

***Third Thursday* –Crowell & Moring’s Labor & Employment Update**

December 18, 2014

The webinar will begin shortly. Please stand by.

Today's Presenters



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The NLRB's Latest Enforcement Actions – Now What?

Today's Discussion

- *Purple Communications*
- New Representation Case Procedures
- *Browning-Ferris*
- *McDonald's*

Purple Communications

- Holding: employee use of employer's email system for statutorily protected communications during non-work time is presumptively allowed
 - Overturns 2007 *Register Guard* decision that allowed employers to prohibit use of company email for union solicitation if employer banned all solicitations for non-work causes

Purple Communications: Facts

- Employer's policy
 - Company-provided equipment is company property
 - All information stored on equipment/messages sent over email are company property
 - Equipment and email to be used for business purposes only
 - Employees prohibited from using hardware/systems to engage “in activities on behalf of organizations or persons with no professional or business affiliation with the company”
 - Employer also had policy that banned sending uninvited email of a personal nature
- No evidence of discipline or discharge here – solely a question of whether the policy is unlawful on its face
- ALJ found these policies lawful under *Register Guard*

Purple Communications: Majority

- Solicitation/distribution v. communication
- Employee §7 rights v. employer property Rights
- Monitoring v. surveillance
- Retroactivity
- Attempts to limit applicability/ways to overcome presumption

Purple Communications: Dissents

- Prohibiting §7 email over employer system not an unreasonable impediment
 - Availability of alternative communication outlets
- Employee §7 rights v. employer property rights
- Effect on “work time” v. “non-work time”
- Monitoring v. surveillance
- §302 issues
- First Amendment issues

Purple Communications: Takeaways

- Just the beginning
 - Appeal
 - Application to additional employer provided communications systems
- Employers must review email practices
 - Employee access?
 - Implementing new rules?
 - Monitoring systems?

NLRB Representation Case Procedures

- Electronic Filing
- Shorter timelines
- Limits on pre-election hearings
- Earlier submission of *Excelsior* List
- Statement of Position Requirements

Don't Panic but Plan Ahead

- Understand the Details:
<http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3317/Comparisontable.pdf>
- The “Permanent Campaign” Environment
 - Wage/benefit comparisons
 - Attitude surveys
 - Early warning systems
 - Training
 - Policy review

The Traditional Joint Employer Test

- *TLI, Inc., & Laerco Transportation*
- Joint employers must share control over matters such as hiring, firing, discipline, supervision and direction of employees
- Control must be “direct and immediate”
- “Limited and routine” control insufficient

Browning-Ferris Industries (BFI) – Facts

- BFI operates recycling processing facility with 60 BFI employees
- Contractor Leadpoint has 240 employees at BFI (sorters, screen cleaners and housekeepers)
- Teamsters filed election petition seeking to represent both Leadpoint and BFI employees in a single unit

The Employment Arrangement

- Staffing Arrangement
 - Cost-plus, labor-only contract
 - Leadpoint has authority to recruit, hire, train, assign, discipline and fire employees
 - Leadpoint sets wages, offers benefits, administers payroll
 - Onsite supervisors and onsite Human Resources

BFI Control

- BFI has right to establish minimum qualifications, drug testing, background check
- BFI retains right to reject or discontinue use of personnel
- Contract places cap on Leadpoint wages
- BFI establishes hours of operation, production speeds, numbers of employees needed

Procedural Posture

- ARD decision – No Joint Employer Relationship
- Union Requested Review
- Board Granted Review, solicited amicus briefs
- Briefs filed June 2014
- General Counsel seeking new joint employer standard
- Schiffer term expired December 16, 2014

Why Browning-Ferris Matters

- A new, significantly broader standard would:
 - Expand potential joint-employer liability to cover numerous potential contracting arrangements
 - Lose secondary boycott protections
 - Impact 8(a)(3) liability under *Malbaff* doctrine
 - Signal potential reversal of *Oakwood Care Center*, 343 NLRB 659 (2004), *Greenhoot, Inc.*, 205 NLRB 250 (1973) & *Lee Hospital*, 300 NLRB 947 (1990)

McDonald's Franchisees

- July 29 announcement by OGC – 43 complaints
- Various fact patterns involving conduct that “violated the rights of employees as a result of activities surrounding employee protests.”
- Settlement discussions apparently unsuccessful
- Procedural context

Legal Issues

- Traditional Joint Employer Test
 - “direct and immediate control” over terms and conditions of employment
- A New Test?
 - Direct, indirect, or potential control of employment matters by franchisor
- Lanham Act Considerations

Is There a Tipping Point?

- Specific factual issues
 - Brand control v. daily operations
 - Site visits and quality control
 - Training
 - Technology
 - Agreement language

Why Is this Important?

- An existential threat to the franchise business model?
- Implications
 - A boost for union organizing
 - Increased legal exposure; other costs
- Extensions to other ‘shared environment’ business models

Selected Authorities

- *Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014).
- *Register Guard*, 351 NLRB 1110 (2007).
- *Republic Aviation v. NLRB*, 324 U.S. 793 (1945).
- *Browning-Ferris Industries*, 32 RC-109684
- *TLI, Inc.*, 271 NLRB 798 (1984)
- *Laerco Transportation*, 269 NLRB 324 (1984)
- *Oakwood Care Center*, 343 NLRB 659 (2004)
- *M.B. Sturgis*, 331 NLRB 1298 (2000)

Selected Authorities (cont.)

- *Greenhoot, Inc.*, 205 NLRB 250 (1973)
- *Lee Hospital*, 300 NLRB 947 (1990)
- *McDonald's* Announcement by General Counsel:
<http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-mcdonalds>
- NLRB Final Rules on Representation Case Procedures
http://www.ofr.gov/OFRUpload/OFRData/2014-28777_PI.pdf
- NLRB Fact Sheet <http://www.nlr.gov/news-outreach/fact-sheets/nlr-representation-case-procedures-fact-sheet>
- *MikLin Enterprises, d/ba/ Jimmy John's*, 361 NLRB No. 27 (August 21, 2014)

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