Last Fridays "Lunch and Learn" Webinar:
Not So Independent – NYC Sets The Trend Again
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Henry S. Shapiro
Jackson Lewis P.C. | Long Island
Henry.Shapiro@jacksonlewis.com | 631-247-4651

Introductory Statement

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Guidance on New York City's New Independent Contractor Protections under Human Rights Law

- The New York City Commission on Human Rights (NYCCHR) has released a factsheet providing guidance on its view of the scope of the anti-discrimination protections provided to individuals performing services as independent contractors and freelancers under the New York City Human Rights Law (NYCHRL) that went into effect January 11, 2020.
- The guidance explains who is covered, what protections have been added, and the required sexual harassment training, among other topics.

Who Does The Law Apply To?

- The factsheet provides that, for purposes of protections under the NYCHRL and related requirements, an "independent contractor," "freelancer," and, in most cases, any other individual doing work for any employer who is not an employee (collectively herein, "independent contractors"), are synonymous under the NYCHRL amendment. The terminology used by the parties is not determinative.

Expanded Protections

- Independent contractors are protected against employment discrimination and harassment under the NYCHRL.
- Independent contractors also have a right to request and receive reasonable accommodations for disability, pregnancy, lactation, religious observances, or status as victims of domestic violence, sexual offenses, or stalking. This means that all “cooperative dialogue” obligations already in effect for New York City employees also apply to independent contractors.

Sexual Harassment Training

- The annual training requirement applicable to employees applies to independent contractors.
- Employers must train an independent contractor if that individual works for an employer of at least 15 employees (all of whom need not be in New York City) and works:
  - More than 80 hours in a calendar year; and
  - For at least 90 days (does not need to be consecutive)
- Independent contractors do not need to be trained more than once in a given year and may provide proof of completion of one sexual harassment prevention training to multiple workplaces in lieu of additional training.

Hiring Through an App or Platform

- Entities or persons that operate an app or platform that allows independent contractors to provide services also may be liable under the NYCHRL if:
  - The entity or persons operating the app or platform directly engage in discrimination against any independent contractor using their platform; or
  - Any customer using the platform to hire an independent contractor engages in unlawful discrimination and the entity or persons operating the app or platform knew or should have known about the discrimination and fails to take action.
- In essence, all anti-discrimination protections applicable to recruitment of employees now apply to recruitment of independent contractors.

Notices

- As independent contractors are covered by the NYCHRL's anti-discrimination protections, mandatory New York City employee notices reiterating those protections must be issued to independent contractors at retention. These include the anti-sexual harassment notice and the pregnancy rights notice.

Department of Labor Issues Final Rule on FLSA's Joint Employer Standard

- The U.S. Department of Labor (DOL) has released its Final Rule updating regulations governing "joint employer" status under the Fair Labor Standards Act (FLSA). The regulations have not been updated in more than 60 years.
- Following the Notice of Proposed Rulemaking (NPRM) issued by the DOL in April 2019, the new regulations seek to provide a more uniform interpretation that gives employers greater certainty, as well as to reiterate the DOL's "longstanding position that a business model — such as the franchise model — does not itself indicate joint employer status under the FLSA." The new test focuses on whether the purported joint employer "exercises substantial control over the terms and conditions of the employee's work." The Final Rule abandons prior interpretations that subjected employers to the risk of being liable as joint employers if they were "not completely disassociated" from a worker.

Four Primary (Non-Exclusive) Factors

- Derived from the decision of the U.S. Court of Appeals for the Ninth Circuit in *Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465 (9th Cir. 1983), the DOL has adopted a four-factor balancing test assessing whether the purported joint employer:
  - Hires or fires the employee;
  - Supervises and controls the employee's work schedules or conditions of employment;
  - Determines the employee's rate and method of payment; and
  - Maintains the employee's employment records.

Actual, Not Theoretical, Exercise of Control Required

The Final Rule states:

[T]o be a joint employer under the Act, the other person must actually exercise – directly or indirectly – one or more of the four control factors. The other person's ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status without some actual exercise of control.

The DOL walked back the position it proposed in the NPRM (that the reserved right to act was wholly irrelevant for determining joint employer status). It concluded "that the reserved right to act can play some role in determining joint employer status, though there still must be some actual exercise of control."

When is An Employer A "Joint Employer" Under the NLRA?

- An employer, as defined by the National Labor Relations Act may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment.
- To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, the entity must possess and exercise such substantial **direct and immediate control** over one or more **essential terms or conditions** of their employment.
- Evidence of the entity's indirect control over essential terms and conditions of employment of another employer's employees, the entity's contractually reserved but never exercised authority over the essential terms and conditions of employment of another employer's employees, or the entity's control over mandatory subjects of bargaining other than the essential terms and conditions of employment is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment.

Indirect Control, Contractually Reserved Authority

- “Indirect control” means indirect control over essential terms and conditions of employment of another employer's employees but not control or influence over setting the objectives, basic ground rules, or expectations for another entity's performance under a contract.
- “Contractually reserved authority over essential terms and conditions of employment” means the authority that an entity reserves to itself, under the terms of a contract with another employer, over the essential terms and conditions of employment of that other employer's employees, but that has never been exercised.

Essential Terms or Conditions of Employment

- "Essential terms and conditions of employment" means:
  - Wages;
  - Benefits;
  - Hours of work;
  - Hiring;
  - Discharge;
  - Discipline;
  - Supervision; and
  - Direction.

- These are the factors that make up potential direct and immediate control.

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