Employment Law Developments Affecting the Bottom Line of Supply Chain Employers

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The DOL’s New Aggressive Interpretation of Joint Employer Liability
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January 2016 DOL Administrator Interpretation Broadly Defining Joint Employment Increases Exposure to Joint Employment Liability for Prime Contractors

- Joint employment exists when an employee is employed by two (or more) employers such that the employers are responsible, both individually and jointly, for that employee under the law
- The Fair Labor Standards Act provides for joint employment
The DOL’s New Aggressive Interpretation of Joint Employer Liability

Two kinds:
- Horizontal Joint Employment
- Vertical Joint Employment
Get the Facts on Vertical Joint Employment

Joint employment exists when an employee is employed by two (or more) employers and the employers are responsible, both individually and jointly, for that employee under the law. For example, a worker placed by a staffing company to do housekeeping work at a hotel may be jointly employed by the staffing company and the hotel.

**THE HOTEL MAY BE A JOINT EMPLOYER OF THE EMPLOYEE IF SOME OF THE FOLLOWING ARE TRUE:**

- The Hotel Handles Payroll or Performs Other Employer Functions
- The Hotel Sets Hours & Schedule
- The Hotel is Involved in Hiring or Supervising the Employee
- The Employee Works on the Hotel's Premises
- The Employee Has an Ongoing or Permanent Relationship with the Hotel
- The Employee's Work is Integral to the Hotel’s Business
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Vertical employment exists when an employee of one employer (an “intermediary employer”) is also economically dependent on another employer (a “potential joint employer”)

- Look at the economic realities of the relationship between the subcontractor’s employees and the prime contractor to determine whether the employees are economically dependent on the prime contractor
- If so, the prime contractor may be a joint employer of the sub’s employees
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Factors to Determine Economic Realities

- Directing, Controlling, or Supervising the Work Performed
- Controlling Employment Conditions
- Permanency and Duration of Relationship
- Repetitive and Rote Nature of Work
- Integral to Business
- Work Performed on Premises
- Performing Administrative Functions Commonly Performed by Employers
Example of joint employment:

A laborer is employed by ABC Drywall Company, which is an independent subcontractor on a construction project. ABC Drywall was engaged by the General Contractor to provide drywall labor for the project. ABC Drywall hired and pays the laborer. The General Contractor provides all of the training for the project. The General Contractor also provides the necessary equipment and materials, provides workers’ compensation insurance, and is responsible for the health and safety of the laborer (and all of the workers on the project). The General Contractor reserves the right to remove the laborer from the project, controls the laborer’s schedule, and provides assignments on site, and both ABC Drywall and the General Contractor supervise the laborer. The laborer has been continuously working on the General Contractor’s construction projects, whether through ABC Drywall or another intermediary.
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Why Does This Matter?

- Each joint employer is responsible for ensuring all employees receive all employment-related rights under the FLSA
- This includes payment of at least the federal minimum wage for all hours worked and overtime pay at not less than one and one half the regular rate of pay for hours worked over 40 in a workweek (unless exempt)
- FMLA
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Strategies for Reducing Risk:

- Include specific representations and warranties in subcontracts attesting to the subcontractor’s compliance with FLSA and other applicable wage and hour laws, and the FMLA

- Require subcontractors to obtain similar reps and warranties from their subcontractors

- Include indemnification clause allowing recovery against the subcontractor in the event of a damages award against a joint employer
Proposed changes to the Fair Labor Standards Act regulations
Proposed changes to the Fair Labor Standards Act regulations will require dramatic changes to contractors’ workforce compensation practices

- New FLSA regulations top priority for Obama Administration to reduce income inequality
- Proposed regulation published July 6, 2015
- Well over 200,000 comments were submitted during the 60-day comment period.
Background: default requirement that all employees must be paid at least minimum wage and 1.5 times their regular rate for hours worked over 40 in a workweek (“non-exempt”)

- Employees can be non-exempt whether paid hourly, by salary, by job rate, etc.
- Non-exempt status entails heightened record-keeping requirements
- Wage determinations under the Service Contract Act cover only non-exempt employees
Proposed changes to the Fair Labor Standards Act regulations

Six specific exemptions:

- Executive
- Administrative
- Professional
- Outside Sales
- Computer Professionals
- Highly Compensated Employees

