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Presented By

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About

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Biography – Michael Harvey

Michael is a Shareholder in the Labor & Employment and Litigation Sections in the Houston office of Munsch Hardt Kopf & Harr, P.C.

Michael's practice focuses on commercial litigation with an emphasis on labor and employment. Michael has experience in federal and state trial practices and arbitration in areas that concern contract disputes, business torts, FLSA Wage and Hour, Title VII, family and medical leave, sexual harassment, pregnancy discrimination, non-competition and confidentiality agreements.

Michael also spends considerable time consulting with and advising clients as to commercial and employment practices and policies. In this respect, Michael has worked in a secondment position as in-house counsel for international placement company.

An accomplished trial lawyer, Michael was named in *Thomson Reuters'* "Texas Rising Stars" List in 2015 and 2016.

Biography – Brenna Hill

Brenna is an Associate in the Labor & Employment and Litigation Sections in the Houston office of Munsch Hardt Kopf & Harr, P.C.

Her practice focuses on representing employers in federal and state court litigation matters involving Fair Labor Standards Act (FLSA) claims, Title VII, Americans with Disabilities Act ("ADA"), Family and Medical Leave Act ("FMLA") claims, and Age Discrimination in Employment Act (ADEA). She also has significant experience litigating class action product liability claims.

Brenna received her Juris Doctor degree from the University of Houston Law Center, where she graduated *cum laude*, was part of the Order of the Barons and Managing Editor of the Houston Law Review.

She is a member of several organizations in the Houston community, including Houston Bar Association, Houston Young Lawyers Association, State Bar of Texas, and she serves as an Upper Level Mentor at the University of Houston Law Center.

About

Recent Updates to the National Labor Relations Act & the Fair Labor Standards Act

Administrative Law Making this Year

- **A big year for administrative agencies.**
  - **August 2015:** The National Labor Relations Board ("NLRB") issued a new interpretation of who qualifies as an "employer" under the National Labor Relations Act (the "NLRA").
  - **May 2016:** The Department of Labor ("DOL") announced new interpretation of which employees are covered by the Fair Labor Standards Act ("FLSA")
- **The ramifications of these decisions for employers are huge.**
  - Under the NLRB's new interpretation of the NLRA, entities may be considered **"employers"** even if they have only indirect and unexercised control of employees.
  - Under the DOL's new interpretation of the FLSA, **an additional 4.2 million employees will be covered under the FLSA**, which means even more exposure for employers regarding the manner with which they compensate their employees.

What is the National Labor Relations Act?

- The NLRA is a federal law that provides employees with the right to organize and to bargain collectively with their employers through representatives of their own choosing (**unions**).
  - The Act is interpreted and principally enforced by the National Labor Relations Board ("NLRB").
- The NLRA defines certain practices engaged in by employers and unions as **"unfair labor practices."**
- Until recently, only entities who exercised **"direct and immediate control"** were considered "employers" under the NLRA and thus required to engage in collective bargaining and refrain from engaging in unfair labor practices.

Recent NLRB decision: Browning-Ferris Industries

- In a 3-2 decision, the NLRB changed the standard for determining who is an employer under the NLRA.
- The Board claimed that the old standard was **outdated** and needed to change to keep up with workplace and economic realities.

Recent NLRB decision: What changed?

- The Board determined that **two or more entities** are joint employers of a single workforce if:
  - They are both employers within the meaning of the common law, and
  - They share or codetermine those matters "governing the essential terms and conditions of employment."
- This is a drastic departure from the former standard which required **"direct and immediate control."**

What will courts look at to determine employer status?

- The NLRB, in the **Browning-Ferris decision**, made clear that courts should look at whether the potential employer had the **right** (even if unexercised) to:
  - Hire/fire;
  - Discipline;
  - Supervise and direct employees;
  - Dictate number of workers to be supplied;
  - Control schedules, seniority, or overtime; or
  - Assign work and determine the manner/method of work performed

Ramifications of the decision

- **Bottom Line:** the NLRB's decision makes it easier for unions and regulators to hold companies accountable for the practices of contractors, staffing agencies, etc.
- Many have argued that the decision may have far-reaching ramifications for many relationships, including:
  - **Contractor/subcontractor**
  - **User/supplier**
  - **Franchisor/Franchisee**
  - **Creditor/debtor**
  - **Parent/subsidiary**
  - **Lessor/lessee**
  - **Predecessor/successor**
  - **Contractor/consumer**
- The full implications of the decision are not yet fully known.

What now?

- The employer, Browning-Ferris Industries **("BFI")**, appealed the NLRB's decision to the D.C. Circuit Court of Appeals.
  - BFI argued that the new joint-employer standard is so broad and vague it makes it impossible for employers to structure their business relationships with contractors and robs employers of their due process rights.
  - Even if the Board's decision survives appellate review, it will take many years before we have clear guidance on how businesses can avoid joint employer liability because of the myriad questions left unanswered by the Browning-Ferris decision.
- House GOP members also introduced legislation to roll back the decision, stating that the new standard **"would wreak havoc on families and small businesses across the country."**
- It may be wise to revisit current business practices to eliminate the risk of being found a joint employer under the NLRA.
  - Unfortunately, the NLRB's recent decision gave little to no guidance on how to avoid liability, other than to relinquish all semblance of direct and indirect control over essential terms and conditions of employment.

