LABOUR AND EMPLOYMENT

JOINT / RELATED / COMMON EMPLOYERS: ARE YOU AT RISK IN ONTARIO?

by W. Eric Kay and Andrew J. Skinner

In recent years, a number of cases have emerged in both Canada and the United States discussing new implications for companies deemed to be joint and related employers. Cases both from the United States and across Canada will inevitably impact Ontario employers.

The American Environment

While American legislation and jurisprudence has traditionally offered fewer protections to employees than its Canadian counterparts, the US National Labor Relations Board continues to broaden the standard of care for joint and related employers. In particular, there have been recent developments that have had the effect of expanding the definition of what constitutes the scope of liability for companies by finding increasingly distant companies jointly and severally liable to employee claims.

On July 29, 2014, after 43 of 181 individual complaints issued by franchisee employees against McDonalds USA, LLC ("McDonalds") were found to have merit, the US National Labor Relations Board ("NLRB") recommended that the franchisor be treated as a joint employer of its franchisees. The case, currently before a New York court, has named McDonalds as a joint employer respondent, alongside the franchisees that employed the complainants, and therefore exposes McDonalds to liability.

About a year later, on August 27, 2015, the NLRB released a decision, *Browne-Ferris Industries of California, Inc.*, which broadened the definition of what constitutes joint or related employer "control" to include "indirect control". The NLRB further noted that franchisors may be found liable as a joint employer if their franchise agreement was drafted to imply control over employment, even if actual control is not exercised. This was an extension of the industry concept of joint employers, one that was generally not contemplated by those crafting legal and business arrangements in the field at the time.

The NLRB is also considering expanding the umbrella of liability to joint and related employers for actions of their suppliers and contractors, which they require to comply with their company's Corporate Social Responsibility policy. A Corporate Social Responsibility policy often includes minimum standards and directions for companies and their affiliates to operate in an economic, social and environmentally sustainable manner. Unions are actively pursuing joint employer claims based on these policies, often demanding that allegedly joint employers play a role the bargaining process.

The Canadian Situation

Similar to the United States, Canadian law recognizes the concept for joint or related employers. The growing prominence of employment relationships involving franchises, subcontractors and temporary help agencies has brought the issue of joint and related employment to the forefront in Canada.

The Common Law

Similar to the concept of joint and related employment, Canadian common law has a common employer doctrine. Under Canadian common law, where multiple entities carry on business in a way that could be construed as a single, integrated unit and one entity has effective control over the employees of the other entity, it may be designated a common employer for the purposes of potential labour and employment liability. In evaluating employment relationships, Canadian courts have looked beyond corporate structures to identify whether a relationship of common control exists. The common employer doctrine may be triggered at common law where there is "a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer" (from the *Downtown Eatery (1993) Ltd.* case). The threshold may depend on the details of the relationship, including factors such as individual shareholdings, corporate shareholdings and interlocking directorships. The governing factor will be the element of common control.

Canadian case law has held that when any of the following elements are present, the common employer doctrine will usually be triggered:

1. An employee is paid by one employer while working for another;
2. An employee has served all of the entities within a group without having regard to which entity they were bound to serve under their contract of employment;
3. There was a demonstrable intention to create an employee/employer relationship with a group of companies;
4. The companies act as a single, integrated economic unit; and
5. One entity exerts effective control over the employee.

The Canadian common employer doctrine is most typically applicable in cases concerning dismissed employees who sue their employer and extend the lawsuit to other closely related companies.

Ontario Legislation

In addition to the common law, the Ontario *Labour Relations Act, 1995* ("**OLRA**") addresses the issue of joint or related employment. In effect, the Ontario Labour Relations Board has the authority to treat associated or related businesses found to be under common control or direction as one employer under the *OLRA*.

Similarly, under the Ontario *Employment Standards Act, 2000* ("**OESA**"), companies or persons may be treated as jointly and severally liable for any contravention of the OESA if, in effect, associated or related activities or businesses were carried on by or through an employer and one or more other persons with the intent or effect of defeating the intent and purpose of the OESA.

