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Pray for a Good Harvest, but Keep at Your Plow – And Know Enough Employment Law to Stay Out of the Ditch

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Employers in agribusiness face the same risks as those in any other business, but perhaps more than most if faced with frequent employee-turnover and employees with little loyalty to those for whom they work.

Former employees, for obvious reasons, are much less reluctant than incumbent employees to take legal action against an employer who, actually or allegedly, has done them wrong, and the laws (and interpretations of laws) that govern the employer-employee relationship are in constant flux. People with little, if anything, to lose by asserting claims and such shifting ground make it hard for employers to recognize work-related risks before they've come home to roost.

Set forth below are three examples of recent developments in employment law of which all employers should be aware if they wish to avoid stepping into a pile of ... trouble.

'Exempt employees? Non-exempt employees? What does it all MEAN?'

Employees of nearly all employers, as far as "wage and hour" law is concerned, are "exempt" or "non-exempt." That's no small distinction. "Exempt" employees are **not** entitled to (*i.e.*, are exempted from an employer's obligation to pay) premium pay for (usually) hours worked over 40 in a seven-day workweek (commonly known as "overtime" pay); but "non-exempt" employees usually *are* entitled to such pay.

Virtually all employees engaged in agribusiness are covered by the federal Fair Labor Standards Act of 1938 ("FLSA"), but employees employed in "agriculture," as defined in the FLSA, are *exempt* from the overtime pay provisions. "Agriculture," however, does not include work performed on a farm that is **not** incidental to or in conjunction with farming operations. And some "agricultural" employers get into trouble by failing to pay overtime pay to employees whose jobs are related to but don't satisfy the FLSA's definition of "agriculture." Also, many such employers who use the services of a farm labor "contractor" find themselves in "joint employment" with the contractor regarding its employees, as a result of which both the contractor and the farmer can be held responsible for violations of the FLSA. Confused yet?

Navigating the "exempt" vs. "non-exempt" distinction can obviously have an enormous impact on payroll costs, in terms of payable wages and payroll-based taxes. Getting that distinction wrong can result in huge

liabilities, for both the nominal employer and those persons who control the employer's payroll practices.

The U.S. Department of Labor ("DOL"), it appears, is about to change some of the most important rules. On March 7, 2019, the DOL announced a "Notice of Proposed Rulemaking ... that would make more than a million more American workers eligible for overtime" pay. "Under currently enforced law, [most] employees with a salary below $455 per week ($23,660 annually) must be paid overtime if they work more than 40 hours per week." That salary level was set in 2004. Under the new proposal, the minimum salary required to invoke the most important so-called "white collar" exemptions (which depend not only on one's salary *but also on critical job duties*) would be $679 per week (which equals $35,308 per year). That's an increase in the minimum required salary of more than 49%. The proposal would also increase the total annual compensation requirement for “highly compensated employees” from the currently-enforced level of $100,000 to $147,414 per year. The proposed regulation will appear in the "Federal Register," and the public will have 60 days from the date of publication to comment on the proposed regulation.

These proposed changes are not the law yet, but they might be soon. So keep an ear to the ground.

'If my workers aren’t ’employees,’ then what do I care?'

Workers can be "employees" or "independent contractors." If they are truly independent contractors, then the cautions set forth above can be ignored. But that distinction isn’t always clear, and the consequences of getting it wrong can be severe.

So what's an "independent contractor?" It's typically a worker who contracts with individuals or entities to provide defined services in exchange for compensation, and who does not work regularly for a single company. Acres of trees have been felled to make the paper required to state all the rules delineating the distinction (or trying to) between employees and contractors, but independent contractors typically:

- Charge fees for services;
- Are engaged only for the term required to perform an identified service or task;
- Retain control over the method and manner of the work they do;
- Retain economic independence from those for whom they work;
- Are responsible for paying their income, social security, and Medicare taxes; and
- Are not covered by most federal and state laws that are designed to protect employees, such as laws requiring payment of overtime pay and laws pertaining to unlawful discrimination in "employment."

These are just some of the factors. There are others. Unfortunately for employers (or those who might be), no shorthand formula can be reliably applied to distinguish contractors from employees in every case. Courts and governmental agencies responsible for deciding who is and isn’t an employee wrestle with the issue to this day: The National Labor Relations Board (which enforces the federal labor law known as the National Labor Relations Act), just two months ago, in *SuperShuttle DFW, Inc.*, addressed it in enormous detail (when deciding that franchisees who operate shared-ride vans for SuperShuttle are independent contractors). The issue is sometimes clear as mud, but the rules usually add up to this: An entity contracting with an independent contractor generally has the right to control only the final result of the project, and not *how* the independent contractor accomplishes the result.

The economic incentive to construe the definition of "independent contractor" as liberally as possible is obvious: the "principal" who engages a mere "contractor" (as opposed to an "employer" who hires an "employee") can, for example, avoid having to comply with "wage and hour" laws, pay for payroll taxes, and pay for and maintain workers' compensation insurance coverage, and deny responsibility for compliance with

the array of federal and state laws prohibiting various kinds of discrimination/retaliation in employment (and with the FMLA where it might otherwise apply).

