EMPLOYMENT LAW IN THE STAFFING WORLD

PART 2

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WEBINAR SERIES OVERVIEW

- Four-part series for staffing companies
- First two webinars will focus on the legal issues in the employment arena for staffing companies, which includes the complexities of the joint-employer relationship
- Third webinar will focus on immigration issues
- Final webinar will focus on staffing services agreement

AGENDA FOR TODAY

- Fair Labor Standards Act (FLSA)
- Discrimination and harassment
- Family and Medical Leave Act (FMLA)
- Labor law issues

FAIR LABOR STANDARDS ACT (FLSA)

- Applies to joint employment relationships
- Joint employment status "depends upon all the facts in the particular case," but will generally be found where there is an "arrangement between the employers to share the employees' services"

FAIR LABOR STANDARDS ACT (FLSA)

- Courts employ the "economic reality" test to determine whether a worker is an employee under the FLSA
- Factors include:
  - Who controls the worker's duties and schedules
  - Who pays wages
  - Who has the right to hire, fire and discipline
  - Who maintains the employment records

FAIR LABOR STANDARDS ACT (FLSA)

- If joint employment exists:
  - Both companies are responsible for wage and hour compliance
  - Both companies are jointly and severally liable for violations of the wage and hour laws
- According to the Department of Labor, 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 contingent employee worked more than 40 hours in the week for the client company

FAIR LABOR STANDARDS ACT (FLSA)

- In July 2015, the DOL released an Administrator's Interpretation regarding the misclassification of employees as independent contractors
- The Interpretation is in response to the increasing number of complaints from workers alleging misclassification, and the DOL's successful enforcement actions against employers who misclassify workers
- The Interpretation is the DOL's effort to make sense of what it believes the FLSA's "Suffer or Permit" standard is

FAIR LABOR STANDARDS ACT (FLSA)

- The DOL will consider the following factors in analyzing whether an individual is an "employee" under the FLSA:
  - Is the work an integral part of the employer's business?
  - Does the worker's managerial skill affect the worker's opportunity for profit or loss?
  - How does the worker's relative investment compare to the employer's investment?
  - Does the work performed require special skill and initiative?
  - Is the relationship between the worker and the employer permanent or indefinite?
  - What is the degree and nature of the employer's control?

FAIR LABOR STANDARDS ACT (FLSA)

- DOL's "Bridge to Justice Program"
  - The Wage and Hour Division will refer employees who contact the DOL regarding wage and hour violations to local attorneys
- DOL is targeting "fissured" industries -- those sectors that increasingly rely on a wide variety of organizational methods that have redefined employment relationships:
  - Subcontracting; third-party management; franchising; independent contracting; and other contractual forms that alter who is the employer of record or make the worker-employer relationship tenuous and less transparent
  - These industries include the agricultural, construction, janitorial, hotel/motel and delivery industries

DISCRIMINATION/HARASSMENT

- 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

- 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
  - Generally, the EEOC will find that staffing firms and client companies are joint employers of the temporary and/or leased employee
- Staffing firms and client companies must count every worker with whom they have an employment relationship when determining whether they have 15 employees

DISCRIMINATION/HARASSMENT

- Many courts apply the "economic reality" test when determining if joint employment exists:
  - Control of a worker's duties
  - Payment of wages
  - Right to hire and fire and the right to discipline
  - Duties are an integral part of the employer's business

DISCRIMINATION/HARASSMENT

- 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

DISCRIMINATION/HARASSMENT

- "Prompt corrective measures within its control" include whether the staffing firm:
  - Ensured that the client is aware of the alleged misconduct
  - Asserted the firm's commitment to protect its workers from unlawful harassment and other forms of prohibited discrimination
  - 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

- 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

DISCRIMINATION/HARASSMENT

- Integrated employer liability
  - Exists when a client company and a staffing firm are so closely integrated that they are deemed a single employer for purposes of liability

DISCRIMINATION/HARASSMENT

- Courts look to the following factors to determine whether two entities are a single integrated employer:
  - Interrelation of operations, such as common offices, common record keeping, shared bank accounts and equipment
  - Common management, common directors and boards
  - Centralized control of labor relations and personnel
  - Common ownership and financial control

FAMILY AND MEDICAL LEAVE ACT (FMLA)

- The primary factor in determining joint employment is whether the entity exercises "control over the work or working conditions of the employee"
- Joint employment exists where:
  - An employee performs work that simultaneously benefits two or more employers
  - An employee works for two or more employers at different times during the workweek
  - There is an arrangement between employers to share an employee's services or to interchange employees
  - One employer acts directly or indirectly in the interest of the other employer in relation to the employee
  - The employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with another employer
  - A temporary placement agency supplies employees to a second employer

FAMILY AND MEDICAL LEAVE ACT (FMLA)

- 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

FAMILY AND MEDICAL LEAVE ACT (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

FAMILY AND MEDICAL LEAVE ACT (FMLA)

- 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
- The secondary employer is also prohibited from:
  - Interfering with an employee's attempt to exercise rights under the Act, or
  - Discharging or discriminating against an employee for opposing a practice that the Act prohibits

FAMILY AND MEDICAL LEAVE ACT (FMLA)

- 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

LABOR LAW ISSUES

- *Browning Ferris* 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

LABOR LAW ISSUES

- New standard uses a two-part test
  - Is there a common-law employment relationship between the employer and the employees in question
  - 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

LABOR LAW ISSUES

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

LABOR LAW ISSUES

- Both the staffing company and client company are liable for unfair labor practices when:
  - They are "joint employers"
  - The non-acting employer knew or should have known of the unfair labor practice
  - The non-acting employer acquiesced in the unfair labor practice by failing to protest it or exercising a contractual right it had to resist it

LABOR LAW ISSUES

- Independent contractors are not employees under the National Labor Relations Act
- There is no duty to bargain unless both employers agree to be part of a multiemployer unit
- Confidentiality provisions in temporary employment agreements that prohibit employees from discussing their compensation violate Section 7 rights to engage in concerted activity

QUESTIONS?

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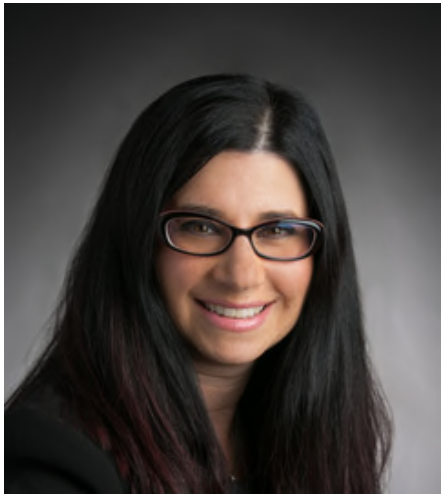

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THANK YOU

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