The new regulations affect only the executive, administrative, and professional ("EAP") and Highly Compensated Employee exemptions
Proposed changes to the Fair Labor Standards Act regulations

Three tests for EAP Exemptions

**Salary Basis Test**
Predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed

**Salary Level Test**
Minimum level of guaranteed weekly salary

**Duties Test**
Primary job duties must meet exemption requirements
Proposed changes to the Fair Labor Standards Act regulations

The new regulations specify changes only to the Salary Level Test for the EAP exemptions and the Highly Compensated Employee exemption, although the Notice of Proposed Rulemaking ("NPRM") also hints at changes to the Duties Test.
Proposed changes to the Fair Labor Standards Act regulations

The minimum salary for the EAP exemption currently is set at $455 per week, or $23,660 annually.

- This has been the level since 2004.
- The salary level has only changed seven times since the FLSA was enacted in 1938.
- $23,660 is below the federal poverty level for a family of four.
Proposed changes to the Fair Labor Standards Act regulations

Proposed rule would adopt a new approach.
- The minimum the salary level would be set at the 40th percentile of earnings for full-time salaried workers.
- For 2016, that would be approximately $50,440, more than double the current level.
- There would be automatic annual salary level updates based on a fixed percentile of wages or the Consumer Price Index for All Urban Consumers (“CPI-U”).
Proposed changes to the Fair Labor Standards Act regulations

The final rule may allow nondiscretionary bonuses paid at least monthly to count towards the salary requirement, with a cap at 10 percent of the salary level.
Proposed changes to the Fair Labor Standards Act regulations

Similar change for Highly Compensated Employees

- Current minimum salary $100,000 annually.
- Proposed new level: 90th percentile of earnings for full-time salaried employees, or $122,148 annually in 2016.
Proposed changes to the Fair Labor Standards Act regulations

One-size-fits-all proposal:

- No differences based on region, industry, employer size, or for-profit versus non-profit sector.
- National Retail Federation study shows that more than 50% of all workers in eight largely rural states would become eligible for overtime pay under the proposal.
Proposed changes to the Fair Labor Standards Act regulations

Many concerns have been voiced:

- Even some CEOs would become overtime-eligible
- Hard to budget when payroll costs will change on 60 days’ notice
- Unhappiness of employees converted from exempt to non-exempt
- Reduced flexibility and career growth for converted employees
- Increased burden on exempt co-workers
Proposed changes to the Fair Labor Standards Act regulations

Strategies:

- Identify affected cohort NOW and track their overtime hours
- Identify ways to pass on increased costs
- Contracts should allow for labor cost adjustments
- Reverse-engineer hourly rate, including overtime, to set comparable annual compensation
- Bring in extra part-time personnel to reduce overtime costs
Proposed changes to the Fair Labor Standards Act regulations

Hints of potential changes to the Duties Test:

- Adding 50% time standard to primary duties definition (Bad)
- Adding new illustrative examples of exemptions (Good)
Proposed changes to the Fair Labor Standards Act regulations

Caution: Also keep track of state and local wage and hour requirements
Executive Order 13673, the Fair Pay and Safe Workplaces Order
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Proposed Guidance was published in May 2015.

- The comment period has closed.
Executive Order 13673, the Fair Pay and Safe Workplaces Order

Applies to government contractors bidding on or holding supply, services, or construction contracts of $500,000 or more.

- Must disclose during the procurement process “any administrative merits determination, civil judgment, or arbitral award or decision” over the past three years, under 14 federal labor laws and their state equivalents.
- The contractor must also provide 6-month updates.
Executive Order 13673, the Fair Pay and Safe Workplaces Order

The 14 laws include the FLSA, the FMLA, Title VII, the ADA, the ADEA, the NLRA, OSHA, the Davis-Bacon Act, the SCA, and the laws enforced by the OFCCP.

- State law equivalents will also be included.
Executive Order 13673, the Fair Pay and Safe Workplaces Order

- “Administrative merits determinations” are not final judgments.
- The issuance of an EEOC determination of “reasonable cause” against an employer would have to be reported.
- So would a “Show Cause” notice by the OFCCP.
- So would other agency determinations that the contractor is still challenging or that are subject to further review.
Contracting officers, in consultation with a new position called a Labor Compliance Advisor ("LCA"), will evaluate the information to determine “if a contractor is a responsible source with a satisfactory record of integrity and business ethics” eligible for a contract award.

