



Dealing With The EEOC In 2012

Independent Contractor Considerations

Card Check –NLRB 10-day Election Initiative

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EVERYTHING MATTERS

Overview of State Tax Issues for Franchisors

Overview of Recent Franchisee as Employee Cases

Legislative Update on Healthcare Reform and Pending Franchise Relationship Legislation

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Dealing With The EEOC In 2012



Discussion Points

- What is Hot in the EEOC Enforcement Litigation World?
 - ▶ Key Trends and Developments in 2011, and What to Look for Throughout 2012
 - ▶ Noteworthy Settlements and Verdicts in 2011 & 2012, and What They Signal for Employers
 - ▶ Significant Court Rulings in 2011 & 2012, and What They Mean for Employers
 - ▶ What Should Be in Your Corporate Tool Kit?



What Should Be In Your Corporate Tool Kit?

- Robust E-Discovery And Data Management Capabilities
 - ▶ On-Going Audit Of Payroll Procedures
 - ▶ Rigorous Monitoring Of Key Employee Data (Hiring, Pay, And Promotions)
 - ▶ Ongoing Review And Assessment Of Workplace Due Process Practices
 - ▶ Capability To Track Charge Activity
 - ▶ State-Of-The-Art Leave of Absence And Anti-Retaliation Policies

Overview of State Tax Issues for Franchisors

- State budgetary issues and the search for new revenue sources
- Environment where states are looking for revenue sources beyond their borders
- General Rule: State may tax a business only if it has a significant connection – or “nexus” – with the state to justify imposition of the tax
- For many years, state taxing authorities treated only physical presence in the state a sufficient nexus between a taxpayer and a state, with limited exceptions

- *Geoffrey v. South Carolina Tax Commission*
 - Out-of-state taxpayer deemed to have nexus for income tax purposes arising from the license of intangible property to an affiliate conducting business in SC
 - Decision influenced by fact that arrangement was for tax planning amongst related parties
 - Tax Planning - Transactions between related businesses which generated deductible expenses, rather than bona fide business transactions

- In recent years this has been extended, states have aggressively asserted they only need an economic connection between the state and taxpayer.

Overview of State Tax Issues for Franchisors, cont.

- KFC Corp. v. Iowa
 - Not present in Iowa
 - Iowa Dept. of Revenue asserted franchise agreements with Iowa franchisee constitutes sufficient economic nexus to impose income tax
 - Sought back taxes, interest and penalties for years during which it was not even Iowa's policy to apply economic nexus standard
 - Court held that KFC met the economic nexus standard
 - US Supreme Court denied review
 - Case is particularly concerning because it extended economic nexus from related entities transactions to transaction between non-affiliated companies dealing at arm's length

Overview of State Tax Issues for Franchisors, cont.

- Business Activity Tax Simplification Act of 2011
 - Pending federal legislation to establish bright-line test using a taxpayer's physical presence in the state
 - Nexus present if taxpayer has employees located in the state; uses an agent (working exclusively for taxpayer) to create a market for the taxpayer in the state; owns or leases tangible or real property in the state; or is an corporate entity formed in the state.
 - Awaits discussion in House of Representatives; many similar bills have languished in the committee state over the years
 - Opponents are concerned that tax evasion may result if it becomes law (particularly with regard to related entities)
 - Should not rely on hopes of federal legislation when planning future interstate activities

■ Practical Tips

■ Assess Potential Risk

- Consider States Where You Have Franchisees (particular focus on where you have large number of franchisees and where you have been operating for long periods)
- Analyze What Groups These States Fall Within
 - States that have statutes requiring the use of economic nexus when imposing corporate income tax on out-of-state taxpayers (some of these states require a specific minimum amount of sales, property or payroll within the state before imposing an income tax based on economic nexus alone)
 - No statutes, but have courts addressed the issue of economic nexus as it relates to corporate income tax on an out-of-state taxpayer
 - States that have rejected the economic nexus doctrine
 - States that have not addressed the issue of economic nexus
- Analyze if any of these state apportion income from services and intangibles
 - Example – In South Dakota, fee charged to franchisee that incorporates both royalties and services provided by the franchisor will be subject to sales tax in its entirety. When taxable sales (for services or tangible personal property) are included within the royalty fee, and not separated, the entire royalty payment is subject to South Dakota sales or use tax.

Overview of State Tax Issues for Franchisors, cont.

