Identifying Joint Employer and Independent Contractor Issues

Presented by: GORDON&REES SCULLY MANSUKHANI

Joint Employment

What is Joint Employment?

- When two or more businesses exercise some control over the work or working conditions of the employee
- Joint employment is typically found to exist when a business utilizes employees from a temporary staffing agency (i.e., temporary or contract employees)
- 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.

Liability for Joint Employers

If joint employment exists:

- Both companies are responsible for wage and hour compliance
- 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"
- 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:
  - Initiated 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 Employment

- Broad 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

- 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

Best Practices

- Ensure that the staffing agency meets your needs
- Obtain indemnities and indemnification clauses in staffing agreements
- Make certain that workers are properly classified in staffing agreements
- Include a clause in the contract in staffing agreements
- Include a provision in the contract that the staffing company will terminate employees the client company is not satisfied with, for any or no reason
- Enter discussions between contingent and full-time employees by providing essential benefits/access and to attend meetings
- Client companies should not keep personnel records on contingent employees (unless required)
- Assign members of contingent employees work for indefinite periods of time, requires the staffing agency to provide an on-site permanent supervisor 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

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Best Practices

- 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**
- 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

FLSA Definitions

- The FLSA definition of employ, which includes "to suffer or permit to work," was specifically designed to broadly cover as many workers as possible.
- In order for the FLSA's minimum wage and overtime pay provisions to apply, an employment relationship must exist between the "employer" and the worker (the worker must be an "employee").
- Most workers are employees under the FLSA.
- The MSPA and the FMLA incorporate the FLSA definition of "employ."
- FLSA employment relationship concepts also apply to questions about whether a worker is an employee or independent contractor under the MSPA and the FMLA.

Misclassification

- A common problem arises where employers misclassify workers who are employees under the law as independent contractors.
- Studies suggest that 10 to 30 percent of employers may misclassify their employees as independent contractors.
- Workers misclassified as independent contractors are wrongfully denied access to important benefits and protections, such as:
  - Minimum wage and overtime pay
  - Workers' compensation
  - Family and medical leave
- Misclassified employees may still be eligible for unemployment insurance, but misclassification complicates their ability to collect these benefits.

Employee or Independent Contractor?

- There is no single test for determining whether a worker is an employee (for most workers) or an independent contractor under the FLSA.
- A worker is an employee if he or she is economically dependent on the employer, whereas a worker is an independent contractor if he or she is in business for himself or herself.
- The economic reality of the worker's relationship with the employer determines whether the worker is economically dependent on the employer (and therefore, an employee) or is in business for himself or herself (and therefore, an independent contractor).
- Courts generally apply a number of "economic realities" factors as guides when making the determination, but the factors applied can vary and no one set of factors is exclusive.

Overarching Considerations

- No single "economic realities" factor determines whether a worker is an employee or an independent contractor.
- The six factors discussed in this presentation are not exclusive.
- Courts may consider additional factors that shed light on whether a worker is an employee or an independent contractor.
- The factors should not be applied as a checklist or scorecard.
- What matters is whether the totality of the circumstances indicates the worker is an employee or independent contractor.

"Economic Realities" Factors

We generally consider the following factors when determining if a worker is an employee or independent contractor:

- Is the work an integral part of the employer's business?
- Does the worker's managerial skill affect his or her opportunity for profit and loss?
- Relative investments of the worker and the employer
- The worker's skill and initiative
- The permanency of the worker's relationship with the employer
- Employer control of employment relationship

Work Integral to the Business

- Work is integral to the employer's business if it is a part of the production process or is a service that the employer is in business to provide.
- If the work performed is integral to the employer's business, the worker is more likely economically dependent on the employer.

Control

- An independent contractor typically works relatively free from control by an employer (or anyone else, including the employer's clients).
- This factor includes who controls:
  - Hiring and firing,
  - The amount of pay,
  - The hours of work, and
  - How the work is performed.

Control

- The employer's lack of control does not automatically indicate the worker is an independent contractor.
- An employer can still exercise control over the worker *even if* the worker teleworks or works offsite.
- To be considered an independent business, the worker must also exercise control over *meaningful aspects* of the work.

Worker Classification Best Practices

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

Worker Classification Best Practices

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

Worker Classification Best Practices

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

Worker Classification Best Practices

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

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