer Status in Temporary Employment Contexts**

Before assessing liability for violations of the NLRA in temporary employment relationships, the NLRB will seek to determine whether the temporary service provider and client employer are "joint employers" under the Act. Applying the standard enunciated by the Supreme Court in *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), the question of "joint employer" status is a factual issue and requires examination into whether the employer that is alleged to be a joint employer (the client employer) possesses sufficient control over the work of the employees at issue to qualify as a joint employer with the actual employer (the temporary service provider). Under this standard:

[W]here two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute "joint employers" within the meaning of the NLRA.<sup>7</sup>

At the outset, it should be noted that "joint employers" are businesses that are entirely separate legal entities, although both "take part in determining essential terms and conditions of employment of the group of employees."<sup>8</sup> Thus, joint employer relationships are found where, despite the absence of common ownership, one entity effectively and actively participates in the control of labor relations and working conditions for employees of the other entity.<sup>9</sup>

The Board has defined "essential terms and conditions of employment" as those involving such matters as hiring, firing, discipline, supervision, and direction of employees.<sup>10</sup> Moreover, the presence of

an operational control clause in a temporary services agreement—that is, a clause that gives one employer the sole and exclusive right to direct the temporary employees—is not, in and of itself, conclusive evidence of joint employer status.<sup>11</sup> Rather, to establish joint employer status, there must be a showing that the employer meaningfully affects essential terms and conditions of employment of the temporary employees' employment, and that its involvement is more than minimal or routine.<sup>12</sup>

For example, in *Continental Winding Co.*, 305 NLRB 122 (1991), the Board found that Continental Winding and Kelly Services, a temporary services agency, shared or codetermined essential employment conditions of the temporary employees. Kelly hired the temporary employees supplied to Continental, established and paid their wages, paid for their workers' compensation insurance, maintained their payroll records, and withheld the required payroll deductions. However, Continental exercised sole authority to effectively discipline and discharge the temporary employees, and to assign, schedule, and supervise the employees on a day-to-day basis. Moreover, the temporary employees worked alongside Continental's own employees, under the same working conditions. In finding joint employer status, the Board specifically noted, inter alia, that the day-to-day supervision of the Kelly temporary employees by Continental's supervisors was essentially identical to that exercised over Continental's regular employees, was more than "routine," and was "not insignificant."

Likewise, in *American Air Filter Co.*, 258 NLRB 49 (1981), the Board found that American Air Filter, the client employer, and Transport Associates, a driver leasing agency, were joint employers of drivers supplied by Transport Associates. Transport Associates initially hired the drivers, referred them to the employer, processed and mailed their paychecks, and provided them with benefits. However, Transport Associates was "divorced from the daily supervision of the drivers once they were assigned to" the client employer. Rather, it was American Air Filter, through its supervisors, who, on a day-to-day basis, supervised the drivers, scheduled their work and vacations, and rejected drivers referred to it. In finding joint employer status, the Board concluded that it was American Air Filter that "had the most consistent contact and control over the day-to-day incidents of the drivers' employment relationship."

On the other hand, in *Laerco Transportation*, 269 NLRB 324 (1984), the Board found that Laerco, a trucking and warehousing company, was not a joint employer of drivers and warehouse workers supplied to it by California Transportation Labor, an employee leasing agency.

The Board found that while Laerco had a contractual right to direct the work of the employees provided by California Transportation, the evidence showed that the leased employees received only minimal and routine supervision by Laerco, such as being told to give one job priority over another. All significant supervision and discipline involving the leased drivers and warehousemen were handled by California Transportation. Even though California Transportation did not maintain a supervisor at Laerco's facility, the evidence showed that it nevertheless issued discipline against the employees and resolved their grievances.

