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Joint Employer Issues Summit

February 11, 2018

OBJECTIVES FOR TODAY'S SESSION:

- Learn the current state of joint employment liability after Year One of the Trump Administration in the federal and state arenas.
- Learn what both franchisors, franchisees and suppliers should be doing in 2018 to grow their businesses while avoiding joint employment liability under multiple areas of law

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Panel One – *Is Joint Employer Finished?*

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MICHAEL LOTITO, Littler Mendelson

Panel One Agenda:

- NLRB's Changing Joint Employer Standard
- The Attack on *Hy-Brand*
- Is a Return to *Browning-Ferris* on the Horizon?
- Don't Forget About the FLSA
- State Law Matters Too
- Is There a Permanent Solution for Employers?

NLRB's Changing Joint Employer Standard

- *TLI, Inc. and Laerco Transportation*: direct and immediate joint control over essential terms
- *Browning-Ferris*: “indirect control”
- *Hy-Brand Industrial Contractors*: returned to the *TLI* and *Laerco* standard

The Attack on *Hy-Brand*

- Arguing for recusal of new Members due to alleged conflict
- Pre-mature to overturn *Browning-Ferris*:
 - with appeals pending and
 - without an invitation for briefs
- Unnecessary because entities involved were joint employers under any formulation of the test

Is a Return to *Browning-Ferris* on the Horizon?

- Current Board Term Lengths:
 - **Chairman Kaplan** – August 27, 2020
 - **Member Pearce** – August 27, 2018
 - **Member McFerran** – December 16, 2019
 - **Member Emanuel** – August 27, 2021
 - (**John Ring** nominated for fifth Board seat)
- If elected in 2020, a Democratic President could create a Democratic majority no later than August 2021

What About the FLSA's Test?

- SCOTUS denial of cert. in *Direct TV* provides no certainty
- Circuit split regarding correct FLSA joint-employer test:
 - 4th Circuit: the “fundamental question” is “whether two or more persons or entities are ‘not completely disassociated’ with respect to a worker”
 - 9th Circuit: *Bonnette* 4-factor test provides “useful framework” for joint employer analysis
 - 5th Circuit: liberalization of *Bonnette*

The U.S. Dept of Labor Hasn't Provided Clarity

- WHD Administrator's Interpretation in January 2016
- Withdrawal of Interpretation in June 2017
- No replacement currently planned

Don't Forget About State Laws Either

- State laws could also have significant impact
- For example, *Salazar v. McDonald's* on appeal in 9th Circuit
- Plaintiffs argued that “common sense,” and an “ostensible agency” theory, support joint employer finding against McDonald's
- District Court for ND of Cal. rejected these theories

Is There A Solution?

- The Save Local Business Act (H.R. 3441)
 - U.S. House's response to *Browning-Ferris*
 - Would modify both NLRA and FLSA
 - Joint employer would be one that “directly, actually and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment.”
 - Passed by U.S. House on 11/7/2017

