Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

The Third Circuit Affirms Test for Joint Employer Liability in Wage and Hour (FLSA) Matters, Distancing from the NLRB Position

On November 18, 2015, the Third Circuit issued an Opinion, *Faush v. Tuesday Morning, Inc.,* Civil Action No. 2-12-cv-07137, which addresses whether the Defendant was a joint employer. The court explained that, unlike in the recent NLRB decision discussed in our September Client Alert, under Federal Wage and Hour law, the joint employer test that has been used for the last thirty years, will remain in place.

The doctrine still remains that a single individual may stand in the relation of an employee to two or more employers at the same time. The determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all of the facts in the particular case. The factors that most influenced the *Faush* court's determination regarding joint employment in that case were as follows: (1) the alleged employer's authority to hire and fire the relevant employees; (2) the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment; (3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and (4) the alleged employer's actual control of employee records, such as payroll, insurance, or taxes.

The *Faush* court focused on the following facts in finding that Labor Ready and Tuesday Morning were joint employers: (1) Labor Ready provided time cards to Faush, on which Faush recorded his time, however, Tuesday Morning approved Faush's time, and if questioned, accurately fixed the time; (2) Tuesday Morning supervised and directed Faush's

activities; (3) Tuesday Morning was required to train *Faush* as to safety procedures, and provide safety equipment, if any; (4) Tuesday Morning determined whether *Faush* was skilled enough to perform the job; (5) Faush performed the same work as full time Tuesday Morning employees; and (6) Tuesday Morning was required to ensure that there was complete and accurate compliance with all state and federal wage statutes.

Thus both the contractual requirements and the actual behavior of the parties were determinative.

Be On The Look Out

In spite of the court decision in *Faush* affirming the established test, it appears that change may be on its way. As set out in our **September Client Alert**, the NLRB expanded the joint employer doctrine that was used for the last thirty years and affirmed *Faush*. The NLRB found that even though the company did not actually exercise any control over the terms and conditions of employment of temporary workers, it was the potential for control that governed. As the NLRB itself noted, the ruling departs from thirty-two years of prior NLRB decisions requiring a showing of actual exercise of authority before a company using temporary employees would be found to be a joint employer.

Additionally, on December 19, 2014, the NLRB charged a group of McDonald's franchises and the parent company as joint employers. The NLRB found that McDonald's USA possessed control over the franchisees through the franchise agreement, as well as computerized advice to the franchisees about optimizing workforce hours. The NLRB has clearly started to shift away from direct control to indirect control to determine joint employer status.

We are hopeful that because the *Faush* court did not change the rule of law that has been in place over the last thirty years, that this broadening of the joint employer doctrine by the NLRB will not be applied in FLSA matters. However, David Weil, the Administrator of the Wage and Hour Division, has long expressed concern about what is termed the "fissuring" of the employment relationship and seems to believe that the joint employer doctrine should be expanded, subjecting employers to more potential liability.

EMPLOYER TIPS

Employers should enter into a contract with a company with which they are doing business, defining the duties and distancing themselves from the definition of employer.

This contract is not dispositive, but can be used as evidence. An employer should also ensure that the staffing agency, subcontractor, or other company from which they are receiving employees, understands the laws regulating employees, so as to limit liability. The employer should allow the other employer to control the payroll, taxes, and other related tasks so as to attempt to avoid liability under the joint employer doctrine. This list is in no way exhaustive, but is representative of the ways in which an employer should structure its relationship with outside vendors, franchisees, subcontractors and the like, so as to limit or avoid liability under the joint employer doctrine.

If you have any questions regarding information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

David I. Rosen, Esq.
Chair, Employment and Labor Practice Group
drosen@sillscummis.com | (973) 643-5558

Galit Kierkut, Esq.
Client Alert Editor; Member, Employment and Labor Practice Group
gkierkut@sillscummis.com | (973) 643-5896

Charles H. Kaplan, Esq.
Member, Employment and Labor Practice Group
ckaplan@sillscummis.com | (212) 500-1563

Andrew I. Glenn, Esq.
Client Alert Author; Counsel, Employment and Labor Practice Group
aglenn@sillscummis.com | (609) 227-4631