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You Need to Understand the Fair Labor Standards Act Part 3 - Are You a Joint Employer?

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General contractors typically use subcontractors to perform various aspects of the project, and some subcontractors also use subcontracted labor. In these situations, you may be liable for your subcontractors' violations of the FLSA. Everyone typically accepts that a general contractor supervises and may even ensure a subcontractor's quality of work: the owner (or architect) first looks to the general contractor, who then directs the subcontractor to fix the problem or coordinate the repair. Be aware, though, that when the subcontractor's problem is not related to its work but, for example, its payment of wages, the FLSA may apply, and you may be liable.

The historical use of subcontractors in the construction industry gives you some protection. General contractors usually are not thought to be the "employer" of a subcontractor's workforce.[1] However, any contractor who subcontracts part of the project for which it is responsible should pay attention to several factors because an "employer" could be found liable for overtime wages owed to its subcontractors' employees and for statutory penalties. [2]

The key issue to consider is the FLSA's definition of employer. An "employer" is "any person acting directly or indirectly in the interest of an employee in relation to an employer." [3] You can see the problem. The term "employer" under the FLSA is not just defined to include a company's direct employees. Several factors help to analyze whether you may be considered a worker's "employer," including: (1) who provided the equipment the employee used; (2) whether the employee was economically beholden to the so-called employer; (3) the workers' level of skill; (4) whether the company has an ownership interest in the subcontractor; (5) the degree to which the employee's efforts are supervised by the so-called employer; (6) for whom did the employee predominantly work; (7) who set the terms and conditions of the employment; and (8) who maintained the employment records regarding the employee.[4]

A "joint employer" analysis also applies to several other federal and state employment law statutes. While a discussion of these additional statutes is beyond the scope of this newsletter, you should keep in mind that it is best not to blur the line between your company and another company. This practice particularly applies when, as often occurs in the construction industry, owners or principals in one company also have an ownership or management position in another company.

1. Quintanilla v. A&R Demolition, Inc., 2005 WL 2095104 (S.D. Tex. August 30, 2005).

2. See Mitchell v. Chapman, 343 F.3d 811 (6th Cir. 2003); Johnson v. Fayette County, Tennessee, 271 F.Supp.2d 1068 (W.D.Tenn. 2003).

3. 29 U.S.C. § 203(d).

4. Zheng v. Liberty Apparel Company, Inc., 355 F.3d 61, 72 (2nd Cir. 2003); Morcon v. Air France, 343 F.3d 1179, 1188 (9th Cir. 2003); Watson v. Graves, 909 F.2d 1549, 1553 (5th Cir. 1990).