ASA STAFFING CONNECT:
YOUR SOURCE FOR LOCAL LEARNING AND NETWORKING

womblebonddickinson.com

WOMBLE BOND DICKINSON

ASA Staffing Connect
Employment Law Update

Jill M. White
Womble Bond Dickinson (US) LLP
May 17, 2019

Employment Law

Joint Employer Status

Harassment

Employee Misclassification

Why is this worth my time?

- DOL's proposed changes to Joint Employer status
- Sexual harassment claims are on the rise
- Drug testing and the ADA
- Beware: penalties are on the rise!

Department of Labor's Proposed Rulemaking:

Joint Employer Status

Joint Employer Status Under the FLSA

April 9, 2019 → DOL issues Proposed Rulemaking to update & clarify the DOL's interpretation of "joint employer" status under the FLSA

- DOL has not significantly revised the regulation (Part 791 of Title 29, CFR) in over 60 years (1958)
- Intended to promote certainty for employers and employees, reduce litigation, create greater uniformity among the courts, and *encourage innovation in the economy*

*Comments due June 10, 2019

Joint Employer Status Under the FLSA

The FLSA allows joint employer liability when both parties are jointly responsible for the employee's wages.

A staffing company and its client must understand their responsibilities to pay at least minimum wage for all hours worked and overtime for all hours worked over 40 in a workweek.

Joint Employer Status Under the FLSA

The DOL is proposing a **four-factor test** to assess whether the potential joint employer actually exercises the power to:

1. Hire or fire the employee;
2. Supervise and control the employee's work schedule or conditions of employment;
3. Determine the employee's rate and method of payment; and
4. Maintain the employee's employment records.

Joint Employer Status Under the FLSA

The Take-Away?

Actions speak louder than words.

- DOL's position is that "a person's ability, power or contractual right to act … would not be relevant to that person's joint employer status under the FLSA."
- "Only actions taken with respect to the employee's terms and conditions of employment, rather than theoretical ability to do so under a contract, are relevant."

Joint Employer Status Under the FLSA

Guiding principles:

1. Business practices such as being a franchisee, providing a sample employee handbook, offering or participating in an associated health plan, or jointly participating in an apprenticeship program do not result in joint employer liability.
2. Only where the company enforces or otherwise takes action "in relation to" the employee does it impute liability.
3. Has the potential joint employer taken "sufficient action" to be held jointly and severally liable under the Act?

Remember – actions speak louder than words!

Joint Employer Status DOL's Examples

The DOL has provided examples in its proposed rulemaking which are very helpful.

https://www.dol.gov/whd/flsa/jointemployment2019/joint-employment_factsheet.pdf

EEOC

Sexual Harassment Suits are on the Rise

Sexual Harassment Suits on the Rise

- In 2018, 41 out of the 66 workplace harassment lawsuits filed by the EEOC in 2018 alleged sexual harassment.
  - This means there was a **50%** increase in suits challenging sexual harassment over FY 2017.
- In 2018, the EEOC recovered $56.6 million with respect to sexual harassment cases only.
  - This is an increase of more than $10 million from FY 2017.
- The filing of sexual harassment charges increased by 13.6% from FY 2017 to FY 2018.

Sexual Harassment & Confidentiality Agreements

As part of the #metoo movement there has been support for raising awareness and promoting transparency

One priority has been to curb confidentiality of harassment claims

Legal Update – Virginia

- Effective July 1, 2019
- New law prohibits employers from requiring an employee or a prospective employee to execute or renew any provision in a nondisclosure or confidentiality agreement that has the purpose or effect of concealing the details related to a claim of sexual assault as a condition of employment. Any such provision will be against public policy and is void and unenforceable.

EEOC v. Premier Employees Solutions, LLC

- In 2018, the EEOC sued Premier Employee Solutions LLC, a North Carolina staffing company.
- The key facts and allegations:
  - Female employee was subjected to a sexually hostile work environment.
  - The employee began working for Premier in January 2016, and she was assigned as a temporary employee at the Del Monte Fresh Produce, N.A., Inc. facility in Whitsett, N.C.
  - The EEOC alleged that from February to April 2016, a male line lead employed by Premier subjected the employee to sexual harassment on a daily or near daily basis, including comments, sexual gestures, and physical touching (such as grabbing the employee's breasts).
  - The employee complained to Premier about the sexual harassment, but the harassment continued.
- The result? Premier paid $34,000 in early 2019 to settle the lawsuit.

EEOC v. Select Staffing

- In 2018, the EEOC sued Select Staffing in the U.S. District Court for the District of New Mexico.
- The key facts and allegations:
  - Select Staffing allowed its female employees to be subjected to sexual harassment when they were placed at the Inspection of Public Records Act Unit of the Albuquerque Police Department.
  - The employees were subjected to pervasive unwelcome sexual comments, including comments about their breasts and buttocks, being referred to as "prostitutes" and "sluts," and being subjected to unwelcome touching.
  - The EEOC also charged that, despite complaints, Select Staffing did nothing about the sexual harassment of its employees.
- The case is ongoing.