Similarly, in *Millcraft Paper Co.*, 270 NLRB 812 (1984), the Board found that Millcraft and the temporary service provider, Leaseway, were not joint employers of unionized drivers provided to Millcraft by Leaseway. The Board determined that Millcraft gave only minimal direction to the leased drivers and did not actually supervise their work. Moreover, Millcraft's management did not attend meetings between Leaseway and the union, nor were its views presented at such meetings. Instead, the evidence clearly showed that Leaseway was responsible for paying the drivers' wages, holiday and vacation pay, making required withholdings, supervising the drivers, resolving their grievances with their union, issuing discipline, and negotiating with the union.

As the foregoing, representative cases demonstrate, minimal or routine supervision or direction of employees is insufficient to establish joint employer status under the NLRA. Rather, meaningful day-to-day supervision of the temporary employees, and exercise of the authority to discipline and discharge the employees or to effectively recommend such action, generally are required to establish a joint employer relationship between a temporary service provider and client employer.

### **Joint Employer Status and Liability for Unfair Labor Practice Involving Discipline and Discharge**

When joint employer status is established between a temporary service provider and a client employer, both entities may be liable for the unlawful discipline or discharge of the temporary employees under Section 8(a)(3) of the NLRA. The NLRB recently articulated the circumstances under which such joint liability would be imposed in *Capitol EMI Music*, 311 NLRB 997 (1993). There, Capitol, the client employer, requested that the temporary service provider remove and terminate one of the temporary employees working for Capitol. The evidence showed that Capitol's request was motivated by the fact that

the temporary employee had engaged in union activities on Capitol's premises, and thus was unlawful under Section 8(a)(3). However, at no time did Capitol inform the temporary service provider of the motives behind its request, and there was no evidence that the temporary service provider "knowingly participated" or "acquiesced without protest" in Capitol's unfair labor practice.

At issue was whether knowledge of an unlawful motive harbored by Capitol could be imputed to the temporary service provider, for purposes of liability under Section 8(a)(3), simply because they were joint employers of the same workforce.<sup>13</sup> In addressing this issue, the Board announced the following rule:

[I]n joint employer relationships in which one employer supplies employees to the other, we will find both joint employers liable for an unlawful employee termination (or other discriminatory discipline short of termination) only when the record permits an inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former had acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it.

Recognizing that the joint employers are in the best position to produce evidence of their knowledge of a particular action taken by the other, the Board also proceeded to allocate the burden of proof as follows:

The [NLRB] general counsel must first show (1) the two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the *employer* who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer's action or that, if it knew, it took all measures within its power to resist the unlawful action. (Emphasis added.)

In concluding that the temporary service provider was not liable for Capitol's unlawful termination of the temporary employee, the Board relied on evidence showing that Capitol did not tell the temporary service provider that it was taking unlawful action against the employee, and the absence of evidence that any of the information conveyed to the temporary service provider should have put it on

notice of Capitol's unlawful motive. The Board also observed, however, that if the reason given by Capitol for requesting the temporary employee's removal had suggested a violation of Section 8(a)(3), then the temporary service provider would have had the burden of presenting some evidence of its efforts to ascertain the reason for the removal.

In *Capitol E.M.I. Music*, the Board noted that its rule applied only to joint employer relationships where one employer supplies employees to work in the business of another and to unfair labor practices under Section 8(a)(3) of the Act, which are dependent upon findings of unlawful motive.<sup>14</sup> To date, the Board has not issued any significant decisions clarifying the rule announced in *Capitol EMI Music* or answering the questions left open by its decision. Thus, for example, the Board has not answered whether or how it will apply *Capitol EMI Music* to unfair labor practices alleging employer interference, restraint, or coercion of an employee's Section 7 rights in violation of Section 8(a)(1) of the Act, which do not require proof of an anti-union or other unlawful motive.<sup>15</sup>

### **Joint Employer Status and the Obligation To Bargain**

When it is shown that two or more employers in a temporary employment relationship codetermine the terms and conditions of employment of an appropriate unit of employees, the Board finds that the joint employers share an obligation to bargain with the employees' properly designated collective bargaining representative. In *W.W. Grainger, Inc.*, 286 NLRB 94 (1987), the employer, which engaged in the distribution of electrical products and equipment, leased its drivers from Rentar. The leased drivers were represented by a union and covered by a collective bargaining agreement between the union and Rentar. Grainger decided to cancel its leasing agreement with Rentar due to escalating costs and dissatisfaction with Rentar's management, and the leased drivers were laid off as a result of the agreement's termination. In response, the union filed unfair labor practice charges alleging that Grainger and Rentar were joint employers of the leased drivers and that Grainger violated Section 8(a)(5) of the Act by failing and refusing to bargain with the union over its decision to cancel its agreement with Rentar and substitute a different driver leasing company.

