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THE WORKFORCE OF THE FUTURE: MINIMIZING LEGAL RISK

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The traditional belief that "a job" consists of full-time, long-term employment is disappearing. Alternatives to such employment are sometimes referred to as the "shadow workforce." Typically this means individuals engaged in forms of employment that differ from full-time, long-term employment. That is, they are engaged in unconventional, non-standard work. See "The End of the Job," The Downsizing of America and "Jobs in an Age of Insecurity." (Bridges 1995; Cahill 1996; Church 1993).

Experts find it difficult to compute the size of the shadow workforce. Indeed, it is often hard to even agree upon the definition of just who is a member of the shadow workforce. Sometimes referred to as "contingent employees," the United States Bureau of Labor Statistics began collecting data on the shadow workforce phenomenon in 1995. The BLS defines "contingent" employment as work that does not involve explicit or implicit contracts for long-term employment. The BLS actually uses three alternative measures of the contingent workforce. Regardless of the measure used, it is clear that the contingent workforce is growing. It is equally clear that in the future the shadow workforce will become a larger portion of the American workforce.

There are a number of organizational reasons cited for relying upon the contingent workforce, including cost reductions, flexibility, avoiding legally imposed restrictions and consequences and the availability of a larger talent pool. Regardless of the benefits, there are very real and growing legal risks associated with relying upon the shadow workforce.

THE SHADOW WORKFORCE

The non-traditional or contingent workforce consists of a broad array of potential arrangements. Franchisers, sub-contractors, temporary employees, joint employees, leased employees, trainees, unpaid interns and volunteers are just a few of the descriptions of members of the shadow workforce.

LEGAL ISSUES SURROUNDING THE USE OF THE SHADOW WORKFORCE

This outline will discuss the legal risks associated with using members of the so-called shadow workforce. The risks discussed will include a discussion of misclassification of employees for purposes of the Fair Labor Standards Act and the

Internal Revenue Code, the unintentional "joint employment" relationship that might arise from what is characterized as a franchise or contractor relationship, the traditional risks of "joint employment" under new tests used by the National Labor Relations Board and the ongoing risks associated with unpaid interns, trainees and volunteers and the emerging white collar criminal risk associated with using third-world contractors.

AVOIDING EXPOSURE

Finally, this outline will discuss best practices for avoiding liability under the National Labor Relations Act, the Internal Revenue Code, wage and hour laws and other laws.

JOINT EMPLOYMENT AND THE NATIONAL LABOR RELATIONS ACT

A. Joint Employment and the NLRA. Last August, the National Labor Relations Board issued its long awaited decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (BFI), redefining its joint employment standard under the National Labor Relations Act. The split decision of the Board has garnered extensive attention from the media and from the legal sector as well as labor advocacy groups.

B. Traditional Joint Employer Standards under the NLRA. Beginning in the 1980s, the National Labor Relations Board imposed a very precise joint-employer standard. See *TLI Inc.* 271 NLRB 798 (1984). The standard acted as a near presumption that there would be no joint employment relationship. It was not enough that one employer might have a contractual right to control the workplace. Under the old standard, there had to be evidence of control that was "direct and immediate" and that such control had to be exercised on a regular basis and could not be "limited and routine." See *AM Property Holding* 350 NLBR 998 (2007); *Airborne Express*, 338 NLRB 597 (2002).

   Under the new standard, the Board held that it could find that two or more statutory employers are "joint employers" of the same employees if they "share or co-determine those matters governing the essential terms and conditions of employment." See *BFI,* supra. The test was set forth as follows: (1) whether there is a common law employment relationship with the employees in question; and (2) whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. In the *BFI* case, BFI ran a recycling facility in California and used workers provided by a staffing agency. The Teamsters represented employees who were working directly for BFI. The Union petitioned to represent the staffing agency employees naming both the staffing agency and BFI as joint employers. BFI and the staffing agency were parties to a temporary labor services agreement that could be terminated by either party with thirty (30) days notice. The agreement was a cost plus labor agreement, common in the industry. BFI and the temporary agency both employed supervisors at the recycling facility. BFI established the schedule or working hours, including the number of employees per shift. Applying the new standard, the Board found that BFI was an employer under common law principles and that a joint employment relationship existed.

