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Joint Employment: Strategies and Tactics for Insulating Your Company from Unintended Subcontractor Employment Liability

I. Definition of Joint Employment

a. Joint Employment Liability

Joint Employer liability can arise in any number of contexts. Most of the working population is familiar with the concept of a temporary employee provided through a staffing company. (Think of the ever-popular Kelly Girls of the 70s and 80s) The temporary employees are now commonly referred to as a contingent workforce which is frankly a much better way to describe the contingent candidate's role at the client corporation. The job is contingent upon any number of factors that are solely within the discretion of the client corporation, yet the staffing company usually bears all the employment risk contractually.

The (multi) million-dollar question, therefore, is when are two (or more) companies joint employers? As with nearly everything in the legal profession there is no bright line rule and over recent years much has been at both the State and Federal level about defining those terms. In a series of decisions issued by the NLRB beginning in 2015 and ending most recently in December 2017, employers have been whipsawed from one extreme to another ultimately ending up about where things started prior to 2015. In response, State Legislatures have jumped in and tightened the analysis further in a professed effort to "protect vulnerable members of the workforce." Practically speaking it has done little more than pave the way for more lawsuits with little support for liability and huge potential monetary windfalls for contingent workers.

II. Analysis of Joint Employment Liability prior to 2015

Beginning in 1984 and continuing until the NLRB's 2015 Browning-Ferris decision, the NLRB and the courts determined whether two separate entities were joint employers by assessing whether each exerted such direct and significant control over the same employees that they could be said to "share or codetermine those matters governing the essential terms and conditions of employment. . ." The Board applied this analysis by evaluating whether an alleged joint employer "meaningfully affects matters relating to the employment relationship." In so evaluating, the case law developed and instructed the Courts to look at responsibilities such as hiring, firing, discipline, supervision, and direction and whether that entity's control over such matters was direct and immediate.

In order to determine whether the control is "direct and immediate," you must consider which company is receiving the benefit of the employees' work (even if those employees are technically on another company's payroll) (i) hires or otherwise selects the workers, or has input into the selection process; (ii) pays the workers or determines their compensation; (iii) directs the workers' day to day activities, sets schedules or supervises performance; or (iv) has the authority to discipline the workers, enforce workplace rules or terminate the workers' employment. In short, if two or more companies exercise some control over the work or working conditions of an employee, those companies will likely be considered "joint employers" under Federal and most State employment laws.

Not all these additional factors have to be present to find joint employer liability. Courts will look at the actual practices of the companies involved and their dealings with the workers in question and weigh the specific facts of each case. Using this framework, courts have generally found that staffing agencies and their clients are joint employers, and that franchisors could be joint employers with their franchisees.

A. Analysis of Joint Employment Liability following Browning-Ferris (2015-2017)

In 2015 the NLRB adopted a new joint employment test emerged that frustrated employers, lawyers, and judges alike. The so-called Browning-Ferris Test was broader (translation: more ambiguous) and more invasive than joint employer liability under other employment-related laws.

In Browning-Ferris the NLRB concluded that two businesses can be joint employers when one business simply possesses "indirect" or "reserved" control even if it never exercises the control. Upending more than 30 years of legal authority, a company that contractually bargained for control over a contingent employee would be determined to be a co-employer and therefore could be found liable for any number of employment related causes of action.

The new rule was even less clear than the prior rule. Employers had no idea how to determine whether or if the never exercised retention of control would lead to liability under the National Labor Relations Act.

III. Analysis of Joint Employment Liability following Hy-Brand

In December 2017, the board issued its decision in Hy-Brand Industrial Contractors, which put in place a narrow definition of joint employer status, requiring that there be actual exercise of control by one entity over another, rather than a mere right to do so. The majority concluded that the Browning-Ferris standard was a "distortion of common law," "contrary" to the National Labor Relations Act, "ill-advised as a matter of policy," and its application would prevent the Board from "foster[ing] stability in labor-management relations."