- Contractors may submit evidence of mitigating factors (e.g., attempts to remediate a violation, an otherwise clean record of compliance).
- Unless the LCA credits the mitigating factor, the adverse finding will place the contractor at a competitive disadvantage.
The three-year period runs from the date of the most recent decision.

- If a contractor appeals or litigates an adverse agency determination, the contractor may have to report on that matter for much longer than three years.
Contractors must flow down these reporting requirements to subcontractors.

- Subcontractors must make their reports to the contractor, not to the government.
- In deciding whether to contract with subcontractors, contractors are supposed to make a similar assessment as LCAs.
Executive Order 13673, the Fair Pay and Safe Workplaces Order

This could have a HUGE effect on contractors.

- Risk of litigation is much higher, because it affects business prospects.
- Plaintiffs and agencies have more leverage to push contractors to enter into settlement agreements or conciliation agreements.
The Executive Order also requires contractors to issue written notice every pay period to all employees, listing hours worked, pay, any additions made to or deductions from pay, and either overtime hours, (for non-exempt employees) or a statement that the employee is exempt under the FLSA.
Other Key Developments
Increased Risks of Classifying Workers as Independent Contractors
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January 2015 DOL Administrator Interpretation Adopts an Expansive Interpretation of “Employee”

- Based on Definition: “Suffer or permit to work”
- Identifies “Economic Dependence” as the most important factor
- Common law control test no longer determinative
Increased Risks of Classifying Workers as Independent Contractors

Economic Realities Test – 6 Factors

- 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 skills and initiative?
- Is the relationship between the worker and the employer permanent or indefinite?
- What is the nature and degree of the employer’s control?
Increased Risks of Classifying Workers as Independent Contractors

But Remember

- No single factor determinative
- Factors are indicators of the broader concept of economic dependence
- No change to tax implications of 11-factor IRS test focusing on control
- But IRS test can no longer serve as the standards by which to distinguish between employees and contractors
Increased Risks of Classifying Workers as Independent Contractors

Risks of Misclassification – Intentional Or Willful

- The full amount of income tax that should have been withheld (with an adjustment if the employee has paid or does pay part of the tax)
- The full amount of both the employer and employee shares for FICA
- Interest and penalties
- Criminal and civil penalties
Increased Risks of Classifying Workers as Independent Contractors

Risks of Misclassification – Unintentional

- Penalties can still be large
- The employee’s federal income tax withholding up to a cap of 1.5% of the employee’s wages, plus FICA back taxes (the full employer’s share plus 20% of the employee’s share), plus back unemployment taxes
- Percentage amounts are doubled if employer has not filed required information returns, such as Form 1099
Increased Risks of Classifying Workers as Independent Contractors

Risks of Misclassification – Liability to Worker

- Back overtime for a 2-year period (or 3 if willful)
- Value of denied employee benefits
- Liquidated damages
- Attorney’s fees
- Individual liability for managers or executives making compensation or classification decisions
Increased Risks of Classifying Workers as Independent Contractors

Strategies for Reducing Risk:

- Require centralized approval of any independent contractor agreement with an individual

- Develop checklist of information needed from independent contractors before approval:
  - Evidence of incorporation, if available
  - List of other customers/clients
  - Statement of revenues from other sources

- Avoid contract provisions that weigh in favor of independent contractor status

- Authorize work by independent contractors only by separate, written scopes of work: if you can’t define the specific work projects for which they are engaged, that’s a red flag of potential employee status.
Recent Affirmative Action Requirements for Protected Veterans and Individuals with Disabilities
Hiring benchmarks for protected veterans

- Currently 7 percent of workforce
- Updated annually (in April in 2015)
- Contractors may set their own benchmark based on detailed analysis, but no advantage in doing so.
Contractors must compare the number of veterans who apply for jobs and the number of veterans they hire.

- Invitations to self-identify as a protected veteran must go out both pre-offer and post-offer.
- Data measures the effectiveness of their outreach and recruitment efforts, not total workforce population.
- If benchmark is not reached, contractor must identify alternative outreach and recruitment methods.
- Data must be maintained for three years, to be used to spot trends.
Utilization goals for individuals with disabilities (“IWD”)

- 7 percent of workforce
- Goal must be applied to job groups
- Contractors with fewer than 100 employees may apply goal to whole workforce
Section 503 Affirmative Action

Contractors must compare the number of IWDs who apply for jobs and the number of IWDs they hire.