The Board first found that Grainger was a joint employer of the unionized drivers, along with Rentar, due to Grainger's day-to-day supervision and discipline of the drivers. It then concluded that, because of the joint employment relationship, Grainger shared Rentar's

duty to bargain with the drivers' union representative, and that Grainger had unlawfully failed and refused to bargain over its decision to cancel the Rentar leasing agreement in violation of Section 8(a)(5). In so doing, the Board rejected the administrative law judge's conclusion that Grainger had no duty to bargain with the union—stating that it was unwilling to speculate that the issues giving rise to Grainger's dissatisfaction with Rentar and Rentar's management, which included escalating employee compensation costs, could not be resolved through collective bargaining.

Thus, where the client employer becomes the joint employer of union-represented employees, it will have a duty under Board law to bargain with the union about matters affecting the terms and conditions of the employees' employment. This duty specifically encompasses the decision to terminate a contract with the temporary service provider which jointly employs the temporary employees, as well as the effects of that decision on the employees.<sup>16</sup> Moreover, the client employer must give prior notice to the employees' union representative sufficiently in advance of the actual implementation of its decision to replace the temporary service provider to allow reasonable time for bargaining.<sup>17</sup>

Furthermore, the fact that the temporary services provider was the employer at the time the union was certified as the employees' collective bargaining representative by the NLRB does not bar litigation of a client employer's status as a joint employer in a subsequent unfair labor practice proceeding.<sup>18</sup> Rather, it is established that the issue of joint employer status in an unfair labor practice proceeding is separate and distinct from such a determination in a representation proceeding.<sup>19</sup>

For purposes of remedying an unlawful refusal to bargain in violation of Section 8(a)(5), the Board may conclude that restitution of the contract and reinstatement of the temporary employees would be inappropriate.<sup>20</sup> However, the Board will order the joint employer to bargain with the union over its decision to cancel its temporary services agreement. Furthermore, in order to ensure meaningful bargaining, and to make the laid-off temporary employees whole, the Board also will order the joint employer to pay the temporary employees their normal wages from the date of layoff until the earliest of the following conditions is met: (1) mutual agreement is reached with the union relating to subjects about which the joint employer is required to bargain, (2) good-faith bargaining results in a bona fide impasse, (3) the failure of the union to commence negotiations within five days of the receipt of the joint employer's notice of its desire to bargain with

the union, or (4) the subsequent failure of the union to bargain in good faith.<sup>21</sup>

### **Joint Employer Status and the Appropriate Unit**

It is well-established that the Board does not include employees of joint employers in a unit of employees of a single employer, absent employer consent.<sup>22</sup> Accordingly, while the Board has recognized joint employer status over employees that a petitioner-union seeks to represent, it has denied inclusion of the joint employers' employees in a bargaining unit containing an employer's sole employees because employer consent was lacking.<sup>23</sup> The Board's reasoning is that there is no legal basis for finding a multiemployer unit, absent a showing that the joint employers have expressly conferred the power to bind them in negotiations on a joint bargaining agent or that they have, by an established course of conduct, unequivocally manifested a desire to be bound in future collective bargaining by group rather than individual action.<sup>24</sup>

However, if the temporary employees are not included in the petitioned-for unit with the client employer's employees, the temporary employees could seek separate representation for themselves, and the Board could sua sponte make findings and determinations as to the appropriateness of a separate unit of temporary employees once it finds the petitioned-for unit inappropriate.<sup>25</sup> For example, in *Hexacomb Corp.*, 313 NLRB 983 (1994), the Board refused to include the employees of Hexacomb in a unit with temporary employees supplied by a temporary service provider. However, because it was unclear whether the petitioning union wished to proceed to an election in a separate unit of temporary employees, the Board remanded the case to the appropriate Regional Office of the NLRB for consideration of this issue.

