"Fissured Industry" Homebuilders Feel FLSA Heat

Insights
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News that some of the nation's preeminent homebuilders have received information demands from the U.S. Labor Department under the federal Fair Labor Standards Act has drawn a variety of unhappy reactions. But whatever one thinks about the wisdom, appropriateness, timing, or manner of USDOL's move, the fact is that the administration has had the construction industry in its FLSA sights for some time now.

As we reported in May 2010, even then USDOL had identified construction as being among what it calls "fissured" industries. Officials use this term to refer to business arrangements that in USDOL's view cloud the realities of the employment relationship so as to dilute the responsibility for FLSA compliance.

It is therefore likely that one important purpose of USDOL's homebuilder initiative is to develop a baseline of industry- and company-specific structural information that is relevant to FLSA compliance. For instance, investigators will no doubt be looking into whether ostensibly-separate corporations, partnerships, sole-proprietorships, and the like serving as different components in or layers of construction projects are truly independent businesses, or whether they are instead so integrated with one another as to be a single, overall enterprise.

USDOL will also be delving into the extent to which even truly distinct and separate entities nevertheless collaborate about or exercise control over the workers on construction projects. It will be doing this to judge whether each such entity is a "joint employer" of some or all of those workers so as to share individual and collective responsibility for complying with the FLSA where those workers are concerned. This can be the case if, for example, a worker's efforts simultaneously benefit those entities under circumstances in which:

◊ There is an arrangement between or among the entities to share or interchange the worker's services;

◊ One entity is acting directly or indirectly in the interests of one or more others in relation to the worker; or

◊ The entities "are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of

the fact that one employer controls, is controlled by, or is under common control with" one or more others.

See 29 C.F.R. Part 791. Courts tend to evaluate the joint-employment question under factors that mostly boil down to variations on these themes.

Obviously, USDOL will also be investigating whether the targeted employers have been following the FLSA's minimum-wage, overtime, recordkeeping, and child-labor requirements and restrictions. This will include evaluations of whether these employers have erroneously treated some employees as being exempt or have misclassified employees as being "independent contractors".

Construction contractors subject to federal prevailing-wage and fringe-benefits requirements should also assume that investigators will be alert for any non-compliance with the Davis-Bacon Act or the Contract Work Hours And Safety Standards Act.