According to the majority, Browning-Ferris rewrote the decades-old test for determining who is the employer by redefining and expanding the test that makes two separate and independent entities a "joint employer" of certain employees. This change, according to the majority, subjected countless entities to unprecedented new joint bargaining obligations that most did not even know they had, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity. The majority stated: **"A finding of joint-employer status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint employer status will not result from control that is 'limited and routine."** And so, employers breathed an ever so brief sigh of relief.

In late February 2018, the NLRB again reversed its ruling and reinstated Browning-Ferris and the saga continues. Those that are against it are vociferously proclaiming its unworkable and impractical effects. Meanwhile, State Legislators are implementing laws that essentially codify Browning-Ferris even if the NLRB overturns same. For those doing business in California, keep your eye closely on the evolving wage/hour claims. As of the preparation of this narrative, there are three cases on the horizon that may significantly impact the continued application of Browning Ferris, but it is impossible at this juncture to know where matters could end up as the year progresses.

B. Bases for Liability Arising from Joint Employment

An emerging trend of owner/developer/general contractor joint employment liability is taking the nation by storm. In considering the various NLRB rulings and the impact on state specific common law, general contractors are being found liable for the violations of their subcontractors and it is happening in places other than California.

In Salinas v. Commercial Interiors, Inc. and J.I. General Contractors, Inc., the 4th Circuit Court of Appeals held that a general contractor (Commercial Interiors, Inc.) and one of its subcontractors (J.I. General Contractors, Inc.) were joint employers, creating <u>possible</u> liability on the part of the general contractor to the subcontractor's employees for J.I.'s failure to comply with FLSA overtime requirements. Although the court dismissed the notion that the decision would render the independent contractor concept meaningless in the construction context, all general contractors and first-tier subcontractors should heed the Salinas decision and recognize that they now are potentially exposed to liability for FLSA violations committed by their subcontractors, at least when they exercise significant influence over the subcontractor and its employees.

I. **Wage/Hour Liability**

a. Generally

As most working adults are aware, there are Federal and State laws that provide basic minimum wage and time worked laws that apply to all employers. Employers must comply with both Federal and State wage and hour laws. If the relevant state law conflicts with the federal law, the employer must apply the law that provides the greatest benefit to the employees.

The most common wage/hour violations arise from unpaid overtime and missed rest and meal breaks. GC supervision of subcontractor work usually does not include checking work start and end times or ensuring that each subcontractor employee has taken his or her legally required meal or rest break but that may be a luxury of the past given the heightened scrutiny imposed by the joint employer analyses.

b. State specific action-California, New York

In California, prior to January 1, 2018 there were 14 separate Labor Code provisions that provide penalties for wage/hour violations. The latest addition through California AB 1701 adds Section 218.7 to the Labor Code and applies to contracts entered on or after January 1, 2018. Construction contractors are now jointly and severally liable with their subcontractors for any failure by a subcontractor to pay wages, benefits, or health and welfare pension fund contributions to its workers. Section 218.7 also requires subcontractors to provide payroll records upon request by a direct contractor. This is one of the most significant changes to the construction employment industry in decades. This follows on the heels of the NLRB opinion and ruling regarding joint employer findings based on little more than the provision of a hard hat or safety vest.

In December 2017, District attorneys in all five boroughs of New York City and in other counties, in coordination with state agencies, have ratcheted up efforts against wage theft in the construction industry. A string of indictments last year detailed more than $2.5 million in unpaid wages for more than 400 construction workers in Manhattan and beyond. This isn't going away and most of the other states will follow shortly.

II. Discrimination Based Claims

It should not be a surprise that discrimination claims can happen just as easily inside the walls of building as they can as those walls are being erected.

Diversity can be a challenge for the construction sector. The assets built and services we provide impact everyone in society. Despite this, those who build the nation’s infrastructure are disproportionately white, straight and male. There is little effort to change the make-up of the workforce (most of which does not wear make-up).