Options for Franchisors

- Tax Rulings
- Litigation Defense
- Settlement
- Tax Amnesty Programs (monitor offering of such programs)
- Passing on state tax costs on to franchisees or sharing these new costs with franchisees
 - Gross Up Provisions (net the amount of continuing franchise revenue provided for in franchise agreement)
 - Franchise Relationship Issues
 - Additional tax on additional amounts paid also taxed
- Lobbying Strategies
 - Federal Legislations
 - Minimum threshold requirement
- Services to Franchisees
 - In person contact, training and franchise support to new and existing franchised locations may be used by states to create nexus
 - Should be hesitant to let state income tax concern play sole role in making this decision



Independent Contractor Considerations



Independent Contractor Considerations

- ▶ Advantages vs. Disadvantages of IC status
- ▶ Tests for determining IC status
- ▶ Risks of Misclassification
- ▶ Recommendations



Determining Contractor Status

- **Different Agencies Use Different Tests:**
 - ▶ National Labor Relations Act: Common Law Agency Test
 - ▶ Fair Labor Standards Act: Economic Realities Test
 - ▶ Internal Revenue Service: Right to Control Test
 - ▶ Employment Retirement Income Security Act: Common Law Agency Test
 - ▶ Title VII of the Civil Rights Act of 1964: Combined Test
 - ▶ Unemployment Insurance Acts: Largely the Control Test



Determining Contractor Status

- Most tests focus on the right of control and entrepreneurial nature of contractor's business
- All tests focus on reality, rather than labels or written agreements



The Independent Contractor Agreement

- The agreement cannot be changed unilaterally by the Company.
 - ▶ Any change to the agreement should be accomplished by written amendment that is mutually agreed to by the Company and the contractor.
 - ▶ There are many key provisions that should be included in good independent contractor agreements.
 - ▶ By way of example, the parties should agree in writing that the contractor will not receive any employee benefits.
 - ▶ Similarly, the parties should include a written agreement regarding confidentiality of information and the ownership rights of the Company with respect to materials created by the contractor.



Managing an Independent Contractor

- The following are some “Do’s and Don’ts” of managing the independent contractor relationship:
- **DO NOT** provide the independent contractor with:
 - Employee benefits
 - Payment at an hourly, weekly, or monthly rate (project rates are preferable)
 - Training or instructions
 - Tools, equipment, supplies or materials for free or at a subsidized price



Managing an Independent Contractor (cont'd)

- **DO NOT** provide the independent contractor with:
 - The Company's name, copyrighted materials or trademark for use by the contractor unless the writing clearly and specifically identifies the worker as an independent contractor
 - Regular office space, telephones, or staff listings on the Company's telephone directory, or employee badges or uniforms



Managing an Independent Contractor (cont'd)

- Similarly, do not ask the worker to perform services that are already being performed by Company employees - unique skills and services should be the norm.
- **DO NOT** require the independent contractor to:
 - Provide services exclusively for your organization
 - **DO:** *Ensure the independent contractor has other clients.*
 - Perform services exclusively on the Company's premises
 - **DO:** *Make sure that the independent contractor has the flexibility to work off-premises as he/she sees fit.*



Managing an Independent Contractor (cont'd)

- **DO NOT** require the independent contractor to:
 - Attend employee meetings or events
 - **DO:** *Have the independent contractor attend meetings which are only necessary for proper completion of the project.*
 - Submit regular reports that ordinarily are not required of employees
 - **DO:** *Make sure that the independent contractor provides periodic status reports.*



Managing an Independent Contractor (cont'd)

- **DO NOT** require the independent contractor to:
 - Work established hours
 - ***DO:** Focus on completion of the final result by the delivery deadline.*
 - Provide services personally
 - ***DO:** Allow the independent contractor to subcontract part of the services, if necessary.*



Managing an Independent Contractor (cont'd)

- **DO NOT** require the independent contractor to:
 - Follow your instructions on “the” who, how, when, and where of getting the details of the project completed
 - **DO:** *Permit the independent contractor to complete the project at his own discretion, subject to the terms of the agreement.*
 - Be paid out of payroll or provide the independent contractor with a Form W-2
 - **DO:** *Pay independent contractors out of accounts payable and provide them with a Form 1099, if appropriate.*



Managing an Independent Contractor (cont'd)

- **DO NOT** assume an independent contractor relationship means you are free from managing within any applicable rules or Company policies
 - ***DO:** Ensure that you comply with certain laws and Company policies that apply to independent contractors.*
 - *For example, if an independent contractor complains that someone is harassing or discriminating against them on the basis of a protected status, promptly report the complaint to the appropriate person.*

- **Coverall N. Am, Inc. v. Commissioner of the Div. of Unemployment Assistance**
 - In initial action, Massachusetts court held that individual franchisee was an employee of its franchisor and was thus entitled to unemployment insurance
 - The original action led to follow on decisions by groups of franchisees in Massachusetts claimed they were (i) misclassified as independent contractors and (ii) entitled to overtime pay and other protections afforded employees
 - In the follow on action, court held Coverall franchisees in Massachusetts were misclassified employees because Coverall and the franchisees were in the same business -- providing cleaning services

- **Doctor's Associates, Inc. v. Uninsured Employers' Fund, et al.**
 - Employee of Subway franchisee suffered injuries and franchisee had not purchased workers' compensation insurance
 - Uninsured Employers' Fund sought to recover from franchisor
 - Administrative agency allowed franchisor to be named but held franchisor was not liable because per se rule that franchisor-franchisee relationship distinct from employer-employee relationship
 - On appeal, Kentucky Supreme Court say no per se rule that franchisor relationship is not a franchisee relationship and court said they had enough facts to rule that the relationship in question was not an employment relationship