- Invitations to self-identify as an IWD required pre-offer, post-offer, and to current employees every 5 years.
- Contractors must use the OFCCP’s prescribed language and may NOT: alter the text or wording of the form; alter the order of the content on the form; or make changes that diminish the general accessibility of the form (e.g., reducing font size).
- Responses must be maintained in separate, confidential data file for three years.
Section 503 Affirmative Action

Must compare:

Applicants
The total number of applicants, and the number of applicants who are known individuals with disabilities

Hires
The total number of job openings, the number of jobs filled (by hiring, promotion, or transfer), the total number of hires, and the number of individuals with disabilities hired
When the percentage of IWDs is less than the utilization goal, the contractor must undertake assessment steps.

- Assess existing personnel processes, effectiveness of outreach and recruitment efforts, and other areas.
- Must develop and execute action-oriented programs to correct any identified problem areas.
- Data must be maintained for three years, to be used to spot trends.
Proposed Expansion of EEO-1 Reporting Requirements
Proposed regulation would require employers with EEO-1 reporting requirements also to report aggregate W-2 compensation on their EEO-1 reports, broken down by job category, race/ethnicity, sex, and “pay bands,” starting in 2017.

- 12 pay bands, ranging from "$19,239 and under" to "$208,000 and over."
- Comment period open until April 1, 2016. Comments may be submitted at http://www.regulations.gov/.
Up to Seven Days of Paid Sick Leave for Employees of Federal Contractors and Subcontractors on Covered Contracts on or after January 1, 2017
The proposed regulations implementing President Obama’s executive order requiring federal contractors to provide paid sick leave were published on February 25, 2016. Originally, the comment period was set to close on March 28, 2016, but the Department of Labor just extended the comment period through April 12, 2016. Comments may be submitted at http://www.regulations.gov.
Covered contracts include:

- Procurement contract for services or construction
- Contract or contract-like instrument for services covered by the Service Contract Act (SCA)
- A contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public
- AND - the wages of employees are governed by the Davis-Bacon Act, the SCA, or the FLSA
Covered employees include:

- Exempt and non-exempt employees
- All employees performing services in support of the covered contract or of any lower-tier subcontract supporting the prime contract
Paid Sick Leave on Covered Contracts

Accrual of Paid Sick Leave

- 1 hour of paid sick leave for every 30 hours worked
- Annual accrual may be capped at 56 hours
- Carry over of accrued paid sick leave
- If an employee rehired within 12 months after a job separation, reinstate accrued paid sick leave
- Not required to pay out accrued but unused paid sick leave upon termination of employment
Paid Sick Leave on Covered Contracts

Use of Paid Sick Leave

- Employees’ own physical or mental illness, injury, or condition;
- Obtaining diagnosis, care, or preventative care from a health care provider for themselves;
- Caring for a child, a parent, a spouse, a domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has a physical or mental illness, injury, or medical condition or who has a need for diagnosis, care, or preventative care; or
- Domestic violence, sexual assault, or stalking of the employee, a member of the employee’s family, or a person with whom the employee has a familial relationship
Paid Sick Leave on Covered Contracts

Notice requirements

- Employees may request the leave orally or in writing
- Must provide the expected duration of the leave
- When need is foreseeable, at least 7 calendar days in advance
- Otherwise, as soon as practicable
Paid Sick Leave on Covered Contracts

Health Care Provider Certifications

- Contractors may request only for absences of 3 or more consecutive workdays
- Employees must provide within 30 days from the first day of the leave
- For domestic violence, sexual assault, or stalking, contractors may require employees to provide documentation from an appropriate individual or organization
Interaction with Existing Policies and Other Laws

- Existing paid time off policies (if provided in addition to the fulfillment of the SCA or DBA obligations, if applicable) will satisfy these new requirements ONLY if certain requirements met

- PTO must be made available to all covered employees and the PTO must accrue and be used in a manner meeting or exceeding the Executive Order’s requirements

- Paid sick leave is in addition to contractor’s obligations under the SCA and DBA

- Contractors may not receive credit toward prevailing wage or fringe benefit obligations under those Acts for sick leave provided in accordance with the Executive Order

- Paid sick leave may run concurrently with unpaid FMLA leave under the same conditions as other paid time off
Presenters

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