AM I AN EMPLOYER?... RECENT DEVELOPMENTS TO JOINT EMPLOYMENT STATUS AND INDEPENDENT CONTRACTORS

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JOINT EMPLOYMENT

WHAT IS JOINT EMPLOYMENT?

- Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers

- Joint employment is typically found to exist:

  - When a business utilizes employees from a temporary staffing agency (i.e., temporary or contract employees)

  - In a “leased” employee scenario involving a PEO

- If joint employment is found to exist, both employers can be liable for violations of the anti-discrimination laws, wage and hour statutes, the FMLA, etc.

DOL INTERPRETATION OF JOINT EMPLOYMENT UNDER FLSA

- DOL issued guidance on January 20, 2016 identifying joint employment
- Joint employment “should be defined expansively”
- Vertical Joint employment:
  - Focuses on the economic realities of the working relationship between the employee and potential joint employer
  - “Vertical joint employment exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work”

DOL INTERPRETATION OF JOINT EMPLOYMENT UNDER FLSA

- Factors for vertical joint employment include whether:
  - The potential joint employer directs, controls, or supervises the work of the potential joint employees
  - The potential joint employer controls hiring and discipline decisions, rate of pay, etc. of the potential joint employees
  - There is a permanent and/or lengthy relationship between the potential joint employer and the potential joint employees
  - The work of the potential joint employees is "repetitive and rote, is relatively unskilled, and/or requires little or no training"
  - The work of the potential joint employees is an integral part of the potential joint employer's business
  - The potential joint employees perform work on the premises of the potential joint employer
  - The potential joint employer performs administrative functions for the potential joint employees

DOL INTERPRETATION OF JOINT EMPLOYMENT UNDER FLSA

- Horizontal Joint employment:
  - Focuses on the relationship of the employers to each other
  - “Horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee”
  - For example, a registered nurse works at Springfield Nursing Home for 25 hours in one week and at Riverside Nursing Home for 25 hours during that same week

DOL INTERPRETATION OF JOINT EMPLOYMENT UNDER FLSA

- Factors for horizontal joint employment include:
  - Common ownership
  - Overlapping officers, directors, executives, or managers
  - Shared control over operations (e.g., hiring, firing, payroll, advertising, overhead costs)
  - Inter-mingling of operations (e.g., common administrative operation for both employers)
  - Common supervisors and/or shared supervisory authority over the subject employees
  - Pool of employees available to both employers
  - Shared clients or customers
  - Agreements between the potential joint employers

LIABILITY UNDER THE FLSA FOR JOINT EMPLOYERS

- If joint employment exists:
  - Both companies are responsible for wage and hour compliance
  - The employee's hours worked for both employers during the workweek are aggregated for purposes of calculating whether overtime pay is due
  - Both companies are jointly and severally liable for violations of the wage and hour laws
- According to the DOL, the staffing firm is responsible for keeping records of hours worked and overtime pay for its contingent employees
- However, the client company may also bear responsibility for overtime pay if the employee worked more than 40 hours in the week for the client company

FMLA: DETERMINING JOINT EMPLOYER STATUS

- The primary factor in determining joint employment is whether the entity exercises "control over the work or working conditions of the employee"
- Same as the analysis under the FLSA
  - DOL Fact Sheet #28N
- Employees who are jointly employed must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility
- Use temporary employee's start date when determining FMLA eligibility; not hire date

FMLA: LIABILITY FOR JOINT EMPLOYERS

- Primary employer and secondary employer
- The primary employer is the employer that has the authority to hire and fire, assign or place the employees, determine pay rates and pay employee salary and benefits
  - The primary employer is generally the staffing firm under the FMLA
- **The primary employer must:**
  - Give required notices
  - Provide leave
  - Maintain health care benefits during the leave
  - Restore the employee to his or her job at the end of leave

FMLA: LIABILITY FOR JOINT EMPLOYERS

- The secondary employer must:
  - Accept the employee returning from leave in place of the replacement employee if the secondary employer continues to utilize an employee from the staffing agency
  - Keep basic payroll and identifying employee data with respect to any jointly-employed employees
  - Avoid interfering with an employee's rights under the FMLA and/or retaliating against an employee under the Act

