Avoiding The Blame Game: How To Limit Your Liability To Other Companies' Employees

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Numerous individuals who work in retail stores are actually employed by a company other than the retailer itself. These include vendor employees stocking product, sampling employees who offer customers tasty treats, inventory company employees, cleaning crews, security guards, and delivery personnel. Whether you could be liable as a retailer for the conduct of one of these individuals, or for their employment-related claims, can sometimes be hard to determine. You need to understand and educate your supervisors on how to interact with these individuals without creating liability for your business.

Joint Employment
A little over a year ago, we wrote about the concept of joint employment and its impact on the retail industry, particularly as it related to franchisors and franchisees. At the time of publication (August 2016), the National Labor Relations Board was taking a very expansive view of the concept of joint employment, meaning more companies could potentially be targets for union elections and collective bargaining by individuals with whom they had no direct employment relationship.

With the advent of the new administration, however, the Department of Labor withdrew the previous guidance and its overly expansive view of joint employment. Congress also began work on a proposed law that would scale back the new standards to a less expansive legal test. Then, in December 2017, the newly constituted National Labor Relations Board overruled a 2015 decision that had expanded the concept of joint employment, returning the analysis to a traditional and reasonable interpretation.

Specifically, the Board held that two different companies would be considered joint employers for purposes of the National Labor Relations Act (NLRA) only when each entity has exercised control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so directly and immediately (rather than indirectly) in a manner that is not limited and routine. This was a welcome change for businesses that had operated under these standards for thirty years.

These changes do not, however, signal an end to the joint employment doctrine. To the contrary, even after retreating to the more conservative joint employer standard, the NLRB concluded that the two employers involved in the specific case were joint employers under the narrower standard. Nor do these changes under the NLRA change the law in every arena. Retailers will continue to see

plaintiffs in employment lawsuits attempting to add them as defendants under a variety of laws. There is more than just one joint employment standard. Two examples of this doctrine are also found under the Fair Labor Standards Act (FLSA) and Title VII.

Joint Employment Under Wage And Hour Law

The FLSA – the nation's primary wage and hour law – expressly recognizes the concept of joint employment. The regulations interpreting the Act provide that "a single individual may stand in the relation of an employee to two or more employers at the same time under The Fair Labor Standards Act of 1938 . . . ." When determining whether two entities are joint employers under the FLSA, courts consider the economic realities of the relationship and apply a multi-factor test known as the "economic realities" test. For the most part, the various economic realities tests rely on the traditional common law test for employment with various economic considerations incorporated.

These economic considerations focus primarily on financial dependency. In other words, courts look to see whether the employee depends on the alleged employer for his economic livelihood based upon the parties' *actual* working relationship. Whether or not the parties intended to create a joint employment relationship is irrelevant for purposes of the FLSA.

If a joint employment relationship is found to exist under the FLSA, both employers are responsible for compliance with the Act. For example, if a temporary employment agency supplies an employee to your company but fails to pay proper overtime compensation, the temporary agency and your company could both be held liable for the amount of overtime pay owed to the employee.

Joint Employment Under Discrimination Law

There is no clearly defined standard for determining whether a joint employment relationship exists for the purposes of Title VII, which is the primary federal antidiscrimination law. Nevertheless, for the purpose of Title VII liability, courts treat independent entities as joint employers if they share or co-determine matters that affect the essential terms and conditions of employment. Generally, the key issues examined by courts are whether the alleged employer has the right to hire, supervise, and fire employees.

It is important to note that a joint employment relationship is not always necessary for a finding of joint liability under Title VII. Federal regulations written by the Equal Employment Opportunity Commission (EEOC) provide that an employer may also be responsible for the acts of nonemployees with respect to sexual harassment. The EEOC will consider the employer's degree of control and other legal responsibility with respect to the conduct of the nonemployee. Thus, regardless of whether an actual joint employment relationship exists, so long as you have some control over a contingent worker, you should take immediate corrective action if you become aware of harassing conduct.

Direct Causes Of Action

Furthermore, there are also employment-related claims that can be brought directly against you by individuals on your worksite who are performing employment duties for another employer. These claims generally arise either from direct interactions between your employees and the vendor's employees at the worksite, or from communications between you and a vendor concerning employee performance.