Lessons Learned from Recent Cases

- Establish a reporting process for temporary employees to submit complaints *(this should be included in your policy and handbook)*
- Ensure that all complaints are immediately relayed to human resources and immediately investigated
- Take all complaints seriously, and thoroughly and quickly investigate
- Don't take any action that could be interpreted as retaliating against the person making the complaint
- Take all necessary actions to immediately stop the harassment or correct past harassment.
- If appropriate, discipline the person who committed the harassment. If disciplinary action is not deemed appropriate, specifically document the reasons why.
- Educate and train your client's management team and HR department
- Document, document, document.

Additional Points to Keep in Mind

- Sexual harassment can occur outside of the regular workplace or regular working hours, e.g., email, client events, company events, business trips.
- Sexual harassment claims can arise from the conduct of supervisors, co-workers, customers, contractors, or anyone else with whom the employee interacts on the job.
- Generally, the intent of the harasser is irrelevant.
  - "I didn't mean anything by it" or "other people thought it was funny" or "she is a snowflake" are NOT valid defenses.

Applicant Screening

The EEOC's increased scrutiny of applicant screening in the staffing industry

Applicant Screening & Drug Testing

North Carolina's "Controlled Substance Examination Regulation Act"

- Dictates the procedure and process for administering drug screens
- Requires all positive results to be reviewed by a medical review officer

Americans with Disabilities Act (ADA)

- Recovering drug addicts are protected under the ADA
- "perceived disability" theory

Drug Testing

EEOC's position:

"While drug testing is permitted… it cannot be used to discriminate against people with disabilities" (ADA)

"Communicating with job applicants about drug test results ***before*** jumping to wrong conclusions is an important part of the ADA interactive process required by law"

This is very important for recruiters of staffing firms to understand and implement!
Train, train, train!

Drug Testing

EEOC is filing more lawsuits against employers who take adverse action against applicants or employees because of prescription medications

EEOC has obtained settlements on behalf of individuals using prescription medications:

- $59,000 settlement of suit alleging that an employer terminated an employee for using prescription medications to treat chronic pain;
- $50,000 settlement of suit alleging that an employer fired an employee for taking bipolar medication;
- $25,000 settlement of suit alleging that an employer asked applicants whether they were taking any medications and to identify those medications;
- $750,000 settlement of suit alleging that an employer drug tested employees for prescription medications and made it a condition of employment that the employees cease taking their prescription medications, without any evidence that the medications adversely affected the employees' job performances;
- $146,000 settlement of suit alleging that an employer refused to hire applicants and placed employees on leave due to the use of prescribed narcotic medications;
- $80,000 settlement of suit alleging that an employer refused to hire an applicant due to her use of prescribed medication for epilepsy; and
- $32,500 settlement of suit alleging that an employer refused to hire an applicant due to the applicant's use of prescription medication.

Drug Testing

EEOC is filing more lawsuits against employers who take adverse action against applicants or employees because of prescription medications

EEOC has settled cases on behalf of methadone users:

EEOC settled a lawsuit for $37,500 in which it alleged that an employer refused to hire an applicant who used methadone.

EEOC entered into settlement for $85,000 in which it alleged that an employer refused to hire an applicant due to his use of methadone and without conducting an "individualized assessment" to determine whether the applicant could perform the job safely.

Applicant Screening & Drug Testing

EEOC v. Randstad (lawsuit filed Nov. 3, 2015)

- EEOC sued a temporary labor agency alleging that it violated federal law (ADA) when it refused to hire April Cox because she volunteered that she was in a medically supervised methadone treatment clinic.
- Prior to taking drug test the applicant volunteered this information and the site manager replied *"I'm sure we don't hire people on methadone but I will contact my supervisor"*
- Cox continued to call the Randstad office and told the site manager that she didn't have any medical restrictions to prevent her from performing the job duties.
- Cox never was asked to take a drug test (even though she produced information from the clinic that she was OK to work except as a truck driver or airline pilot)
- Cox was never hired because of her Methadone use.

Applicant Screening & Drug Testing

EEOC v. Randstad (February 8, 2016)

In the lawsuit, EEOC argued the following:

- Cox was disabled because she was recovering from substance abuse;
- Cox had a record of a disability; and
- Cox was "regarded as" having a disability based on her methadone use.

