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Fissured Employment – the Government Has Set Its Sights on You

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For centuries, businesses have used subcontracting arrangements, franchise agreements or otherwise contracted out the performance of some functions to third parties. The business reasons for such actions are obvious: it allows for employment of a greater number of workers; it avoids the tremendous costs incident to high turnover; and it allows for entrepreneurial subcontractors and franchisees to operate their own business and yield their own profit. But regulators are embarking on new territory designed to threaten the very manner in which you operate your business.

For years, courts have recognized "joint" employment for purposes of remediating workers' rights. The issue often arises in the workers' compensation context and when issues related to discrimination practices are in dispute. Those standards are usually relatively difficult, but not impossible, to meet. But over the last decade, the fight has expanded to the wage and hour context as plaintiffs' lawyers have attempted to hold non-employers liable for the misconduct of an employer through the joint employment theory.

Traditionally, the theory was structured around the concept of control. That is, even though you did not directly employ an individual, your relationship with a subcontractor or franchisee was such that you effectively controlled all meaningful aspects of the job: duties, hours, pay, equipment and so on. In egregious situations, courts were never hesitant to find that a putative employer was responsible for the conduct of another if that putative employer had benefitted from the relationship and effectively controlled it. But courts have been reluctant to expand that concept broadly to the world of "fissured" employment.

The theory of fissured employment appears to find its genesis in a book by David Weil entitled "*The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*." The book theorizes that working conditions for the populace have become poor as a consequence of large corporations shedding responsibility for maintaining a well-compensated workforce in favor of outsourcing the work to smaller companies that are fiercely competitive. Those smaller companies are not as safe, do not pay as much, and offer less in the way of benefits that the large corporation would offer. So, the large corporation gets the benefit of the work without the expense of paying for it.

The plaintiffs' bar has seized upon this new book as though it plows new ground, even though the fundamental concepts are not different from decades of joint employer case law. They have cited it recently in lawsuits across the country, all in an attempt to add credibility to theories that have otherwise not garnered much support in the courts. And someone is listening: our government.

Following his stint as an author, Mr. Weil embarked upon a new career and is now the current Administrator of the Department of Labor's Wage and Hour Division. And since his arrival, the Wage and Hour Division is paying special attention to those industries in which it feels that a "fissured" workforce is present. (This is in addition to the extra attention that is being paid by the National Labor Relations Board to this type of issue).

A recent budget increase request from the Wage and Hour Division characterizes it as a law enforcement organization – one that hopes to achieve compliance through over $49 million of additional enforcement efforts. Primary among them is a new initiative entitled "Addressing the Fissured Workplace." This initiative

intends to direct efforts to industries "and business models" that "obscure or eliminate entirely, the link between the worker and the business." In other words, if you have a business model that utilizes another company to perform or deliver goods or services, you fall within the scope of this new initiative (think construction, franchising, hospitality and medical).

This Administration is no stranger to legal challenges, and this type of focus seems ripe for one. But unlike some other battles, there is unlikely to be one broad fight about the DOL's actions in this regard. Instead, the battles will be fought one by one, as the DOL singles out employers and takes the position that they have violated the law by doing what they have always done and used legitimate subcontractors and franchise arrangements.

It is not as though there is nothing to be done on this issue. To the contrary, employers should ensure that their current business relationships with subcontractors or franchisees is meeting the latest standards set by the courts, that they draw the appropriate boundaries between "control" and brand protection, and that they allow for some mechanisms to ensure that employees are being compensated for the work they perform. These initial steps can prevent the DOL from identifying your business as a specific problem, and that alone would keep the target off of your back. For now.