Changes are Coming

The Ontario Ministry of Labour published a report on July 27, 2016, entitled, "Changing Workplaces Review: Special Advisors' Interim Report", which addressed the different perspectives presented to the Ministry as a result of public consultations. The Interim Report presented options under consideration by the Ministry and invited further comment on the reported options.

Section 4.2.2 of the Interim Report, "Related and Joint Employers" discusses new considerations for determining whether entities may be joint employers or related employers. The Ministry is contemplating a number of options for its approach to joint employers under the *OLRA* and *OESA* including maintaining the status quo, expressly excluding franchise relationships, and establishing clear statutory criteria for a related employer declaration, which, for example could arise in the franchise context. At this point, the Ministry has noted, "we have not yet come to any conclusions about our recommendations and we have an open mind on all issues."

Joint or Related Employers in the Franchise Context

By the nature of the franchise relationship, the franchisor is in a position of control over the franchise and its operations. In a typical franchise relationship, the franchisor may wish to exert maximum control over its franchisees. However, a relationship of control may put Canadian franchisors at risk of being construed as a joint or related employer. The Ontario Labour Relations Board will look to how much a franchisor directs, controls or supervises the activities of their franchisees' employees in determining whether they are responsible as a joint employer with their franchisees. The proposed changes to the *OLRA* and *OESA* provide an interesting dilemma for franchisors between exercising control and maintaining system standards and protecting their legal interests from joint employer claims.

A finding of joint or related employer status can leave franchisors exposed to claims by franchisee employees for unpaid wages, overtime, vacation pay, benefits, termination notice, pay in lieu of notice, severance pay, wrongful and constructive dismissal, human rights violations and payroll taxes.

Similar to other businesses, franchisors should consider the degree of control that they exercise over their franchisees' operations. This process begins at the moment that a franchise agreement is contemplated. Franchisors are well advised to review their franchise agreements and operating policies to determine whether there are areas in which they can shift their position from a controlling role to one more supervisory in nature.

Changes Concerning Temporary Help Agencies and Subcontractors

The Ministry's Interim Report addresses the growth of the temporary help agency business model, and discusses many of the shortcomings of the present system. The Interim Report contemplates a number of options, including expanded joint and several liability for temporary help agencies and their clients for all matters of the employment relationship. Currently, the *OESA* only considers temporary help agencies liable for unpaid regular wages, overtime pay and public holiday pay. Changes to the *OESA* may expand the scope of temporary help agency liability to include other unpaid amounts like vacation, severance and termination pay. Alternatively, the Interim Report contemplates a recommendation to shelter temporary help agencies from all employment standards claims.

Other considerations in the Interim Report respect the amounts retained by temporary help agencies for their role in the employment relationship. Currently, a temporary help agency can charge a fee if one their assigned employees are hired with six months of being placed with a client. One option being considered by the Ministry will reduce or eliminate this fee. The Ministry is also considering whether to address the "mark-up" fee, which is the difference between the amount that a temporary help agency charges their client employer for the services of their assigned employee and what the temporary help agency pays the employee for their services. The Ministry is also contemplating the creation of a licensing regime for temporary help agencies.

With regards to subcontractors, the Ministry is considering amending the *OESA* to hold employers and/or contractors responsible for employment standards legislation compliance of their contractors or subcontractors and requiring them to insert contractual clauses requiring compliance. This could apply in all industries or in certain industries only, such as industries where vulnerable employees and precarious work are commonplace.

Moving Forward

With so much uncertainty remaining regarding joint related/common employers in Canada, it is important to engage counsel to review business agreements, arrangements and policies to limit a company's potential for joint liability. There is a delicate balance for all companies to strike, particularly franchisors and temporary help agencies, between adhering to Canadian common law and statute, while also protecting business interests. Companies would be well advised to remember the lessons emerging from both the United States and Canada when evaluating their legal and business decisions moving forward.

The value of a properly drafted employment agreement cannot be overstated in addressing not only joint/related/common employment risk but also managing other employment issues such as termination, bonus and non-competition. Dickinson Wright's lawyers continue to monitor all changes to Canada's labour and employment laws and are available to assist companies in preparing for the coming changes.

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