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AVOIDING THE BLAME GAME: HOW TO AVOID LIABILITY FOR OTHER COMPANIES' EMPLOYEES

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Retailers often hire labor hired by outside vendors, such as employees who stock shelves, take inventory, or provide cleaning, security or deliver services. Retailers should consequently be keenly aware of various joint employment doctrines that are frequently used to hold companies liable for violations of the law alleged by individuals who companies do not consider their employees. There are variations of the joint employment doctrine, and their application depends on the type of employment case brought by the individual.

For wage-and-hour cases brought under the Fair Labor Standards Act (FLSA), courts will apply the "economic realities" test to determine whether an employer-employee relationship exists between a company and a plaintiff. This test primarily assesses whether an employee's actual working relationship with an alleged employer forms the basis for the employee's economic livelihood. If parties are held to be joint employers under the FLSA, then both entities are held liable for the wage-and-hour violations.

Unlike the FLSA, Title VII does not clearly define joint employment for the purposes of antidiscrimination suits. Under Title VII, an alleged employer will be held liable as a joint employer if the company plays any role in determining essential employment matters (i.e., hiring, supervising, or terminating employees). Where sexual harassment is concerned, even an entity with no joint employer relationship can be held liable for the harassing conduct of a nonemployee. If an alleged employer has some degree of control over a nonemployee, it is expected to take corrective action as soon as it becomes aware of the harassing behavior.

Companies may also be liable for tort-related employment claims from individuals. False accusations about misconduct or even a company's refusal to allow an individual on the premises can result in claims for defamation or intentional interference with the contract. If a company's employee makes derogatory or harassing comments to an independent contractor, this may give rise to claims of intentional infliction of emotional distress against the company. The strength of these claims vary depending on the jurisdiction.

Independent contractors present a unique problem for retail companies. There are a variety of tests for determining whether an individual is an independent contractor: federal and state law, the IRS

code, state unemployment insurance codes and workers' compensation law each establish their own test to define independent contractors. For this reason, it is easy to misclassify individuals as independent contractors and risk violating tax, workers' compensation, wage and hour, and unemployment insurance laws. Often, companies mistakenly determine an individual's independent contractor status based on the hours worked; however, it is the employee's job duties, rather than their hours worked, that determines their independent contractor label. It may be advisable in these cases to classify potential contractors as part-time employees instead.

Retailers can take several actions to limit potential joint liability, such as the following:

- Negotiate indemnification with any company whose employees work on your premises.
- Carefully review employment liability insurance policies to determine whether they cover claims by non-employees.
- Ensure that outside vendors provide their own onsite supervision for their employees.
- Circumscribe the scope of onsite management. Clarify to the relevant employees that they are not to supervise employees of the other companies and provide training for how to deal with them when issues arise.

Although nothing can prevent against allegations of joint employer liability, the above actions can strengthen your defense against these claims if and when they arise.

For questions, contact the author, or any member of our Retail or Labor and Employment teams.

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