PRESENTATION

Navigating Joint Employer

As if liability for your own employees was not enough….

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BAKER DONELSON EXPAND YOUR EXPECTATIONS®

Top 4 Developing Areas

The Fair Labor Standards Act (FLSA) is the federal law that governs wage and hour. The FLSA has three basic requirements:

1. NLRB's New Joint Employer Standard;
2. Franchisor/Franchisee Relationship
3. DOL Independent Contractor Memo
4. Outsourced FMLA Administration

NLRB'S NEW JOINT EMPLOYER STANDARD

- Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015)
- The test for joint employment under NLRB law has long been whether the alleged joint employers "share or codetermine those matters governing the essential terms and conditions of employment."
- Prior to BFI, in order to be a joint employer, you had to exercise "direct and immediate control" over the employee.

NLRB'S NEW JOINT EMPLOYER STANDARD

- BFI's new standard says that "direct and immediate control" is no longer required to establish a joint employer relationship.
- Under the new BFI test, the NLRB examines whether the alleged joint employer exercised ***indirect*** control through an intermediary or contractually reserved the right to do so.
- The NLRB found joint employer status based on factors such as BFI determining number of temp employees on a daily basis, setting broad hiring criteria for temp employees, setting safety standards, setting productivity standards, and setting a maximum pay rate for temp employees.

Franchisor/Franchisee

- In December 2014, the NLRB issued complaints against McDonald's USA relating to alleged unfair labor practices of its franchisees across the country.
- The cases were consolidated and tried in the Spring of 2015. The Administrative Law Judge has not ruled yet.
- In the meantime, the BFI decision was released, and most commentators believe that the NLRB will find McDonald's to be a joint employer.

DOL Independent Contractor Memorandum

- Administrator David Weil doubles down on DOL's ongoing efforts to combat independent contractor misclassification and provides "additional guidance" for deciding who is an employee
- After noting DOL's long standing six-part "economic realities" test, Administrator Weil defines the ultimate goal as "determin[ing] whether the worker is economically dependent on the employer (and thus its employee) or is really in the business for him or herself (and thus an independent contractor)." He concludes that applying this test, "most workers are employees under the FLSA."

DOL Independent Contractor Memorandum

Six Factor Test:

1. Is the work an integral part of the employer's business?
2. Does the worker's managerial skill affect the worker's opportunity for profit or loss?
3. How does the worker's relative investment compare to the employer's investment?
4. Does the work performed require special skill and initiative?
5. Is the relationship between the worker and the employer permanent or indefinite?
6. What is the nature and degree of the employer's control?

Outsourced FMLA Administration

- Pros
  - Frees up HR resources
  - Provides purported experts who know the technicalities of the FMLA
  - Isolates knowledge of medical conditions from the disciplinary process
- Cons
  - The employer will always be liable for the TPA's FMLA violation. 29 CFR 825.106(b)(2)
  - Employer is still liable for offering FMLA leave when it has notice that employee needs leave for qualifying reason.

Outsourced FMLA Administration

- Considerations
  - What is the TPA telling your employees?
  - Do your policies require dual notice to the TPA and the employee's supervisor of the absences?
  - What is the scope of the indemnification clause in the contract with your TPA?
  - Is your TPA referring employees whose leave expires back to you for an interactive process?