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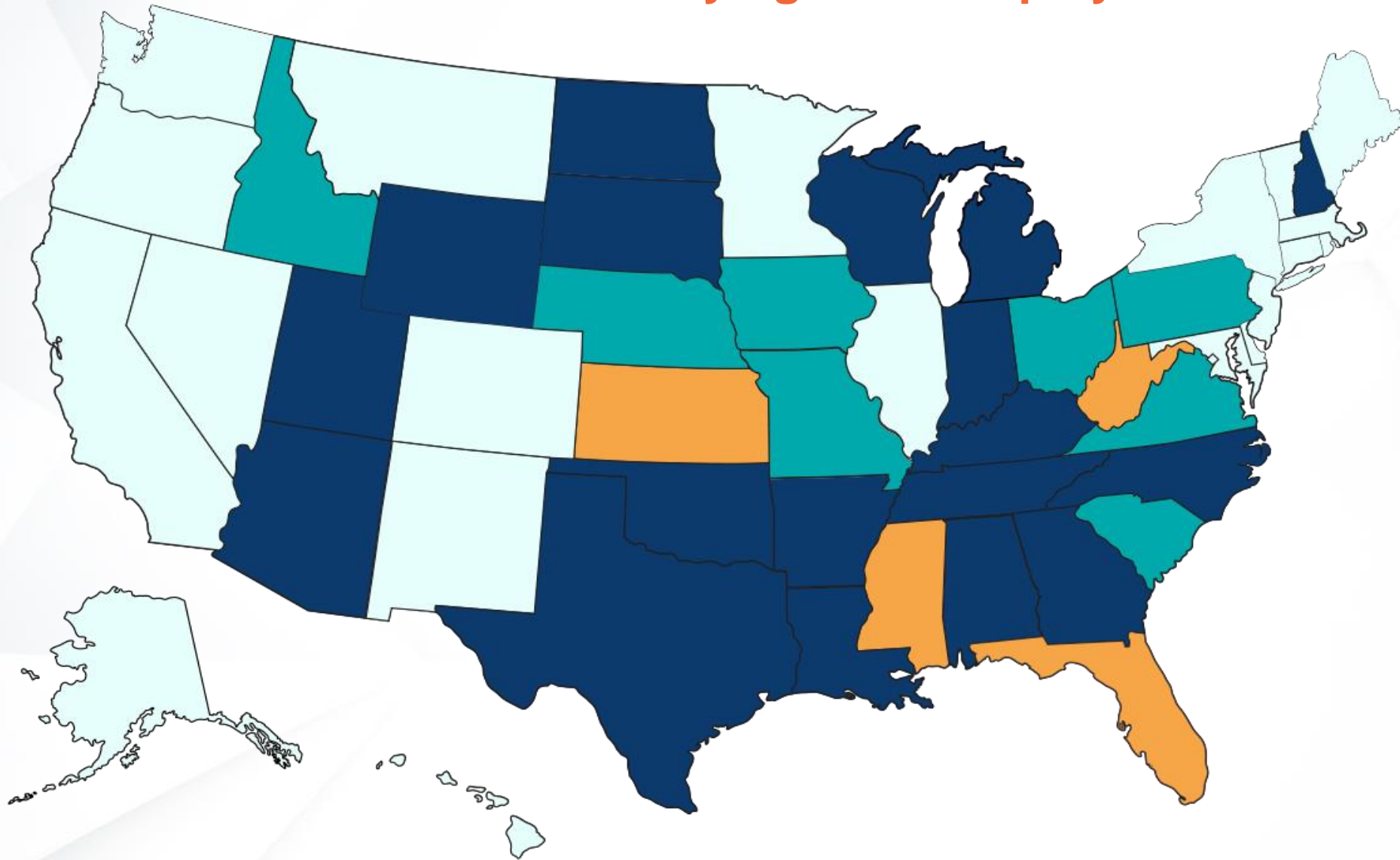
**JEFF HANSCOM, IFA State Government
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Proactive State Joint Employer Legislation

Bill Structure

- Each state law has been unique, tailored to suit the needs of the individual legislature and state. At their core, the laws are based on the reality that franchising is a mutually beneficial contractual agreement between two parties, but not one which creates an employee/employer or joint employment relationship between those two parties. Each state law provides for the same two fundamental principles:
 - 1. A franchisee is not an employee of his/her franchisor; and
 - 2. A franchisee's employees are not employees of the franchisor

State Laws Clarifying Joint Employer



 = TARGETED

 = ACTIVE LEGISLATION

 = PASSED/SIGNED BY GOVERNOR

International Joint Employer Developments

- Australia's "Vulnerable Workers Act"
 - Enacted on September 5th, 2017 and became effective on October 27th, 2017
 - Franchisors are expected to take "reasonable steps" to ensure that franchisees are not underpaying employees or violating certain other employment-related requirements.

CONCLUSIONS: *Is Joint Employer Finished?*

Good news

- NLRB's *Browning-Ferris* standard has been eliminated...for now
- 18 states have enacted joint employment protections for franchises

Bad news

- Joint employment liability under the Fair Labor Standards Act remain a mess – 8 different circuit court standards
- Australia law a harbinger of more laws?

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Panel Two – What Do Franchises Need to Do About Joint Employer in 2018?