DISCRIMINATION/HARASSMENT: DETERMINING JOINT EMPLOYER STATUS

- Joint employer theory:
  - Both employers may be subject to liability for discriminatory acts and/or harassment
  - Staffing firms and client companies are liable for their own discrimination and discrimination by the other entity if it participates in the discrimination or knew or should have known of the discriminatory action and failed to take corrective action within its control

DISCRIMINATION/HARASSMENT: DETERMINING JOINT EMPLOYER STATUS

- The EEOC will look to whether "one or both businesses have the right to exercise control over the worker's employment"
- If both the staffing firm and client company have the right to control the worker and each has 15 or more employees, they are joint employers
  - Staffing firms and client companies must count every worker with whom they have an employment relationship when determining whether they have 15 employees
- Generally, the EEOC will find that staffing firms and client companies are joint employers of the temporary and/or leased employee

DISCRIMINATION/HARASSMENT: DETERMINING JOINT EMPLOYER STATUS

- EEOC enforcement guidelines state that the staffing firm is liable "if it participates in the client's discrimination" or "if it knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control"
- A staffing firm "participates" in discriminatory practices if it honors client requests based on discriminatory reasons
- "Prompt corrective measures within its control" include whether staffing firm:
  - Insisted that prompt investigative and corrective measures be undertaken
  - Afforded the worker an opportunity, if he/she so desires, to take a different job assignment at the same rate of pay

DISCRIMINATION/HARASSMENT: LIABILITY FOR JOINT EMPLOYERS

- When a staffing firm and a client company are both responsible for discrimination, they are jointly and severally liable for damages
- Punitive damages are based on each entity's degree of responsibility for the discrimination

ADA: LIABILITY FOR JOINT EMPLOYERS

- Liability is similar to Title VII
- Staffing firms and client companies are liable for their own discrimination and discrimination by the other entity if it participates in the discrimination or knew or should have known of the discriminatory action and failed to take corrective action within its control

ADA: REASONABLE ACCOMMODATIONS IN JOINT EMPLOYMENT

- Client companies are not responsible for providing reasonable accommodations when the applicant applies directly to the staffing firm
- However, client companies must provide reasonable accommodations if they send applicants to a staffing firm to apply there
- Once employed, the client company and staffing agency will both be responsible for ensuring that the employee is provided with a reasonable accommodation
- Undue hardship may be claimed by the staffing agency or client company if, after engaging in good-faith efforts, the party attempting to provide the accommodation cannot obtain the other party's cooperation in providing the accommodation

NLRB: DETERMINING JOINT EMPLOYMENT

- *Browning Ferris* decision issued August 27, 2015
- **Prior standard:**
  - "Joint employment" existed only when two employers exerted direct and significant control over the same employees such that they shared or co-determined matters governing the essential terms and conditions of employment (*i.e.*, the right to hire, terminate, discipline, supervise and direct the employees)
  - The control exercised by the putative joint employer must be actual, direct and substantial—not simply theoretical, possible, limited or routine

NLRB: DETERMINING JOINT EMPLOYMENT

- **New standard uses a two-part test:**

  1. Is there a common-law employment relationship between the employer and the employees in question; and

  2. If so, does the putative joint employer possess sufficient control over the employees' essential terms and conditions of employment to permit meaningful collective bargaining

- If the putative joint employer has the **right** to control the subject employees' terms and conditions of employment, its exercise of that control need only have an **indirect** impact on the employees

NLRB: DETERMINING JOINT EMPLOYER STATUS

- Board expanded essential terms and conditions of employment to include:
  - Dictating the number of workers to be supplied;
  - Controlling scheduling, seniority, and overtime; and
  - Assigning work and determining the manner and method of work performance
- The joint employer's duty to bargain only extends to terms and conditions that the joint employer possesses the authority to control

FRANCHISOR AS A JOINT EMPLOYER

- *McDonald's/Jimmy John's/ Freshii* decisions
  - Franchisor liability depends on the level of control franchisors assert over the franchisee's business operations
- Franchisors may be deemed joint employers if they:
  - Are personally involved with hiring decisions at the franchise level
  - Control employee work conditions and/or scheduling
  - Determine the method and/or rate of pay

JOINT EMPLOYMENT BEST PRACTICES

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JOINT EMPLOYMENT: BEST PRACTICES

