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INFORMATION MEMO
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The Employment Expansion Trifecta: The Wage and Hour Division, The National Labor Relations Board, and . . . OSHA?

Perhaps it is the end of racing season in Saratoga, but the federal employment agencies are certainly looking to hit the trifecta against independent contractors, franchisors, parent companies, and similar entities under the guise of expanding the definitions of employer and employment.

First, a little background: on April 28, 2014, the U.S. Senate confirmed David Weil as the new head of the U.S. Department of Labor's Wage and Hour Division. Before he was confirmed, Weil had published a book entitled The Fissured Workplace, a dense lament on the perceived evils of independent contracting and franchising, and companies that Weil claims attempt to "have it both ways" by not bearing responsibility for the workers from whom they ultimately benefit by virtue of the work performed. It was thus not unexpected that Weil would seek to remedy those perceived evils during his tenure; however, the extent to which this philosophy has reached other agencies is surprising.

Fast-forward to July 2015, during which Administrator Weil issued an Interpretation turning the classic test for independent contractor status on its head. The central tenet used to be control — does the company set the worker's hours, have the power to discipline the worker, supervise and direct the worker, etc., or instead does the company simply give the worker the contours of the job, and pay contingent on the acceptability of the work? The new Administrator's Interpretation, however, focuses on the "economic realities" of the work arrangement, and whether the worker is "economically dependent" on the company. Most workers have some dependence on the source of the income, and therefore unless a worker has multiple sources of income to demonstrate that he or she is truly in business for himself or herself, many people who currently consider themselves to be independent contractors are now employees in the eyes of the Wage and Hour Division. As Weil puts it in his interpretation: "Thus, applying the economic realities test in view of the expansive definition of 'employ' under the Act, most workers are employees under the FLSA."

But the Wage and Hour Division is not the only agency to get into the act. On August 27, the National Labor Relations Board issued a controversial decision in the *Browning-Ferris* case, basically holding that a staffing agency, franchisor, or contractor that reserves the right to make decisions affecting a worker's employment, even if the entity does not actually exercise that right, will likely be considered a joint employer. In short, the NLRB is also seeking to follow Weil's lead and fuse "the fissured workplace" to hold contractors and other types of entities responsible for possible employment violations under the guise of joint employment.

Not to be outdone, OSHA is going for the trifecta. Late last month, the International Franchise Association disclosed that it is receiving reports from its members that OSHA investigators are seeking information and documents during inspections to tie franchisors into those inspections in order to cite them as employers along with franchisees. The IFA is concerned that OSHA is (at the behest of unions such as SEIU) looking to simply treat franchisors as employers regardless of the details of a franchisor-franchisee relationship. Indeed, the IFA obtained a copy of an internal OSHA memo that shows that OSHA is looking to follow the WHD and NLRB's lead. The memo states, in part:

> *"Issue Presented for OSHA:*
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> *Whether for purposes of the OSH Act, a joint employment relationship can be found between the franchisor (corporate entity) and the franchisee so that both entities are liable as employers under the OSH Act.*
>
> *Ultimate determination will be reached based on factual information about the relationship between the franchisor and franchisee over the terms and conditions of employment. While the franchisor and the franchisee may appear to be separate and independent employers, a joint employer standard may apply where the corporate entity exercises direct or indirect control over working conditions, has the unexercised potential to control working conditions or based on the economic realities. As a general matter, two entities will be determined to be joint employers when they share or codetermine those matters governing the essential terms and conditions of employment and the putative joint employer meaningfully affects the matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."*

The IFA is seeking more information from OSHA via the Freedom of Information Act, and its full statement can be found here.

In short, any entity with franchisees, independent contractors, or other vendors should be well aware that any investigation or inspection by the federal agencies tasked with enforcement of labor and employment laws — the National Labor Relations Board, the U.S. Department of Labor's Wage and Hour Division, and now, OSHA — may seek to expand the investigation or inspection well beyond just the franchisee or contractor inspected, to any franchisor, parent company, or beneficiary of a contract for services.

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