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Action Items

Franchise Agreement Revisions

- Explicitly provide that franchisee is solely responsible for hiring, firing, promoting, disciplining, and compensating franchisees
- Improve indemnification clause to explicitly cover employment-related claims
- Strengthen independent contractor provision by explicitly acknowledging that franchisor is not a joint employer
- Consider mandating Employment Practices Liability Insurance

Action Items

Sample Provision on Employment Policies

You are solely responsible for all labor and employment-related matters and decisions related to your Business, including hiring, firing, promoting, demoting, and compensating (including through wages, bonuses, or benefits) your employees. You must ensure that your employees are qualified to perform their duties in accordance with our Brand Standards. We do not require you to implement any employment-related policies or procedures or security-related policies or procedures that we (at our option) may make available to you in the Manuals or otherwise for your optional use. You shall determine to what extent, if any, these policies and procedures may be applicable to your operations at your Business.

Action Items

Sample Indemnification Clause

You agree to indemnify us against any claims related to your noncompliance or alleged noncompliance with any law, ordinance, rule or regulation, including any allegation that we are a joint employer or otherwise responsible for your acts or omissions relating to your employees.

Action Items

Sample Addition to Independent Contractor Provision

We and you are not and do not intend to be partners, associates, or joint employers in any way, and we shall not be construed to be jointly liable for any of your acts or omissions under any circumstances. We have no relationship with your employees, and you have no relationship with our employees.

Action Items

Review Operating Manuals and Training Materials

- Distinguish between requirements and recommendations
 - Requirements for protecting the brand, the products, and the use of the trademark
 - Recommendations for policies and procedures that will not directly impact the customer experience
- Focus on results rather than process
 - Mandate that a business must be clean, but do not require a specific cleaning process
- Make sure documentation distinguishes between franchisor and franchisee
- Explicitly include joint employment-related disclaimers

Action Items

Adjust Training and Inspection Procedures

- Train the trainer, rather than franchisee's non-managerial staff
 - Rely on inspections and complaints to identify issues impacting brand standards
- Train field staff to provide guidance to owners and managers, but not to exercise control over franchisee's staff
 - Focus on brand standards and quality control

Action Items

Stay Out of the Franchisee-Employee Relationship

- Do not require franchisees to use specific employee handbook
 - Can provide sample handbooks, but there is a risk. Best practice is to refer franchisees to third-party sources.
- Require franchisees to use corporate name rather than franchisor's trademark on employment-related materials such as applications, handbooks, and paychecks
- Require franchisee employees to sign acknowledgement that franchisee, rather than franchisor, is their employer

Action Items

Consider unique risks that may arise under FLSA

- The FLSA's definition of "employment" is extremely broad and is often construed liberally. This makes a finding of joint employment more likely.
- As in the NLRA context, the key issue is actual control over work. Some courts also look at "economic realities" between the parties to determine whether a joint employer relationship exists. These courts consider actions by the franchisor that may effect employee compensation (among other issues) in assessing overall "control."
 - Example: Some franchisors provide perks to employees of their franchisees, such as discounted hotel rooms or meals. A court may consider this a factor that determines joint employer liability since it affects the employee's compensation . Therefore, franchisors should carefully assess these types of programs.

Vicarious Liability

- Will remain a theory to find franchisors liable for franchisee's employment practices--vicarious liability claims will continue
- Joint employer has had limited impact on the standards and application to franchisee's employees claims against franchisors under the various states' laws
- Standard generally follows control, so same recommendations



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CONCLUSIONS: *What Do Franchises Need to Do About Joint Employer in 2018?*

Franchisors:

- DO Revise Your Franchise Agreement
- DO Review Operating Manuals and Training Materials
- DO Evaluate Your Benefits Programs that are Available to Franchisees and their Employees
- DO NOT Get Involved in the Franchisee-Employee Relationship

CONCLUSIONS: *What Do Franchises Need to Do About Joint Employer in 2018?*

Franchisees:

- DO Consider an EPLI policy
- DO Have State-specific Employee Handbooks, potentially provided by a third-party
- DO NOT Engage Franchisor on the employer-employee relationship. Recommendation: Use a third-party

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