- Do your homework to ensure that the staffing agency meets your needs
- Obtain hold harmless and indemnification clauses in staffing agreements
- Make certain that workers are properly classified in staffing agreements
- Include a lease-to-hire provision in staffing agreements
- Include a provision in the contract that the staffing company will remove employees the client company is not satisfied with, **for any or no reason**

JOINT EMPLOYMENT: BEST PRACTICES

- Draw distinctions between contingent and full-time employees by providing separate identifications and business meetings
- Client companies should not keep personnel records on contingent employees (unless required)
- If large numbers of contingent employees work for indefinite periods of time, require the staffing agency to provide an on-site presence to supervise these workers
- The client company should report all issues with contingent workers to the staffing agency
- Ensure that company benefit plans exclude supplemental staff provided by staffing firms

INDEPENDENT CONTRACTORS

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DOL: INDEPENDENT CONTRACTORS

- DOL issued guidance on July 15, 2015 regarding independent contractors
- "Most workers" should be considered employees covered under the FLSA's "broad" definitions
  - **Practical Implication:** More difficult for employers to classify workers as independent contractors

DOL: INDEPENDENT CONTRACTORS

- Reaffirmed use of six-factor economic realities test
- Main focus of economic realities test is whether the subject entity or individual controls the "process of work"
  - If the company controls the process, the worker is likely an **"employee"**
  - If the worker controls the process, the court will be more inclined to classify the worker as an **"independent contractor"**

DOL: ECONOMIC REALITIES TEST

Considers the following:

1. Extent to which services are an integral part of the employer's business
   - Does the worker perform an integral/discrete job that is one part of the employer's overall process of production?
2. Permanency of the relationship
   - How long has the worker worked for the same company?
3. Amount of the worker's investment in facilities and equipment
   - Is the worker reimbursed for any purchases or materials, supplies, etc.? Does the worker use his/her own tools and equipment?

DOL: ECONOMIC REALITIES TEST (CONT.)

4. Nature and degree of control by the principal

   – Who decides the hours to be worked? Who is responsible for quality control? Does the worker work for any other company(ies)?

5. Worker's opportunities for profit and loss

   – Can the worker earn a profit by performing the job more efficiently or exercising managerial skill or suffer a loss of capital investment?

6. Level of skill required and judgment in performing the job

   – Does the worker advertise independently via business cards that do not contain any one company's logo/information?

IRS TEST

- Behavioral Control
  - Who has control or the right to control what the worker does?
- Financial Control
  - Are the business aspects of the worker's job controlled by the individual or the company?
- Relationship of the parties
  - Employees are more likely than independent contractors to receive benefits, such as insurance, pension and paid leave

WORKER MISCLASSIFICATION LIABILITY

- Tax penalties
- Wage and hour liability
- Workers' compensation liability
- Unemployment compensation liability
- Liability under anti-discrimination statutes

WORKER CLASSIFICATION BEST PRACTICES

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CLASSIFY AS AN "EMPLOYEE" IF

- Worker performs services for employer
- Employer controls what is being done and how it is being done

- Key element of employer-employee relationship is the employer's **right to control** the details of how a service is performed
- Cannot have your cake and eat it to!

CLASSIFY AS AN “INDEPENDENT CONTRACTOR” IF

- Worker is self-employed
- Worker will perform designated services for a limited duration of time
- Worker is not economically dependent on any one employer
- Worker may deduct various business expenses on personal income tax returns

- **“Reasonable Basis”** for classification of workers must be based on:
  - Acceptable legal precedent;
  - A prior IRS audit; or
  - A long-standing industry practice

CAREFULLY REVIEW TYPE & SCOPE OF WORK TO BE PERFORMED…

- When determining whether to hire an independent contractor, employers should:
  - Conduct a careful review of the type and scope of work being performed before engaging the services of any nonemployee
  - Determine whether tasks can be performed by current employees, even if it means splitting such tasks among several employees
- Employers should maintain records of business licenses, business cards, contractor tax records, project work plans showing limited engagements and correspondence from the contractor
- Enter into an independent contractor agreement

PERIODICALLY AUDIT EXISTING CONTRACTOR ARRANGEMENTS…

- Sometimes workers inadvertently shift from contractors to employees
- If an independent contractor becomes economically dependent on the work, the relationship may convert to an employment relationship
- Adjust job descriptions and work to be performed if it appears that independent contractors may be shifting toward becoming employees

QUESTIONS?

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THANK YOU

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