But, if the "principal" gets it wrong, then there can be significant risks. To name a few:

1. Liability for unpaid income, Social Security and Medicare taxes, plus significant penalties and interest;
2. Liability for violation of unemployment compensation laws;
3. Liability for violation of workers' compensation laws (both civil and criminal) and for all costs of a work-related injury/illness that might have been covered by a workers' compensation insurance policy, had one been in place;
4. Liability for violation of various anti-discrimination laws; and
5. Liability for violation of federal and state "wage and hour" laws pertaining to minimum wages and overtime pay (which can be imposed on the owner(s) of the business *personally* regardless of whether the alleged employer is a corporation or company).

One can imagine a farmer or two who might take a liberal view of the distinction between employees and contractors, in the hope of avoiding the costs and liabilities that accompany employment. But doing so isn't without risk. Just last month, the Wage and Hour Division of the DOL issued a press release about a Florida tomato packing company – identified by name – that "has paid $87,920 in back wages to 109 employees for violating overtime and recordkeeping requirements of the" FLSA.

The Division "found [that] the employer was ineligible for an agricultural exemption" and, "as a result, [had] failed to pay employees overtime for hours they worked beyond 40 in a workweek." The employer paid up because it had "purchased tomatoes from multiple growers not owned by" the employer "and repacked them. The agricultural exemption from the overtime requirements applies only to employees involved in growing product or processing and packaging products grown only by that company. Once employees were packing goods brought in from other suppliers, the exemption did not apply".

The employer, in this case, HAD characterized the workers as "employees" (although failed to pay them as required by law). If the employer had deemed them to be "independent contractors" and, for example, failed to withhold from wages and timely pay required payroll taxes, then the outcome would have been far worse.

'Even if they are employees, do I have to try to control what they SAY?'

Well, if you don't want to get sued for unlawful harassment based on sex, then YES.

On February 8, 2019, the U.S. Court of Appeals for the Fourth Circuit (which has jurisdiction over employers in North Carolina) considered an appeal in *Parker v. Reema Consulting Services, Inc.*, in which the "central question" was "whether a false rumor that a female employee [had] slept with her male boss to obtain promotion can ever give rise to her employer's liability under Title VII" of the Civil Rights Act of 1964 "for discrimination 'because of sex.'" The court said, where the employer was accused of "**participating in** the circulation of the rumor and **acting on it** by" punishing the employee, that the employer could be held liable for doing so.

The facts alleged in the case were damning. A select few:

1. Parker, the plaintiff, worked for the employer for about 18 months at a warehouse facility. She began as a low-level clerk and was promoted six times, ultimately becoming "Assistant Operations Manager."
2. Near the end of her employment, she learned that certain male employees were circulating an unfounded, sexually-explicit rumor about her that "falsely and maliciously portrayed her as having

[had] a sexual relationship" with a higher-ranking manager, in order to obtain her management position. The rumor originated with another employee.

3. *The highest-ranking manager at the warehouse, Larry Moppins, "participated in spreading the rumor.* In a conversation with another manager, Moppins asked "hey, you sure your wife ain't divorcing you because you're f- -king" the plaintiff?
4. There was a mandatory all-staff meeting. Moppins "slammed the door in" Parker's "face and locked her out." The false rumor was discussed at the meeting.
5. "The following day, Parker arranged a meeting with Moppins to discuss the rumor, and at that meeting, Moppins blamed Parker for 'bringing the situation to the workplace.' He stated that he had 'great things' planned for Parker … but that 'he could no longer recommend her for promotions or higher-level tasks because of the rumor.' He added that he 'would not allow her to advance any further within the company.'"
6. "Several days later, Parker and Moppins met again to discuss the rumor. Moppins again blamed Parker and said that he should have terminated her when she began 'huffing and puffing about this BS rumor.' During the meeting, Moppins 'lost his temper and began screaming' at Parker.
7. Several weeks later, Parker was called to a meeting with Moppins, the Human Resources Manager, and the company's in-house counsel. At that meeting, Parker was fired.

The court took a dim view of the company's dimwitted approach:

> [T]he rumor was that Parker, a female subordinate, had sex with her male superior to obtain promotion, implying that Parker used her womanhood, rather than her merit, to obtain from a man, so seduced, a promotion. She plausibly invokes a deeply rooted perception — one that unfortunately still persists — that generally women, not men, use sex to achieve success. And with this double standard, women, but not men, are susceptible to being labelled as 'sluts' or worse, prostitutes selling their bodies for gain.

And: "The complaint not only invokes … this sex stereotype, it also explicitly alleges that males in the … workplace started and circulated the false rumor about Parker" and that she, "as the female member of the rumored sexual relationship[,] was sanctioned," but that her alleged male paramour was not. "In short, … it is plausibly" claimed that the plaintiff "suffered harassment because she was a woman." The court of appeals, therefore, reversed the dismissal of the claim by the trial court. Parker's claim of an unlawful gender-based hostile work environment, retaliation, and discriminatory termination in violation of Title VII was allowed to proceed.

The Lesson

Do NOT permit employees to engage — and DO adopt, implement and regularly emphasize the importance of policies that expressly prohibit them from engaging — in malicious gossip of a sexual nature about fellow-employees. Period. Anything short of that can land employers in expensive and embarrassing litigation. Reema Consulting Services knows that now.

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