

The Effect of Labor Law Changes under the New Administration:

Too Soon to Tell

Roundtable chaired by David Sherwyn

EXECUTIVE SUMMARY

With a new administration in place, experts in labor law joined union leaders and management to observe the straws in the wind regarding what changes might occur in labor laws and regulations. Changes seem inevitable in the National Labor Relations Board, and existing NLRB rulings may be altered as time goes on. On the other hand, it seems nearly certain that franchisors and firms that contract for employees will continue to be considered joint employers. The “fissuring” of the hospitality industry invites such an outcome, even as different firms are responsible for specific aspects of a venture. Union leaders anticipate that they will continue to do their best to organize employees and work with their members, and de-emphasize political activity.

ABOUT THE ROUNDTABLE CHAIR



David Sherwyn, J.D., is the John and Melissa Ceriale Professor of Hospitality Human Resources, professor of law at Cornell University's School of Hotel Administration, and director of the Cornell Institute for Hospitality Labor and Employment Relations. Dave is also a research fellow at the Center for Labor and Employment Law at New York University's School of Law and of counsel to the law firm of Stokes, Wagner. From 2006-2009, Dave was the director of the Center for Hospitality Research at Cornell University (CHR). Prior to joining the School of Hotel Administration, Dave practiced management-side labor and employment law. Dave has published articles in, among others, *Northwestern Law Review*, *Stanford Law Review*, *UC Hastings Law Journal*, *Indiana Law Journal*, *Berkeley Journal of Labor and Employment Law*, *Fordham Law Review*, *University of Pennsylvania Labor and Employment Law Journal*, and *Cornell Hospitality Quarterly*. Dave annually teaches Business and Hospitality Law, a required class with more than 200 students, and Labor Relations in the Hospitality Industry, in conjunction with Cornell's Industrial and Labor Relations (ILR) School. In his 17 years as a faculty member, Dave has received 15 Teacher of the Year awards. In 2014 he was named a Stephan H. Weiss Presidential Fellow—the most prestigious teaching award at Cornell

University. Dave conceived of, organized, and hosted the CHR's first hospitality industry roundtable, and has hosted more than 20 Labor and Employment Law Roundtables, while other centers and institutes have hosted roundtables in the school's other hospitality disciplines.

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After 100-plus days with a new presidential administration, it's still too early to determine what changes will occur in the nation's labor laws and regulations. Looking forward, however, a top-level group of labor law experts and administrators offered their analysis of what the landscape of labor regulations and union organization will look like during Donald Trump's presidency. Overall, panelists agreed that changes will occur, especially as new members are seated on the National Labor Relations Board, Department of Labor, and other government agencies. Still, participants observed that the law and its attendant regulations remain in place. Moreover, changes are unlikely in the case of the legislation itself and time consuming in the case of regulations. The NLRB and the Courts will, however, still develop and change case law. Over the course of several sessions, the roundtable examined the continuing development of the joint-employer decision, possible changes in the NLRB, and the status of union activity with a new board and new administration.



Unions will work hard to keep their members informed regarding any new regulations. In Michigan, employers and workers have many issues in common.—Nia Winston, President, UNITEHERE! Local 24 Michigan & Ohio

Joint Employer: The Genie Is Out of the Bottle

The connection between a firm's control of working conditions for a subcontractor's employees and the determination that the firm is considered a joint employer seems firmly established, both in NLRB decisions and in court rulings. Cases that are pending before the District of Columbia Federal Circuit Court will test the extent to which the law requires bargaining, and may determine the extent to which indirect control triggers joint employer status. In the landmark *Browning Ferris Industries* case, the NLRB argued that the common law embraced bargaining. The current NLRB has considered indirect control to be a factor, but the courts seem more focused on whether control is direct. Moreover, it's possible—even likely—that a newly appointed board would revert to a direct-control standard and limit the application of the "new" standard.

A key joint-employer proceeding for the hospitality industry involves McDonald's. The NLRB viewed this franchise system as a joint employer together with its franchisees. That case is still being argued in administrative courts, with a decision possible by the end of 2017. One participant observed that existing legal precedent generally carries more weight in a court's decision than do the board's arguments. If direct control is the lynchpin, the BFI case becomes an issue because there is no bright line in that situation.

The absence of a bright line requires hospitality industry franchisors and operators with outsourced workers to carefully monitor the level of control applied to subcontractors' and franchisees' employees and where that control occurs, panel members suggested. The "fissured" nature of the industry—with different firms performing different functions—lends itself to franchising and subcontracting. Chances are good that a firm that engages a subcontractor could be labeled a joint employer. Again, regardless of the test that is applied, a company that exerts control over subcontractors' employees will almost certainly be designated a joint employer.

For many firms, the employee structure makes subcontracting inevitable. High-end lodging firms usually can avoid large proportions of contract labor in their hotels, and some have increased wages and benefits specifically to attract employees and limit contracting. But labor is so tight in many markets that hotels find it almost impossible to hire a sufficient number of workers. Those firms have little choice but to contract out in such areas as housekeeping or the kitchen. Moreover, many employers like the flexibility gained from subcontracting. The difficulty of finding local workers compounds this problem, leading at least one participant to advocate for a national guest worker program.

Fissuring: The Divided Industry

Panel members were clear that the industry's fissuring into multiple firms through hotel management contracts and franchise agreements should be driven by the need for specific corporate expertise and not be used as a mechanism to reduce workers' rights. Restrictions have occurred, though, and some participants have observed a downward pressure on wages for all workers, particularly those at the entry level. While that could be an intentional employer tactic, it may also be a function of a structural change for some hotel firms where internal employment structures such as career ladders no longer exist. The results of such structural changes are that labor competition increases and wages diminish. This is more of an economic issue than a legal one, suggested some panelists. The legal issue arises when workers who are classified as independent contractors should, in fact, be considered employees.