Applicant Screening & Drug Testing

EEOC v. Randstad

On Feb. 8, 2016 Randstad agreed to settle the case for $50,000
https://www.eeoc.gov/eeoc/newsroom/release/2-8-16a.cfm

In addition to money, Randstad is required to advise all employees involved in recruitment/screenings that applicants are not to be rejected because of a lawful prescribed medication (including Methadone) and is required to provide training on the ADA and its protections regarding use of prescription medications

EEOC District Director stated "medically prescribed Methadone is a well-known and effective treatment for recovering from drug addiction" and is protected under the ADA

Applicant Screening & Drug Testing

EEOC's position on drug screening (ADA):

- 5 Panel drug test for illegal drugs can be given at the *pre-offer* stage in hiring process
- 10 Panel drug test that includes testing for legal substances is a "medical inquiry" or medical exam under the ADA, and cannot be given until the post-offer stage (*after a conditional job offer has been extended*)

Applicant Screening & Drug Testing

EEOC's position on drug screening:
Testing for *legal* drug panels OK if:

- It is job-related and consistent with business necessity
- Even if legally permitted to test for legal drugs, employer must accommodate qualified individuals with disabilities
- If applicant fails a drug test then opportunity to produce prescription from doctor and to show that the medication will not prevent him/her from performing the essential functions of the job

WOMBLE BOND DICKINSON

Applicant Screening & Drug Testing

EEOC's position on drug screening:

Employer has the burden

If applicant tests positive for a legal drug, then employer must establish a link between performing the essential functions of the job and why the individual cannot perform those functions while taking his/her medication.

WOMBLE BOND DICKINSON

Drug Testing

Best Practices:

Employers must be careful not to discriminate against applicants or employees who use prescription drugs
(i.e., methadone used to treat a prior heroin addiction)

Employers must ensure review of a positive drug test result by a Medical Review Officer (MRO) *and take steps to ensure that adverse action is not taken against the individual based on incorrect or stereotyped assumptions about certain drugs.*

Train all recruiters and any other employees who are involved in the hiring process and/or work directly with applicants or employees on drug testing.

- Train on a routine basis (not only when hired)
- Provide real world examples and working sessions

WOMBLE BOND DICKINSON

Applicant Screening & Criminal Convictions

EEOC has increased its scrutiny of employer's use of criminal background reports in the hiring process (see EEOC's strategic enforcement plan)

Legal Update – South Carolina

- SC law permits persons to expunge a first-offense, low-level crime carrying a sentence of 30 days or less from their record following a period of good behavior.
- Effective December 27, 2018 → removes the "first-offense" requirement and allows persons to erase multiple convictions arising out of the same sentencing hearing if they are "closely connected." Also allows offenders to expunge first-offense simple drug possession and possession of drugs with intent to distribute crimes.
- From a practical standpoint, job applicants with crimes expunged from their record under the new law will most likely not disclose that fact on a job application or during the hiring process. Employers also will be unable to discover the offenses on a commercial criminal background check.
- NOTE: the new law provides immunity to employers with respect to any administrative claim or lawsuit related to an employee's expunged conviction. These often arise in negligent hiring, retention, and supervision claims against employers.

Increase in Posting Violations

Posters Required Under Federal Law

- Federal Law Requires Most Employers to Post the Following 6 Notices:
  - U.S. Equal Employment Opportunity Commission (EEOC) Poster
  - Employee Polygraph Protection Act (EPPA) Poster
  - Fair Labor Standards Act (FLSA) Poster
  - Family and Medical Leave Act (FMLA) Poster
  - Occupational Safety and Health Act (OSHA) Poster
  - Uniformed Services Employment and Reemployment Rights Act (USERRA) Poster

Increase in Posting Violations

Poster	2018 Fine	2019 Fine
FMLA Poster	$169	$173
OSHA Poster	$12,934	$13,260
EEOC Poster	$545	$559

- The penalties for FMLA and OSHA posting violations became effective on January 23, 2019.
- The penalties for violating the EEOC poster requirements became effective on April 20, 2019.

Increases In Monetary Penalties for FLSA, OSHA, and EPPA Violations

FLSA, OSHA, and EPPA Violation Penalties

- Fair Labor Standards Act:
  - Employers who repeatedly or willfully violate minimum wage or overtime requirements will now receive a maximum monetary penalty of $2,014, per employee.
- Occupational Safety and Health Act
  - The maximum penalty for willful or repeated violations of OSHA increased to $9,472.
- Employee Polygraph Protection Act
  - The penalty for violations of EPPA increased to $21,039.

FLSA, OSHA, and EPPA Violation Penalties

Statute	2018 Penalty	2019 Penalty
FLSA	$1,964	$2,014
OSHA	$9,239	$9,472
EPPA	$20,521	$21,039

All of these penalties became effective on January 23, 2019.

North Carolina Employee Fair Classification Act

Update

North Carolina Employee Fair Classification Act

- Issue: Misclassification of workers as independent contractors.
- NC law that allows employees to easily report and the government to easily prosecute any employer that misclassifies an individual as an independent contractor.
- Became effective on December 31, 2017.