- **Conrad v. Waffle House, Inc.**
 - Franchisee's employees sue on behalf of a putative class for violation of minimum wage act concerning tips
 - Court adopts "economic reality" test to determine if employer-employee relationship exists
 - Test considers: who has the power to hire and fire; who supervises and controls work schedule and conditions; who determines the rate and method of payment; and who maintains work records
 - Court holds no basis for Waffle House to be considered employer

- Take Away – Consider if business structure resembles employment relationship; have franchisees that are entities; use a single purpose franchisor entity (franchising and developing products and services for franchise system); consider the amount of control; monitor and get involved early at the agency level

- Proposed Legislation in Georgia: Franchisees Are Not Employees
 - Amends definition of employees in Georgia's workers' compensation statute by clarifying that individuals who are parties to a franchise agreement shall not be deemed employees for purposes of the chapter
 - Similar legislation is being proposed in other states



**Card Check –
National Labor
Relations Board
10-day Election Initiative**



NLRB 10-day Election Initiative

- In late December 2011, the National Labor Relations Board announced that it adopted final rules that will significantly expedite the processing of election petitions filed by unions.



NLRB 10-day Election Initiative

- **The New Rules Will:**
 1. Provide an NLRB hearing officer with the ability to limit the evidence that can be introduced at a representation case hearing.
 2. Provide the hearing officer with the authority to deny a party the right to file a post-hearing brief.
 3. Eliminate a party's right to have the NLRB review a decision by a regional director that directs an election.
 4. Eliminate current language that requires an election to be conducted within 25-30 days, thereby permitting elections to be held before the 25-day period.
 5. Eliminate a party's right to have the NLRB review any decisions by a regional director or an administrative law judge regarding post-election disputes.



NLRB 10-day Election Initiative

- One of the unstated reasons for the Board making these changes is that many unions and even NLRB personnel claim that employers have abused the current process by litigating issues merely to delay an election.
- Under current NLRB case processing goals, if the parties stipulate to an election it will be held in a median of 38 days from the date of the filing of the petition, but if a hearing is necessary the median is approximately 56 days. The new rules will reduce the time for processing representation cases that require a hearing by approximately 14 days, which means that elections will be held in roughly the same time as if the parties had stipulated to an election.
- The new rules will also limit an employer's ability to raise issues that may inhibit the ability to preserve them for judicial review.
- Although the implementing guidance has not been announced, the new rules give NLRB regional directors and hearing officers significant discretion in determining the issues that can be raised in pre-election hearings. They also give the Board more discretion in deciding what cases to review on appeal.



NLRB 10-day Election Initiative

- Although the new rules will not become effective until April 30, 2012, the National Chamber Litigation Center, in conjunction with the Coalition for a Democratic Workplace, filed a lawsuit seeking to enjoin the implementation of the rules. With additional lawsuits potentially on the horizon, it is important for employers to begin reviewing their policies and strategies regarding resisting union organizing with the new rules in mind.
- It is anticipated that President Obama will make recess appointments to the NLRB. Absent new appointments, the NLRB would be unable to issue decisions after Member Becker's term expires at the end of this year because it would not have the three members necessary to constitute a quorum.
- It would appear that the new rules are a step toward making the anticipated recess appointments because a person must first be nominated in order to be given a recess appointment.
- Because the authority of the President to make recess appointments has rarely been challenged, there is little established law regarding exactly under what conditions the President has such authority. While 47 Republican Senators recently wrote the President announcing their intent to oppose any recess appointments to the NLRB, it is expected that "new" law may soon be in the making.

- Patient Protection and Affordable Care Act (PPACA) – better known as Healthcare Reform – continues to make news.
 - Individual Mandate requiring every individual who files an income tax return to have the minimum essential coverage is under legal scrutiny
 - Florida, Pennsylvania and Virginia federal district judges have struck down the mandate (are other federal judges that have upheld)
 - Virginia federal judge struck down mandate
 - Appeals courts – 11th Circuit has struck down the mandate while the 4th Circuit has upheld the mandate
 - Headed for U.S. Supreme Court
 - Republican members of Congress appear committed to dramatic change or repeal of the law
 - IRS and the Departments of Labor and Health and Human Services grinding away on the list of regulations that have to be issued

- California Assembly Bill 2305
 - Sponsored by American Franchisee Association
 - Regulate What is Good Cause for Termination
 - Modify certain termination requirements in existing California Franchise Relations Act
 - Modify Nonrenewal provisions of California Franchise Relations Act
 - Impose a Duty of Good Faith
 - Impose Anti-Discrimination Requirements
 - Extend the remedies for improper termination or nonrenewal to include (i) reinstatement and all associate damages or (ii) payment of fair market value of franchise or franchise assts

- Vermont House Bill 694
 - Regulate transfers by franchisees (specify the conditions that may be imposed and when a transfer must be permitted)
 - Regulate Encroachment
 - Regulation Terminations
 - Regulate Nonrenewal
 - Regulate Sources of Goods and Services
 - Impose a Duty of Good Faith
 - Regulate Applicable Law, Jurisdiction and Venue

Questions?

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