C. Impact of the *BFI decision*. When it comes to the pragmatic impact of the decision, the main areas of concern are union organizing, collective bargaining, picketing and striking, and unfair labor practice liability under the National Labor Relations Act. Section 8(b)(4) of the National Labor Relations Act prohibits certain kinds of conduct aimed at a "secondary" employer. A joint employer would not enjoy the benefits of this restriction. Likewise, if considered a joint employer, an entity could be liable for unfair labor practice charges and interfering with employee rights under the National Labor Relations Act.

POTENTIAL WAGE AND HOUR EXPOSURE ASSOCIATED WITH THE SHADOW WORKFORCE

A. The FLSA and "Employees." Many individuals might perform services for a business entity at any given time; however, not all of them are employees as defined by the Fair Labor Standard Act. With the workforce of the future, it will be increasingly important to distinguish between employees and non-employees because federal and state discrimination laws and wage and hour laws provide protection and benefits to employees but are not available to the shadow workforce. These rights and benefits involve the minimum wage, overtime compensation, unemployment benefits, anti-discrimination laws and workers' compensation laws.

B. Enforcement Efforts. The United States Department of Labor together with the Internal Revenue Service and many state regulatory agencies are targeting workers misclassified through audits, litigation and workforce outreach efforts. The Department of Labor takes the position that almost all workers are employees under the FLSA.

C. Definition of Employee. The Fair Labor Standards Act has an extremely broad definition of an employee. It defines employment as "to suffer or permit to work." 29 U.S.C. 203(d). In applying the law, the courts have adopted what is known as the "economic reality" test to determine if an individual is an employee or an independent contractor or some other category of service provider. The Courts held that employment status was to be determined by the totality of the circumstances surrounding the relationship. The Court called this the "economic reality" test. See *United States v. Silk*, 331 U.S. 704, 713 (1947).

D. Independent Contractor Tests: The Court developed a test for determining if an individual was an independent contractor as opposed to an employee. *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 326 (1992). To determine whether a worker is a bona fide member of the shadow workforce, the Courts have found the following factors relevant in determining whether the worker is an employee or an independent contractor:

- **Who has the right to control the work?** – The degree of control exercised by the alleged employer over the worker is extremely relevant.

- **Is the work an integral part of business operations?** – The analysis here focuses on whether the business could function without the work performed by the individual in question.

- **Did the worker make any investment in his business?** – The extent to which an individual has invested in his own equipment, supplies, facilities and training, is analyzed. If there is little or no investment, the Courts will lean towards categorizing an individual as an employee as opposed to an independent contractor.

- **Is there an opportunity for profit or loss?** – If the individual can secure a greater profit by being more efficient or hiring helpers, he is probably more likely to be considered an independent contractor. If he is working for a flat or hourly rate with little ability to increase profit, there is a greater likelihood that the individual will be considered an employee.

- **Does the work required specialized skill?** – If there are specialized licenses, certifications or permits required there is a greater likelihood that an individual will be considered an independent contractor.

- **How long has the relationship lasted?** – If the individual and the employer have a long term relationship, it is most likely to be considered an employment relationship.

- **What are the expectations of the parties?** – The courts also look to how the parties characterize their relationship, how they treated it for tax purposes, whether there is a written agreement and whether the relationship would traditionally be considered an employment or independent contractor relationship.

E. The Future of Misclassification. In what is sometimes called the "gig economy," the shadow workforce will be increasingly closely scrutinized in the future. There are a number of high profile mischaracterization cases being decided across the nation. In June, 2015, the California Labor Commission held that a former Uber driver was an employee and ordered Uber to reimburse her for the costs incurred while driving for the company. Services like Uber, Handey, Lyft rely on the so-called "gig economy" as part of the business model. This will become increasingly pervasive and will undoubtedly continue to draw the attention of regulators and the courts.

F. Joint Employment. The Department of Labor has issued guidance on treating more than one entity as an "employer" for purposes of the FLSA.