Corporate culture may also be affected by labor competition and the use of contractual workers. For this reason, many firms do not use contract labor. Instead, most hotel management firms employ their workers in a traditional labor arrangement. On the other hand, there are scenarios where a large, well financed company subcontracts with workers expressly for the purpose of keeping labor costs low, rather than implementing a strategy

where the contractors specialize in a particular aspect of the hotel's operation. In many cases, an employer must address the realities of operating in a globalized labor market, with its attendant competition. Among those realities is the gig economy, which changes the workplace social contract and often limits worker protections.

Roundtable participants discussed the three major factors surrounding the issue of who is an employee and who is a contractor: namely, health insurance, termination rights, and an appropriate wage. Adopting a national single-payer health program, for instance, would remove many employers' incentive for contracting out for personnel. Although employer-provided health insurance is an entrenched employee benefit in the U.S., employers probably would be pleased to get out of the health insurance business. Failing that, employers would seek ways to control costs, perhaps by increasing the competition among health insurance firms. One participant contended that employees, on the other hand, perceive employer-provided health insurance to be superior to existing or proposed government programs.

The Franchise Dilemma

The essential element of a franchise agreement is that one party operates a business according to the successful formula developed by another party. The principle of joint employment complicates that arrangement, particularly since franchisors want to ensure franchisee compliance with system standards. Moreover, franchisors also should ensure that franchisees comply with wage and hour laws, and franchisors typically have greater experience with labor regulations and access to legal expertise. Consequently, simply providing guidance and ensuring that the law is observed should be neutral, rather than an indication of joint-employer status. However, franchisors face the issue of trying to establish a balance between avoiding specific responsibility for employees and exerting control over franchisees' operations. Another source of successful system control occurs when operators and franchisors communicate on a regular basis, a practice that is essential in hotel management contracts and franchising. One potentially important trend in franchising is that the economic and regulatory environment could favor more profitable franchisees, while smaller firms could be swept aside.

Unions: Business as Usual

Turning to the status of labor organizations, the roundtable's union representatives explained that they will continue to work with their members, educate them on laws and NLRB rulings, and build strong relationships. Anticipating that the environment for labor might become



The joint-employer test still exists, so employers should pay attention to what control is applied and when it is applied.
—Steven Swirsky, Member, Epstein Becker Green

more challenging under the new administration, unions will become more organized. They may also direct more resources toward organizing efforts, rather than overtly political strategies. Many union members are immigrants who need to understand their rights in the workplace. This is an area where labor and management can work together, as even citizens who are immigrants are fearful of current law enforcement tactics.

Participants pointed to the importance of maintaining a positive relationship between labor and management, rather than taking an adversarial approach, since hotel operators and union members have many common concerns. Moreover, some observers pointed to Donald Trump's lengthy relationships with building and trade unions in his businesses, and others noted that the president's voting base comprises many union members. Another element to consider is the immense number of young workers. Corporations could underestimate the influence of the next generation, which has an interest in civil rights and workers' rights. Unions could get millennials more involved and engage with them.

While Trump clearly has a bias toward smaller government and less regulation, he also has expressed an interest in infrastructure. Should construction projects go forward, it's likely that the trades will see more work—especially given the administration's stated policy to “hire American.”



If you addressed the following three issues, the question of who is a contractor or an employee might become moot: single payer healthcare, termination regulations, and a real minimum wage.—John Ceriale P'16 & '18, Founder and President, Prospect Advisors

At the same time, it's likely that change is coming to the NLRB, albeit gradually. The arguments for relative stasis (or slow change) are that amendments to the NLRA itself are unlikely, and there are many labor violations that all parties agree are unacceptable, such as human trafficking. Additionally, some aspects of labor law, such as maintaining employee handbooks, have bipartisan support. In areas of disagreement, the NLRB could revert to some of its earlier policies, rather than continue to enforce more recent decisions. It does make a difference who sits on the board, under the principle that personnel is policy, but members must set priorities and determine which battles they want to fight.

Regulatory Changes

Prospective changes to existing government rulings remain an open question, especially those relating to salaries. There may be a move to reverse recent Department of Labor regulations regarding eligibility for overtime wages. (The week following the roundtable, the House of Representatives once again voted to facilitate the exchange of overtime pay for additional time off.) Then again, many firms have already reclassified their employees accord-

ing to the existing rules and simply may leave salaries as they stand. States and municipalities have also filled in the gaps or reclassified, as has occurred in New York City and New York State. Still, with all the turbulence there's no way to predict the outcome of wage rules, including minimum wages (especially since the president has not made an issue of this).

Policy changes at the NLRB hinge on cases that are presented to the board, which does not initiate investigations. Union card-check rules may be at risk in the new environment. One scenario is that the U.S. Supreme Court could set aside card check organizing, if a such a case is presented.

In sum, much of the situation for labor in the new administration involves a wait-and-see analysis. Although 100 days has been treated as a political milestone, three months is actually a short time to ascertain policies coming from a new president and a new Congress. The roundtable closed with projections that the EEOC and NLRB will swing toward business, that we'll see a more anti-regulatory environment, and that the administration will embrace a conservative, small government agenda. ■



The roundtable was held at the Statler Hotel, adjacent to the School of Hotel Administration. Students were welcome to attend and to ask questions at the end of the session.

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