WORKER CLASSIFICATION AND JOINT EMPLOYER LIABILITY ISSUES

I. WHEN ARE MY CONTRACTORS ACTUALLY EMPLOYEES?

A. Internal Revenue Service: Facts that provide evidence of the degree of control and independence fall into three categories: 1) **Behavioral**: Does the company control or have the right to control what the worker does and how the worker does his or her job? 2) **Financial**: Are the business aspects of the worker's job controlled by the payer (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)? and 3) **Type of Relationship**: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

1. Example 1: Jerry Jones has an agreement with Wilma White to supervise the remodeling of her house. She didn't advance funds to help him carry on the work. She makes direct payments to the suppliers for all necessary materials. She carries liability and workers' compensation insurance covering Jerry and others that he engaged to assist him. She pays them an hourly rate and exercises almost constant supervision over the work. Jerry isn't free to transfer his assistants to other jobs. He may not work on other jobs while working for Wilma. He assumes no responsibility to complete the work and will incur no contractual liability if he fails to do so. He and his assistants perform personal services for hourly wages. Jerry Jones and his assistants are employees of Wilma White.

2. Example 2: An auto sales agency furnishes space for Helen Bach to perform auto repair services. She provides her own

tools, equipment, and supplies. She seeks out business from insurance adjusters and other individuals and does all of the body and paint work that comes to the agency. She hires and discharges her own helpers, determines her own and her helpers' working hours, quotes prices for repair work, makes all necessary adjustments, assumes all losses from uncollectible accounts, and receives, as compensation for her services, a large percentage of the gross collections from the auto repair shop. Helen is an independent contractor and the helpers are her employees.

3. Consequences: If you classify an employee as an independent contractor and you have no reasonable basis for doing so, you're liable for employment taxes for that worker. In addition, misclassifying employees can result in additional liability under the Affordable Care Act ("ACA") and for failure to provide benefits which the employee is entitled to under the law.

B. Department of Labor/Fair Labor Standards Act: The Economic Realities Test. Factors to consider: 1) The extent to which the work performed is an integral part of the employer's business; 2) Whether the worker's managerial skills affect his or her opportunity for profit and loss; 3) The relative investments in facilities and equipment by the worker and the employer; 4) The worker's skill and initiative; 5) The permanency of the worker's relationship with the employer; and 6) The nature and degree of control by the employer.

1. Example 1: For a construction company that frames residential homes, carpenters are integral to the employer's business because the company is in business to frame homes, and carpentry is an integral part of providing that service. In contrast, the same construction company may contract with a

software developer to create software that, among other things, assists the company in tracking its bids, scheduling projects and crews, and tracking material orders. The software developer is performing work that is not integral to the construction company's business, which is indicative of an independent contractor.

2. Example 2: A highly skilled carpenter provides carpentry services for a construction firm; however, such skills are not exercised in an independent manner. For example, the carpenter does not make any independent judgments at the job site beyond the work that he is doing for that job; he does not determine the sequence of work, order additional materials, or think about bidding the next job, but rather is told what work to perform where. *In this scenario, the carpenter, although highly-skilled technically, is not demonstrating the skill and initiative of an independent contractor* (such as managerial and business skills). He is simply providing his skilled labor. In contrast, a highly skilled carpenter who provides a specialized service for a variety of area construction companies, for example, custom, handcrafted cabinets that are made-to-order, may be demonstrating the *skill and initiative of an independent contractor* if the carpenter markets his services, determines when to order materials and the quantity of materials to order, and determines which orders to fill.

II. WHEN ARE SOMEONE ELSE'S EMPLOYEES ACTUALLY MY EMPLOYEES?

A. The advent of Professional Employer Organizations ("PEOs") and employee leasing firms has complicated employment relationships. Now, you may be responsible not only for the employees and

contractors on your direct payroll, but also for those employees provided to you by a third party PEO or employee leasing firm.

B. Fair Labor Standards Act. The Department of Labor will use the Economic Realities Test, discussed above, to determine whether a worker is considered an employee for joint employment purposes. The most likely scenarios for joint employment are 1) Where the employee has two (or more) technically separate but related or associated employers, or 2) Where one employer provides labor to another employer and the workers are economically dependent on both employers.

