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Know the risks when hiring third-party workers

by Michael R. Marra, Esq.

U. S. businesses currently engage approximately 2.7 million temporary and staffing agency workers—and that does not include the many workers engaged through other subcontracted service providers.

For some time, employers had been bracing for the National Labor Relations Board's recent decision regarding its new, broader standard for "joint employer" status. Because the board's decision appears to be about as far off the mark as business groups and management-side attorneys had feared, it's a good time to remind employers of just a few of the consequences of the joint employer doctrine to consider when engaging third-party contractors.

Joint employer FLSA liability

When an employer is found to be the joint employer of a worker (together with that worker's staffing agency or traditional employer), the retailer will become liable for wages and overtime under the Fair Labor Standards Act (FLSA), together with liquidated damages and the worker's attorneys' fees (in the event of wage- and-hour litigation).

The FLSA defines "employer" broadly, and the various federal circuits have looked to a number of factors to determine whether the "economic realities" of a party's relationship with a worker is indicative of joint employment. Most courts have considered at least some version of the following four factors in what is always a fact-intensive determination:

- Whether the alleged joint employer retained hiring and firing authority over the subject worker
- Whether the employer supervised the worker, controlled work schedules and controlled other terms and conditions of employment
- Whether the employer set rates of pay and the manner of payment
- Whether the employer maintained employment records, including records of work hours.

This four-factor "formal control" analysis was originally set forth more than 30 years ago.

However, some courts have concluded that an entity may still be deemed a joint employer even where formal control does not exist, as long as the entity exerts "functional control" over the worker. Functional control factors may include:

- Whether the worker used the alleged joint employer's premises and equipment
- Whether the worker performed a function integral to the alleged joint employer's business
- Whether the relationship between the alleged joint employer and the agency/subcontractor could pass to another entity without material changes to the worker's work
- The degree of supervision of the worker exhibited by the alleged joint employer
- Whether the alleged joint employer screened workers for qualifications
- Whether the worker performed services predominantly or exclusively for the alleged joint employer.

Plaintiffs' lawyers will inevitably seek to ride the wave of the NLRB recent decision, which makes it critical for employers to identify and resolve potential areas of weakness in engagement of third-party services.

Joint employment and Title VII

Courts have typically permitted plaintiffs alleging joint employer liability to bring claims under Title VII of the Civil Rights Act under one of three tests. First is the control test, which is essentially the same framework used to analyze joint employment under the FLSA. The second is an economic realities test, which analyzes the degree to which the worker depends upon the alleged joint employer for work and pay.

The third is a "hybrid" test, which bridges the other two tests in making the fact-specific inquiry called for under Title VII. This hybrid test was explicitly set out earlier this year in a 4th Circuit Court of Appeals decision that held that nine factors should be considered to capture "the reality of modern employment" in analyzing whether the recipient of a worker's services is a joint employer. Factors include:

- The authority to hire and fire
- Day-to-day supervision, including discipline
- The furnishing of tools, equipment, and workplace
- Possession of and responsibility for employee records, including payroll, insurance, and taxes
- Duration of service by the worker
- The provision of formal or informal training
- The similarity of the prescribed duties to those performed by the entity's regular employees
- Whether the worker performs services exclusively for the entity
- The intent of the worker and the entity regarding the nature of the relationship.

While the court did not consider any of those factors to be dispositive, it did instruct the lower courts that the first three factors were the most important and most useful in determining ultimate control, practical control, and similarity to other employees.

Although the Title VII context for joint employer liability does not present the same scope of potential liability as the FLSA, it is nonetheless important for employers to understand their potential responsibility for discrimination claims brought by contracted workers.

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