### **Practical Pointers**

As demonstrated by their increasing use, temporary employment relationships serve a legitimate business need. However, they also expose both the client employers and the temporary service providers to potential liability under the NLRA, stemming from the application of the joint employer doctrine. Accordingly, temporary service providers and client employers both may wish to structure their temporary employment relationships to shift the risk of liability to the party willing to assume it. Thus, when temporary service providers are willing to assume the potential liability, they—and not the client employers—should be the party who:

- Receives applications, screens, tests, and hires the employees;
- Assigns, schedules, and transfers employees in their employment;
- Establishes terms and conditions of employment, including wages and fringe benefits;
- Responsibly directs and supervises the employees, in more than a routine fashion;
- Resolves employee complaints and grievances; and
- Evaluates, rewards, promotes, disciplines, and discharges the employees.

However, given the realities of a client employer's business operations, this arrangement may not prove practical. The client employer may feel the need to be involved in the day-to-day supervision, direction, and discipline of the temporary workforce, which thereby places both the temporary service provider and the client employer at risk for the unlawful actions of the other. Accordingly, from a legal standpoint, it would be beneficial to both parties to the relationship to include in their service agreement mutual indemnification provisions for violations of the law caused by the other party, including the costs of defending against the alleged violations.

### **Conclusion**

The trend toward the use of temporary employment relationships can be expected to continue as employers seek needed human resource flexibility and cost reductions to remain competitive. Intelligent planning by both parties to the temporary employment relationship will allow them to anticipate liabilities and shift the risk to their mutual satisfaction, by properly structuring the relationship or by contractual indemnification provisions.

### **Notes**

1. Barbara J. Feder, "Bigger Roles for Suppliers of Temporary Workers," *The New York Times*, April 1, 1995, §1, at 37.
2. See generally, H. Lane Dennard, Jr. and Herbert R. Northrup, "Leased Employment: Character, Numbers, and Labor Law Problems," 28 *Ga. L. Rev.* 683 (1994) (discussing the various supply and demand factors driving both employers and employees toward temporary employment relationships).
3. See, Judith W. Tansky & Peter A. Veglah, "Legal Issues in Co-Employment," 46 *Lab. L.J.* 293 (1995) and Gregory L. Hammond, "Flexible Staffing Trends and Legal Issues in

the Emerging Workplace,” 10 *The Labor Lawyer* 161 (1994) for general discussions of various types of temporary employment relationships and their respective characteristics, including inter alia, temporary service agencies, and employee leasing agencies. For purposes of background, and at the risk of generalization, “temporary employment services” provide temporary employees to the client employer, are responsible for paying the temporary employees directly, and bill the client employer for the use of temporary employees. Employee leasing, also known as staff leasing, refers to a contractual arrangement whereby the clients employer’s employees are placed on the payroll of the leasing employer, who then leases the employees back to the client employer for a fee. Employee leasing is attractive because personnel administration and human resource burdens are attended to by the leasing employer.

4. 29 USC §§151-169 (1994).

5. Section 8(a)(3) makes it unlawful for an employer to discriminate against employees because they engage in protected, concerted, or union activities. 29 USC §158(a)(3).

6. Section 8(a)(5) makes it unlawful for an employer to refuse to bargain in good faith with the union representing its employees. 29 USC §158(a)(5).

7. *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117 (3rd Cir. 1982); see also, *TLI, Inc.*, 271 NLRB 798 (1984).

