

Employer Update
Bloomington Chamber of Commerce Webinar
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Agenda

- Rulemaking landscape
- DOL proposed rule on exempt salary floor
- DOL guidance on independent contractors
- NLRB decision on Browning-Ferris and implications for joint employer status
- Questions

Disclaimer: Chris is not an attorney. He is not qualified to provide legal advice. The information provided in this webinar is intended for broad audiences, is general in nature, and should not be construed as legal advice.

Rulemaking Landscape

- Following the loss of both Houses of Congress the Administration turned it's focus to Executive Orders and agency rulemaking
 - Since 2010 President Obama has authorized 184 executive orders or memoranda ¹
 - Federal Agencies have more than 70 rules in final stage process and 82 others in a in other stages ²

1. National Archives

2. Office of Information and Regulatory Affairs

Fair Labor Standards Act

Proposed rule to take salary floor from
\$23,600 to \$50,770

- Comments reviewed and changes considered; modifications made
- Interagency review
- Final rule likely by mid-2016
- FLSA applies to employers with \$550K in annual sales and involved in interstate commerce; farmers exempt

Fair Labor Standards Act

What employers need to do NOW

- Make sure JD's are up to date
- Re-evaluate roles to make certain of proper classification
- Determine where salaries plot against the expected floor
- If not already tracking labor hours of exempt roles determine a way to do so. Vital for setting wage rates.

Fair Labor Standards Act

- How will workers react to less flexibility?
- How will workers react to “clock punching”
- What are the implications for future pay increases?
- What are the implications for advancement?
- What are the implications for organizational design?
- What are the implications for compensation strategy and design?



Independent Contractor Rules

DOL says most independent contractors are actually employees

- Says misclassification is rampant
- Cite cases they have won
- Will apply an economics reality test
(except its not really a test)

Economic Realities Test

- Is the work performed by the individual an “integral part of the employer’s business?”
- Does the individual’s “managerial skill” affect his or her opportunity for profit/loss?
- How does the worker’s investment compare to that of the company?
- Does the work performed require special skill and initiative?
- Is the relationship between the worker and the company permanent or indefinite?
- What is the nature and degree of the employer’s control?

NLRB Joint Employer Case

- Browning-Ferris operates a recycling facility in Newby Island, California
- The facility has 60 unionized workers and 240 temporary laborers provided by LeadPoint to sort and separate recycled materials; how many laborers used each day was a function of recycled materials brought to the facility

NLRB Joint Employer Ruling

- The Teamsters argued that B-F was a joint employer because it wanted to organize the workers and could not unless a status of employment could be established

NLRB Joint Employer Ruling

- The NLRB determined the joint employment existed via indirect control because B-F:
 - Required that LeadPoint's employees pass a drug screening prior to commencing work
 - It prohibited Leadpoint from hiring anyone ineligible for rehire by B-F
 - It reserved the unilateral right to discontinue the use of a subcontracted/temp worker
 - It controlled Leadpoint workers' day-to-day activities

NLRB B-F Decision Continued

- It set the productivity standards for Leadpoint's employees
- It asked Leadpoint to assign certain tasks to its employees
- It required that Leadpoint employees comply with B-F's safety policies
- It prohibited Leadpoint from paying its employees more than B-F paid its employees to perform similar work.
- It recommended the immediate dismissal of two of Leadpoint's employees (first when a B-F manager caught two Leadpoint employees drinking on the job; and second where a Leadpoint employee was caught on surveillance tape causing damage to BFI property).

NLRB Joint Employer Ruling

- This has implications for all types of co-joined interests including:
 - Parent - Subsidiary
 - Contractor - Subcontractor
 - Franchisor – Franchisee
 - Organization – Temporary Labor Agency

Best Practices Tips

- Consider...
 - Taking a hands off approach by conveying ultimate goals to the temp agency and let them determine best way to achieve it
 - Avoid being involved in hiring, firing, training, scheduling, disciplining, approving overtime or other exerting direct control over temporary laborers
 - Examine the need for pre-employment mandatory drug testing
 - Notify the agency of inappropriate or unacceptable behavior by temporary laborer by refrain from suggesting any discipline.

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