Tort claims under state law are the most common source of these liabilities. For example, let's say a worker loses their job because of negative information you reported to the direct employer. That worker might bring a defamation claim against you. This could easily arise from a situation where you accuse the individual of theft or some other criminal conduct (which could be considered defamation per se). In fact, even if you do not communicate negative information, but simply advise the direct employer that the individual is no longer welcome on your premises, the employee could bring a claim against you for intentional interference with a contract. While the premises for and viability of these claims differ among states, they do provide a means by which nonemployees can seek to punish the company that, in their minds, cost them their jobs.

Individuals may also have claims based on the conduct of one of your employees. For example, if your employee makes derogatory comments to the individual, a claim for intentional infliction of emotional distress could arise, and there is little doubt that the plaintiff's attorney will name your company as a defendant. While one of the most difficult torts to prove, such allegations can pull your company into costly litigation.

Independent Contractors

Another problem area exists when contracting directly with an individual for services pertaining to functions commonly performed in the business. If your company identifies such an individual as an independent contractor, and therefore makes no withholding from their pay, you may run afoul of tax laws, as well as workers' compensation, wage and hour, and unemployment insurance laws.

There is no single test for determining independent contractor status. Rather, the definition varies depending on the legal issue and the enforcement agency involved. For instance, you will find different definitions and tests for independent contractors in the IRS Code, the state unemployment insurance codes, federal and state wage hour laws, and state workers' compensation statutes.

In the retail world, the question of whether to designate an individual as an independent contractor appears most often in situations that call for part-time employees. For example, if your store hires a janitor to clean the store twice a week, one of your managers might assume the individual is an independent contractor because they are not working full time. However, the number of hours an individual works is generally less important than the type of work being performed. Here, cleaning is a task for which most retail employees have some responsibility to oversee, which might categorize that individual as an employee in the eyes of the law. It is much safer to avoid the question by simply classifying the janitor as a part-time employee who is paid on a W-2 hourly basis.

Our Advice

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No one can stop an individual from filing suit, no matter how frivolous. So your first step should be to obtain whatever protections are available before a suit is ever filed. If contracting with a company whose employees will be performing work on your premises, it is critical to negotiate for indemnification. While this won't prevent your company from getting sued, it will put the burden of defense and associated costs on the contracted company.

Next, never sign a contract with a labor agency without a thorough review of the agreement. Oftentimes these contracts are written to assign responsibility to the retailer, indemnifying the labor provider for any event occurring on the premises that gives rise to litigation. Additionally, employment practices liability insurance policies should be reviewed with an eye toward whether they cover employment-related claims made by individuals who are not your direct employees. It's important for your company to have this coverage.

When contracting for services, another important piece of the puzzle is to make sure the vendor supplies onsite supervision. While it isn't necessary for these supervisors to be onsite 100 percent of the time, they should be visiting the workplace to check on their employees' performance and to address any issues with a particular employee.

Once protections are in place, there are internal measures you should address. In-store management must understand that they are not to fill the role of supervisor to the other company's employees. You need to conduct training identifying the individuals who fall into this category and the necessary procedures to follow for handling problems associated with these individuals. There should also be a stop-and-check mandate before a manager asks to have another company's employee removed from your premises. While there will certainly be times when an individual's misconduct means such action is appropriate, supervisors are often unaware of any risk in removing another company's employee, and therefore act with little thought.

Conclusion

Hiring employees is not easy, and using another company to handle the administrative aspects of hiring can certainly be beneficial. But before traveling this road, you should take stock of where issues might arise and be prepared to address those risks.

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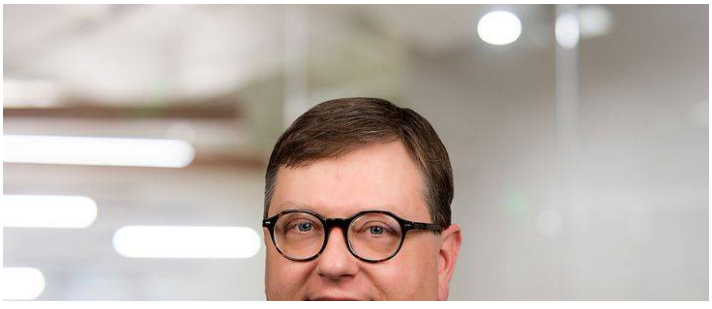

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