8. *Capitol EMI Music* (cited on p. 130). While admittedly there was, at one time, some blurring and confusion between the concepts of joint employer status and single employer status, it is clear that the two concepts are distinct. *NLRB v. Browning-Ferris* (cited in note 7) at 1122; *Parklane Hoisery Co., Inc.*, 203 NLRB 597, 612 (1972). The joint employer concept assumes that the companies are “what they appear to be” — independent legal entities that have merely chosen to handle jointly important aspects of their employer-employee relationship. *NLRB v. Browning-Ferris*; *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966). However, a single employer relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all practical purposes, there is in fact only a “single employer.” The question in the single employer situation is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise. In answering this question, the board considers four factors: (1) functional integration of operations, (2) centralized control of labor relations (3) common management, and (4) common ownership. *NLRB v. Browning-Ferris*; *Radio Union v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

9. *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993); *Laerco Transp.*, (cited on p. 129).

10. *Goodyear Tire* (cited in note 9) at 676; *Laerco Transp.*, at 325-26.

11. *Goodyear Tire* (cited in note 9).

12. *Laerco Transp.* (cited on p. 129) at 325-26; *Goodyear Tire* (cited in note 9) at 676.

13. In *Capitol EMI Music*, the temporary service provider and client employer were found to be joint employers because they shared and codetermined the essential terms and conditions of employment of temporary employees. The temporary employment agency negotiated the wage rates of its temporary employees assigned to Capitol, while Capitol's supervisors assigned all work and supervised the temporary employees, effectively disciplined the temporary employees, and made effective recommendations concerning the firing and discharge of the temporary employees.

14. See also, *America's Best Quality Coatings Corp.*, 313 NLRB 470 (1993), enforced, 148 LRRM 2136 (7th Cir. 1995) (temporary service provider is not liable for client employer's discriminatory activities where it neither knew nor should have known about the client's discriminatory activities). In *Capitol EMI Music*, the board also noted that even in the absence of a joint employer relationship, an employer is properly held liable for its own deliberate actions that affect an individual's employment status with another employer. Thus, for example, in *Flav-O-Rich, Inc.*, 309 NLRB 262 (1992), the employer, Flav-O-Rich, was provided temporary employees by Job Shop, a temporary employment agency. Because Flav-O-Rich exercised only very limited and routine control over the temporary employees, it was found not to be a joint employer of the employees. Rather, Job Shop was found to be the sole employer of the temporary employees. However, Flav-O-Rich was found liable for successfully requesting that a temporary employee be removed from its facility because he engaged in union activities, and was required to pay back pay to the employee, even though it was not the temporary employee's employer. Job Shop was not found liable for acquiescing in the request because it was not aware of the motive behind the request.

15. Section 7 of the Act guarantees to employees the right to organize, collectively bargain with the employer, and engage in or refrain from engaging in concerted activities. 29 USC §157. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere, restrain, or coerce employees in the exercise of their Section 7 rights. 29 USC §158(a)(1).

16. *American Air Filter* (cited on p. 129) at 53; *Sun-Maid Growers of California*, 239 NLRB 346 (1978), enforced, 618 F.2d 56 (9th Cir. 1980).

17. *Sun-Maid Growers* (cited in note 16) at 354.

18. *American Air Filter* (cited on p. 129) at 52-53.

19. *Id.* at 53.

20. *Mobil Oil Corp.*, 219 NLRB 511, 512 (1975).

21. *W.W. Grainger* (cited on p. 132) at 97.

22. *Greenhoot, Inc.*, 205 NLRB 250 (1973); *Lee Hosp.*, 300 NLRB 947 (1990); *Hexacomb* (cited on p. 134).

23. *Flatbush Manor Care*, 313 NLRB 591 (1993); *Brookdale Hosp. Medical Center*, 313 NLRB 592 (1993).

24. *Greenhoot* (cited in note 22) at 251; *Hughes Aircraft Co.*, 308 NLRB 82 (1992). In *Brookdale* (cited in note 23) Chairman Stevens agreed that this conclusion was in accord with Board law, but he noted over the last decade, health care employers had increasingly utilized contract labor to perform work formerly done by their permanent workforces and that in light of these changed working conditions, it would be appropriate for the Board at some point to examine the continued validity of this policy.

25. *Greenhoot* (cited in note 22) at 251 n. 5.