The site environment can be hostile for anyone who doesn’t “fit in”.

C. Insulating from Liability

As with all construction contracts you will want to include risk transfer language for Employment based claims. The language will not prevent suit from being filed but it will certainly go a long way to mitigating risk on defense and indemnity obligations if, and likely when, an issue arises as to joint employment. Just as with other contractual indemnity provisions you may want to consider including language that specifically addresses EPL claims, particularly those of the wage/hour variety, to ensure maximum protection going forward.

Again, as typically expected, you require subcontractors to carry various kinds of insurance to protect against foreseeable risks such as construction defects, job site injuries, and the like. CGL policies often do not cover Employment based claims thus you should also consider including terms that require the provision of EPL insurance.

Additional Insured language and requirements are also fairly standard industry practice. Generally speaking, wage/hour claims are not covered by insurance and there are limited products available in the market at prices that are palatable for most construction companies, but you can certainly incorporate AI obligations specific to employment-based claims into your contracts to provide further protection from such liabilities.

There are also operational mechanisms that can be implemented and utilized to mitigate against liability. However, you will want to carefully consider the implementation of policies, procedures and protocols that would push the scale too far in favor of a finding of a joint employment relationship. Alternatively, it may be wise to simply accept that a joint employment relationship will be presumed so prepare accordingly.

Consider implementing site or project specific training requirements related to gender, disability, age, race, and sexual harassment training for all persons working on the jobsite. In addition, make it clear to all persons who set foot on the project site that such training will be mandatory and that all employees will be held to certain standards.

Payroll auditing is another mechanism for insulating against liability. Under California Labor Code section 226(a), General Contractors are vested with the authority to request from their subcontractors their employees' wage statements and payroll records that must be maintained under section Labor Code Section 1174. Such “records must contain information sufficient to apprise the requesting party of the subcontractor’s payment status in making fringe or other benefit payments or contributions to a third party on the employee’s behalf.”

General contractors and subcontractors also have the right to request from subcontractors below them “award information that includes the project name, name and address of the subcontractor, contractor with whom the subcontractor is under contract, anticipated start date, duration, and estimated journeymen and apprentice hours, and contact information for its subcontractors on the project.” Significantly, a general contractor may withhold as “disputed” all sums owed if a subcontractor fails to timely provide the payroll or project information referenced above, until that information is provided.

While there may not be an applicable Labor Code Section to offer the protections or guidelines there is absolutely no reason why a Developer/GC/Owner should not and could not include similar provisions in the prime and sub-contracts to ensure such protections are included. The contractual provisions could and likely should also include specific assurances that subcontractors have compliant meal and rest period policies and practices, which in California includes one 10-minute rest break for every 4 hours worked and one 30-minute uninterrupted meal break to be completed before the end of the 5th hour of work and a second 30-minute lunch break if the employee works more than 10 hours in a day. California law is certainly more favorable to employees than most other states but nearly every state has some employee protection related to meal and rest breaks so know your venue and adjust your contracts accordingly.

Following the audits consider implementing a good old-fashioned bell system like on the Flintstones or in elementary school. Ring the bell for recess and lunch and shut down the site as much as reasonably possible for the lunch period. The case law coming out of California is clear that employers need not police rest breaks. Simply having a policy, procedure, or protocol in place and known to your employees is enough to avoid liability for such a claim.

As noted, however, some of this can be a slippery slope. While PPE is required on job sites, consider whether a project uniform is the right approach. Likewise, you may want to encourage your superintendents and foreman to refrain from issuing directives to non-supervisory employees of other companies on the project.

D. Take Aways/Wrap-Ups/Questions (5-7 minutes)

I. Understand your joint employment exposure both at a state and national level.

II. Go home and look at your contracts, educate your clients, and review your insurance policies to determine whether you have the protections and insurance in place to shield against employment practices liability

III. Review your operational policies, procedures, protocols and training and identify areas for exposure and implement changes to those operations.