UNPAID INTERNSHIPS

A. Interns and Trainees. While the FLSA does not specifically refer to unpaid trainees or interns, the courts have held that individuals who work for their own advantage are not "employees" entitled to minimum wage and overtime pay. The Supreme Court held that the law was not intended to categorize all persons as employees, especially those who "might work for their own advantage." See *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). See also *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985).

B. The DOL Test. The Department of Labor developed a six part test to set forth the analysis of whether a service provider or member of the shadow workforce is an intern or trainee. All six factors must be met in order for the Department of Labor to consider the work training and not employment to be compensated:

- The training, though it might include actual operation, is similar to that which would be given in a vocational school.
- The training is primarily for the benefit of the trainee or student.
- The trainee or student do not displace regular employees – but rather work under close supervision.
- The employer that provides the training receives no immediate advantage from the activities of the trainees or students and on occasion, might actually have operations impeded by providing the training.
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
- The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

C. Judicial Tests. A number of courts have either refined or completely rejected the Department of Labor's six-part test. Some courts focus primarily on which party primarily benefits from the work. See *Solis v. Laurelbrook Sanitarium and School*, 642 F.3d 518 (6th Cir. 2011). Other courts have focused on who received the "immediate benefit" or immediate advantage from the relationship. See *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2nd Cir. 2015). While other courts reject the six-part test in favor of a three-part test that asks whether the trainee displaces regular employees, whether the trainee works solely for his or her own benefit and whether the company derives any benefit from the trainee's work. See *Wirtz v. Wardlaw*, 339 F.2d 784 (4th Cir. 1993).

VOLUNTEERS

Under the law, a volunteer is someone who works for another without any expectation of compensation and who does so solely for the personal purpose or pleasure of engaging in the activity. See *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985). The bottom line is volunteers and "for profit" businesses don't mix.

CRIMINAL LAW RISK

A. The Risks of Utilizing "Cheap Labor." It is very tempting to rely heavily upon suppliers and service providers who can distinguish themselves based upon cost. As the Nestle Corporation and others have recently learned, there are risks associated with cheap suppliers. Human trafficking has become a hot button issue and it is not simply a concern in the third-world. Prosecutors and non-governmental agencies are looking for ways to attack human trafficking by pursuing the otherwise law-abiding entities that are recklessly or knowingly taking advantage of the byproducts of human trafficking.

B. Human Trafficking – The Law. Iowa has adopted a law outlawing human trafficking. Iowa Code Chapter 710A makes it a Class D Felony for any entity to knowingly engage in human trafficking by "benefitting from the services of a victim." See Iowa Code Chapter 710A.2. The law goes on to define "human trafficking" as "participating in a venture" to recruit, harbor or obtain a person for "forced labor or service that results in involuntary servitude, peonage, debt bondage, or slavery."

C. Third-World and First-World Human Traffickers. Legitimate law abiding Iowa employers should be extremely cautious of who they partner with in the "shadow economy." Soon it will be insufficient to simply rely upon the defense that an employer "just didn't know."

PREVENTION

A. Independent Contractors.

- Put all agreements in writing.
- Set minimum qualifications.
- Monitor compliance on a regular basis.
- Require indemnification.

B. Interns and Trainees.

- Identify and document the benefits to trainees and interns associated with the program.
- Require that all interns and trainees be affiliated with a training program or a school of some sort.
- Control expectations concerning compensation and potential future employment.
- Keep interns and trainees separate from employees.

C. Volunteers.

- Educate your supervisors to make sure they are not undermining the distinction between volunteers and employees; volunteers should not be disciplined or fired and should not be scheduled to fill-in for employees.
- Keep volunteers separate.
- Make sure there is no expectation of pay or compensation of any sort.

D. Joint Employment.

- Investigate the reliability and reputation of any staffing agency that is used.
- Set and enforce time limits on assignments.
- Take steps to minimize liability by partnering with the correct vendors and insuring that you have a comprehensive agreement providing indemnification and insurance.

CONCLUSION

As the "shadow workforce" grows and traditional employment becomes less common, it will be important to make sure that you know precisely how labor and services are being provided so that you can minimize the legal risk associated with the new workforce.