‘CREATIVE’ STAFFING ALTERNATIVES HAVE RISKS FOR UNWARY EMPLOYERS

Steve Bond, Brouse McDowell

Trying to minimize their exposure to wage, benefit, and governmental obligations, many employers are implementing alternative employment arrangements. But, there is a potential 'hidden' liability in federal wage and hour law lurking for the unwary employer.

What is an example of the kind of arrangement you have in mind?

One obvious alternative is to engage workers through an outside staffing agency. An entrepreneur may reason: I can make a contract with an agency; they will take all the responsibility for recruiting, hiring, assigning, and paying the staff - all I need to do is tell them how many and when to arrive. Then I can tell the workers what to do.

That may sound good, but the Department of Labor has made its position clear recently by announcing that, if a staffing agency fails to follow minimum wage and overtime rules in paying that worker, the entrepreneur who engages the staffing could have equal responsibility for the unpaid wages and penalties.

But, how can one corporation be held responsible for another one's failure to pay wages?

Federal law recognizes the concept of two businesses acting as the 'joint employer' of an individual worker for certain circumstances. In the staffing agency model, the Department of Labor may argue that two businesses are engaged in a 'vertical joint employer' relationship. For example, in one case last year, a food manufacturer was forced to pay over $2 million for minimum wage and overtime pay to workers who had been hired and provided through a staffing agency that failed to follow the law.[1] When the ultimate employment of those workers was economically dependent upon the underlying relationship of the staffing agency with the manufacturer, the government was able to argue that, as an economic reality, the two companies are 'joint' employers of that worker ñ and, so, both may be held liable for the legally required wages. This is part of an enforcement initiative of the Wage and Hour Division, which was highlighted by its Administrator in an 'Interpretation' of the law issued in January of this year,[2] based on the premise that companies which engage staffing agencies have an obligation to ensure that the staffing company follows federal law.

(continued on following page)

Amy Price, Licensed Realtor and Attorney
(440)308-9151 amy.price@era.com
Specializing in the sale of court involved properties
Let me deal with the real estate!
ERA REAL ESTATE

Does this Interpretation apply to all staffing agency arrangements?

Not necessarily. There is no black-and-white checklist that employers can rely on to determine when they have crossed a line. But, there are criteria which the government uses:

- Does the manufacturer directly control or supervise the work of the agency-provided employee?
- Does the manufacturer control the details of employment conditions (e.g., rate of pay, hours of work, right to hire and fire, etc.)?
- Is the term of employment with the staffing agency contingent on the continuation of the contract with the manufacturer?
- Is the nature of the work routine and repetitive?
- Is the work being done by the worker integral to the operation of the manufacturer?
- Is the work performed on the manufacturer's premises?
- Is the manufacturer involved in day-to-day administrative functions with the worker (e.g., handling payroll, training, providing equipment or tools)?

Considering these questions will help the business owner considering use of a staffing agency to assess whether that arrangement is likely to be challenged by the government in the event that the staffing agency fails to follow the law.

By the way, this same issue can arise where a business engages a subcontractor - although the two companies may be entirely unrelated, nevertheless, when the company which engages the subcontractor is found to exercise similar kinds of control over the workers on the job, at some point, that company can be held as a joint employer of the worker, along with the subcontractor. In other words, the company has potential exposure for minimum wage and overtime violations of that subcontractor when it is integrally involved in the employment of the workers. For example, in a suit last year, DirectTV agreed to pay $395,000 for minimum wage and overtime due from its subcontractor to the installers, based on the intricate involvement of DirectTV in the employment practices of the subcontractor, including the fact that the installers worked exclusively on DirectTV assignments, drove DirectTV vans and wore Direct TV uniforms.[3]

(continued on following page)

Introducing Spencer Ryan

Your Lorain County Bar Association's 'Authorized Agent'

Spencer Ryan is your Lorain County Bar Association's 'Authorized Agent' for Lawyer's Malpractice Insurance. Before entering the insurance field, Spencer was licensed and practiced law in Lorain County, making him uniquely qualified to organize the complex coverage plans necessary in professional fields. For expert guidance in creating your next malpractice insurance plan, call Spencer Ryan at Ryan-St. Marie Insurance today. 440-322-3200 • spencerryan@windstream.net

Visit us online at ryanstmarieinsurance.com • Visit us on Facebook

Expect More!

How can a company minimize this exposure?

The short answer would be to minimize involvement in the day-to-day activities of the worker supplied by the staffing agency. However, to the extent that is not feasible, then the company should be prepared to more closely monitor the actions of the staffing agency. For one thing, the contract with that agency should spell out its obligations to follow the law in this area. For another, the company can insist that it be allowed to monitor the payroll records of the agency from time to time to help assure that compliance.

Are there other arrangements which the Labor Department is focused on?

Yes, in addition to 'vertical' joint employment, there can also be 'horizontal' joint employment.

How's that different?

Suppose you have multiple locations being operated under separate corporations, but all under the same umbrella of ownership and management. Typical examples could be multiple restaurant locations under the same trade name, or multiple health care facilities operating within the same health care 'system.' If employees are treated as if in a 'pool,' whereby they can be assigned to one location or another based on some centralized management decision, then the separate companies involved could be deemed a 'joint employers,' of the individual. The direct effect could be that, though an employee works for, say, 25 hours at one facility, and 25 hours at the next, the total hours (50) would exceed the 40 hour floor for mandatory overtime pay - and both facilities may then, unwittingly, be liable for (unplanned/unbudgeted) overtime pay and potential penalties.

How does one know if he has this kind of joint relationship?

Again, there is no specific safe harbor for employers to comply with. The Department of Labor looks at the surrounding facts of the relationship, and asks questions like this to make its evaluation:

- Do the two companies have a common owner?
- Do the two companies have any overlapping officers, directors, executives, or managers?
- Do the two companies share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs)?
- Are the two companies' operations inter-mingled (for example, is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless of which employer they work for)?
- Does one company supervise the work of the other?
- Do the two companies employers share supervisory authority for the employee;
- Do the two companies treat the employees as a pool of employees available to both of them?
- Do the two companies share clients or customers?
- Are there any agreements between two companies?

If the employees were paid by each employer for their hours worked at each company, wouldn't the mistake be considered minimal?

Not really. For example, in one case last year, involving a small restaurant group that shared employees, the companies were required to pay the employees a total of over $52,000 for the extra overtime pay, and then additional 'damages' which doubled the payout to employees.[4] That is a substantial amount, given that each employer thought it had paid the employees in full at their straight time rates.

Endnotes

[1]J&J Snack Foods pays more than $2.1M in back wages, damages to 677 temporary workers in New Jersey, Pennsylvania'

[2]Administrator's Interpretation No. 2016-1, January 20, 2016, Issued by Administrator David Weil.

[3]'U.S. Labor Department obtains joint employment judgment ordering DirecTV to pay $395K in back wages and damages to 147 cable installers in Washington'

[4]'Phoenix-area restaurants to pay more than $105K in overtime back wages and damages to 19 employees working at three locations'