North Carolina
Employee Fair Classification Act

What is the applicable legal standard or "test"?

- The NC statute does not change the definition of "employee" or "independent contractor."
- The analysis is always case-by-case, turning on "control"
  - Is the worker truly controlling his/her own work *or* is the worker's service controlled and directed by the employer?
- At the end of the day, each law (whether it is wage & hour, workers' compensation, or tax law) has its own legal standard.

North Carolina
Employee Fair Classification Act

What has been the outcome of this Act since it was implemented in December 2017?

- For the period of July 1, 2017 – June 30, 2018:
  The NC Industrial Commission received
  328 complaints and collected $611,742
- A clear increase in the effectiveness of investigating and collecting monetary damages.

New Intern Test

Interns In the Trump Era

- In 2018, the DOL replaced its former six-part test to determine whether a worker is an "unpaid intern," and replaced it with the primary beneficiary test.
- The primary beneficiary test does not include a rigid set of requirements—rather, it has a non-exhaustive list of factors to determine who the primary beneficiary is of the internship.

Primary Beneficiary Test Factors

1. the extent to which the intern and the employer clearly understand that there is no expectation of compensation;
2. the extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by an educational institution;
3. the extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;
4. the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;

Primary Beneficiary Test Factors

5. the extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
6. the extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and
7. the extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

QUESTIONS?

WOMBLE BOND DICKINSON 46

Womble Bond Dickinson is a **transatlantic law firm,** providing **high-quality legal capability** and **outstanding personal service,** to a wide range of regional, national and international clients from 27 key locations across the United States and the United Kingdom.

27 Locations

WOMBLE BOND DICKINSON 47

With teams located across the US and the UK we bring an **international perspective** and **extended jurisdictional reach** to a wide range of client needs

US

Boston
Wilmington
Baltimore
Washington, D.C.
Tysons Corner
Charlottesville
Raleigh
Research Triangle Park
Greensboro
Winston-Salem
Charlotte
Greenville
Columbia
Charleston
Atlanta
Houston
Silicon Valley
Los Angeles
Orange County

UK

Aberdeen
Edinburgh
Newcastle
Leeds
London
Southampton
Bristol
Plymouth

WOMBLE BOND DICKINSON 48

Our legal capability
Sectors

- Energy & Natural Resources
- Healthcare
- Manufacturing
- Private Wealth
- Transport, Logistics & Infrastructure
- Financial Institutions
- Insurance
- Life Sciences and Pharmaceuticals
- Real Estate
- Retail & Consumer
- Technology

Our legal capability

The breadth and depth of our industry and sector knowledge plus the quality of our service capability provides clients with serious commercial leverage on both sides of the Atlantic.

Womble Bond Dickinson at a glance

27 Locations across the US and UK

More than **400** Partners **1,000** Lawyers

US

UK

Consolidating our national reputations and regional heritage under one powerful transatlantic brand

Our sectors

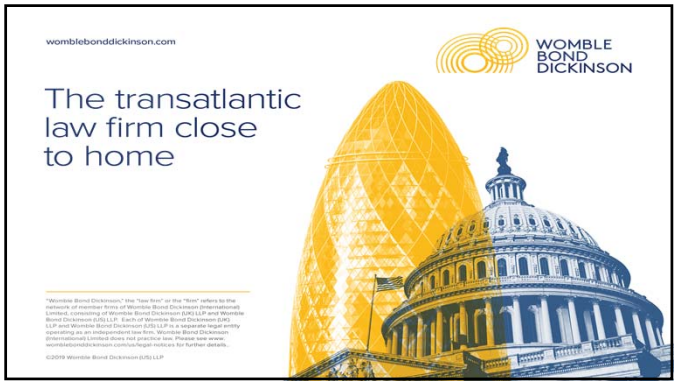
Representing more than **250** Publicly Traded Companies in the US and UK

+150 Chambers rankings

UK Top 20 Law firm

US Top 80 Law firm

Global Top 100 Law firm by revenue


womblebonddickinson.com
WOMBLE
BOND
DICKINSON
The transatlantic
law firm close
to home
"Womble Bond Dickinson," the "law firm" or the "firm" refers to the network of member firms of Womble Bond Dickinson (International) Limited, consisting of Womble Bond Dickinson (UK) LLP and Womble Bond Dickinson (US) LLP. Each of Womble Bond Dickinson (UK) LLP and Womble Bond Dickinson (US) LLP is a separate legal entity operating as an independent law firm. Womble Bond Dickinson (International) Limited does not practice law. Please see www.womblebonddickinson.com/us/legal-notices for further details.
©2019 Womble Bond Dickinson (US) LLP