Look Out Below

Insights
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How Subs Can Cause Problems For General Contractors

The U.S. Labor Department (DOL) often sets its sights up the food chain, focusing enforcement efforts on general contractors (GCs) for the wage violations of their subcontractors. In recent years, federal district courts and the DOL have been putting pressure on GCs to insist on and monitor Fair Labor Standards Act (FLSA) compliance by others with whom they share a business relationship by terming them "joint employers."

A joint-employer analysis applies to several federal and state employment statutes – for example, Title VII of the Civil Rights Act and the National Labor Relations Act. And while joint-employer issues are prevalent in retail services, hospitality, food, and the manufacturing industries, in this article we'll focus mostly on wage-hour issues and the construction industry. Although these different laws and industries are not discussed in this article, the same principles apply. The main point here is to keep in mind that employment liability does not always end when work is contracted out.

The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." Up until fairly recently, the issue of a GC being considered the "employer" of a subcontractor's workforce for purposes of the FLSA has not been widely litigated. But in the last several years GCs and subcontractors have found themselves entangled in the legal debate over whether they share a joint employer relationship with respect to some or all of the employees performing work under a contract. And the DOL's focus on joint employer issues is expected to continue and, even increase, under the current administration.

Too Much Entanglement

There is no question that employee advocates are seeking every available opportunity to assert that different entities are, in reality, a joint employer. This move is supported by the DOL, which has focused particularly on multiparty business arrangements, such as GCs and subcontractors. Unfortunately, case law interpreting the FLSA has broadened the definition of "employer," which could create unanticipated liability and a trap for unwary GCs.

In a recent federal court case in Louisiana, four employees of a subcontractor on a construction project filed a lawsuit alleging minimum wage and overtime claims against both the subcontractor *and* general contractor, Patterson Structural Moving & Shoring LLC. In their complaint, the workers alleged that they understood that Patterson would pay their wages and that a Patterson employee

served as one of their supervisors. They also alleged that all defendants "continuously exercised the right to exert authority over the manner in which Plaintiffs performed and completed the work," including hours and rates of pay.

The court denied Patterson's motion to dismiss the complaint because the workers alleged facts regarding Patterson's exercise of control over their work, including the fact that one of their supervisors was a Patterson employee. In sum, the court held that the four employees of the subcontractor had sufficiently alleged control by the general contractor to avoid dismissal and could proceed with their minimum wage and overtime claims.

This case is a good reminder that GCs need to be aware of how much control they exercise over another company's employees, and the liability that such control may bring. Even if, in its own eyes, a GC does not directly employ workers, it could still be liable for wages if it supervises them or involves itself with their employment relationship. Generally speaking, when a court finds joint employment, this serves to create liability on a GC for the actions of a subcontractor's employees, based on the idea that it is the GC controlling the work done by the sub's employees.

Keep Your Distance

Although it's impossible to completely avoid the filing of lawsuits for FLSA violations, there are steps that you can take before and during a project to minimize the costs and risks associated with a potential joint employer situation. Prior to a project, GCs should insist on legally enforceable defense and indemnity provisions in their subcontracts – provisions that are sufficiently broad enough to include any claims asserted by subcontractors' (and even lower-tier subcontractors') employees for violations of the FLSA. Further, all subcontracts should specifically require compliance with the FLSA, mandate that similar requirements be imposed on lower-tier subs, and allow the GC to monitor whether all subs are, in fact, maintaining compliance.

While these contract provisions could allow GCs to shift the burden and cost of defense onto subcontractors, GCs should also take steps during a project to ensure that you don't create a joint-employer relationship in the first place. Clearly identify and define your role in relation to the individuals working on the project. Supervise and manage the contractual chain of command, but have as little direct communication with your subcontractors' nonmanagerial employees as possible, and don't exert (or even create the appearance of exerting) an excessive amount of control over the subcontractors' employees except perhaps in emergency situations.

This does not, however, eliminate a GCs obligations to prevent and abate hazardous conditions under the Occupational Safety and Health Act. OSHA may cite an employer for a hazardous condition if: 1) it created the safety hazard; 2) its employees are exposed to the hazard; 3) it is expected to correct the hazard; or 4) it controls subcontractor work. GCs are normally responsible for assuring that other contractors fulfill their obligations regarding employee safety which affect the entire site.

And while you can require that a subcontractor's employee be removed from a project, be careful

not to participate in the hiring or firing of other entities' employees. Don't set the hours during which your subcontractors' employees must work, nor should you coordinate the work schedules for these individuals. Never mandate or take part in the decision of how much a subcontractor pays its employees (other than requiring compliance with the FLSA and all other applicable laws and regulations), and definitely do not play a role in the preparation of payroll or the payment of wages to the subcontractors' employees.

If this is a potential issue for you, and you'd like help in reviewing your workplace policies and practices, training your managers, and helping minimize potential exposure, let us know.

For more information, contact the author at CCaulkins@fisherphillips.com or call 954.525.4800.

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Charles S. Caulkins
Partner
954.847.4700
Email

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