1. Consequences: Joint employers are responsible, both individually and jointly, for compliance with the FLSA. Under the FLSA, each of the joint employers must ensure that the employee receives all employment-related rights under the FLSA (including 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 an exception or exemption applies). Furthermore, joint employers must combine all of the hours worked by the employee in a workweek to determine if the employee worked more than 40 hours and is due overtime pay.

2. Family Medical Leave Act. When an individual is employed by two employers in a joint employment relationship under the FMLA (and applies the same standards as the FLSA), in most cases one employer will be the primary employer while the other will be the secondary employer. Determining whether an employer is a primary or secondary employer depends upon the particular facts of the situation.

Factors to consider include: 1) who has authority to hire and fire, and to place or assign work to the employee; 2) who decides how, when, and the amount that the employee is paid; and 3) who provides the employee's leave or other employment benefits. In the case of a temporary placement or staffing agency, the agency is most commonly the primary employer.

Example: A large medical staffing company, Staffing Company ABC, places registered nurses in jobs at public and private hospitals operating in several U.S. states. For purposes of this example, Staffing Company ABC is an FMLA-covered employer, and the nurses meet all of the FMLA eligibility requirements. The nurses are placed at various hospitals throughout the year. Staffing Company ABC pays the nurses and provides them with retirement and insurance benefits. When the employees need leave, they call Staffing Company ABC to request time off. At the hospitals, the nurses are given their job assignments and are supervised by hospital staff. The nurses treat hospital patients, use hospital equipment, and are obliged to follow the same work protocols day to day as the hospital's regular workforce.

In this example, the nurses are jointly employed by Staffing Company ABC and the client hospitals. Staffing Company ABC is the primary employer and therefore is responsible for following all of the FMLA requirements of FMLA-covered employers, including giving FMLA notices, providing FMLA leave, and maintaining health benefits. Each hospital is the secondary employer of the Staffing Company ABC's employees that are placed at that hospital. Each hospital must keep and maintain payroll records for the employees placed at that hospital, as well as count the temporary registered nurses placed at each hospital as employees for their own FMLA coverage and employee eligibility tests. The

hospitals are prohibited from interfering with Staffing Company ABC's employees' FMLA rights, or from retaliating or discriminating against Staffing Company ABC's employees.

C. **National Labor Relations Act**. This area of the law has been in upheaval since the National Labor Relations Board issued its decision in *Browning-Ferris Industries*. In the decision, the Board found that two or more entities are joint employers of a single workforce if (1) they are both employers within the meaning of the common law; and (2) they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the Board will – among other factors -- consider whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so.

The decision in *Browning-Ferris Industries* continues to be subject to scrutiny from Congressional leaders and the franchising community. Some believe it will be subject to reversal once President Trump fills two vacancies on the Board shifting the Board to Republican control.

III. MINIMIZING THE RISKS OF EMPLOYEE MISCLASSIFICATION AND JOINT EMPLOYMENT RELATIONSHIPS

A. Step 1 – Evaluate whether your business needs to exercise significant control over a particular role. If so, consider employing the worker.

B. Step 2 – Evaluate the potential liabilities in the event of misclassification or a finding of joint employer status. Major risk factors include: 1) significant number of workers in a particular group; 2) contractors or third party workers are frequently working more than 40 hours each week; 3) a change in worker classification will require

additional legal compliance (e.g., 50 employees under the ACA); and 4) third party workers are subject to a collective bargaining agreement or attempting to unionize.

C. Step 3 – Review applicable insurance and obtain appropriate insurance if available.

D. Step 4 – Obtain contractual protections for your business. The types of provisions commonly negotiated include: 1) only do business with contractors and consultants who operate an LLC or other corporate entity; 2) limit the amount of control outlined in a contract to the amount necessary for your business; 3) obtain indemnification for employment related taxes or compliance costs (if the other party maintains sufficient insurance or assets to obtain recovery); 4) obtain representations and warranties regarding key compliance issues (e.g., ensuring another party is responsible for paying minimum wage and overtime); and 5) require notification and coordination of key events, such as a Department of Labor or Internal Revenue Service audit.