Some practical advice

- Take a **hands-off** approach
  - Try conveying your **ultimate goals** to the subcontractor/temp agency, and letting that entity determine the best means of achieving those goals.
  - Avoid being involved in the **interviewing, hiring, firing, training, scheduling, disciplining, approving overtime**, or otherwise reserving control over temporary workers.
  - **Report** inappropriate temp worker behavior to the subcontractor/temp agency, but refrain from suggesting that the worker be disciplined.
  - Consider **eliminating contractual provisions** that reserve partial or complete control over temporary workers, such as retaining the unilateral right to discontinue the use of a temporary worker.
- Educate management (or in the case of franchisors, franchisees) on the cost and liability ramifications of a **"joint employer"** relationship.
- Re-examine contracts with subcontractors/temp agencies to ensure they include **favorable language**, including:
  - Language specifying that the business is not a co-employer of the subcontractor/temp agency workers.
  - An **indemnification clause** providing that the subcontractor/temp agency assumes any and all liability for costs or damages stemming from the temp workers' relationship with the business.
- Re-examine whether **mandatory pre-assignment drug test policies** are truly necessary, given the NLRB's finding that doing so demonstrates "significant control" over temp workers.

What is the Fair Labor Standards Act ("FLSA")?

- **The FLSA is a federal law which establishes minimum wage, overtime pay eligibility, recordkeeping, and child labor standards affecting full-time and part-time workers in the private and public sectors.**
- **It:**
  - Differentiates between **employees** and **independent contractors**.
  - Differentiates between **exempt** and **non-exempt employees**.
  - Mandates wage rates and **overtime wages** for employees.
  - Provides **penalties** for non-compliance (misclassification).

Why should you care about the FLSA?

- In this jurisdiction alone, FLSA case filings have **nearly doubled** from 2014 to 2015, and continue to rise in 2016.
- The Department of Labor recently updated these regulations, effectively extending FLSA coverage to an **additional 4.2 million workers** across the country.
- The FLSA provides a mechanism for a collective action, which permits the aggregation of hundreds or thousands of claims requiring only that employees be **"similarly situated."**
  - Claims can be filed by the Department of Labor **or** privately enforced (by plaintiffs' attorneys)

Liability is Costly

- **The FLSA allows employees to recover damages in the amount of their unpaid wages or overtime for up to two or three years before the date they filed a lawsuit.**
  - Depending on whether the employer acted "**willfully**"
  - If the employer involves counsel and seeks advice regarding compliance with the FLSA *before* litigation ensues, it may help eliminate any finding of a willful violation
- **Damages may be doubled if the court finds the employer acted in bad faith.**

Personal Civil and Criminal Liability

- Directors, officers, and even (rarely) supervisors can be held personally liable for employee wages owed under the FLSA where the employer-company is insolvable.
- The FLSA also authorizes criminal prosecutions as to any person who violated the FLSA **intentionally, deliberately, and voluntarily**, **or** with reckless indifference to or disregard for the FLSA's requirements.
- FLSA criminal liability can also extend to owners, partners, directors, officers, shareholders, managers, supervisors, and even others.
- The penalties include a fine of up to $10,000, imprisonment for up to six months, or both.
  - A person cannot be imprisoned for the first FLSA criminal conviction.

How do I get into compliance?

Ask yourself these questions:

- Am I properly classifying employee vs. independent contractor?
- Am I properly classifying employees as exempt and non-exempt?
- Am I paying my employees for all compensable hours?
  - Suffered or Permitted
  - Waiting Time
  - On-Call Time
  - Meal and Rest Periods
  - Training Time
  - Travel Time
  - Sleep Time
- Am I correctly calculating my employees' overtime pay?

Overview: Independent Contractor vs. Employee

Courts typically consider the following factors – REMEMBER, you do not have to win them all:

1. The extent to which the work performed is an **integral part** of the employer's business;
2. The degree of **control or supervision** exercised or retained by the employer;
3. Whether the work performed requires **special skills and initiative**;
4. The extent of the **relative investments** of the employer and the worker;
5. The **permanency of the relationship**; and
6. The worker's opportunity for **profit or loss** depending on his or her managerial skill.

Overview: Exempt vs. Non-exempt Employees

To apply most exemptions, an employee must pass three tests, the:

1. Salary Level Test

- Currently: **$455/week**
- December 1, 2016 (with the updates): **$913/week**

2. Salary Basis Test

- Predetermined amount of compensation each pay period
- Cannot be reduced because of quality or quantity of work performed by the employee
- Must receive full salary for any week in which the employee performs any work, regardless of days or hours worked
  - Does not need to be paid for any workweek in which employee performs no work

3. Job Duties Test

- Executive employees
- Administrative employees
- Professional employees

Overview: What hours are compensable?

- **Work not requested but "suffered or permitted."**
- **"Waiting time" when the employee is unable to use the time effectively for his or her own purposes and the time is controlled by the employer.**
- **On call time when the employee has to stay on the employer's premises or so close to the employer's premises that the employee cannot use that time effectively for his/her own purposes.**
- **Rest periods of short duration (normally 5-20 minutes)**
- **Training time (meetings, lectures, etc.) unless:**
  - Attendance is outside regular working hours;
  - Attendance is voluntary;
  - The course, lecture, or meeting is not job related; **and**
  - The employee does not perform any productive work during attendance
- **Travel time between job sites during the normal work day.**
- **Time spent sleeping when an employee is on duty for less than 24 hours (if an employee is on duty for more than 24 hours, the parties can agree to exclude "bona fide sleep periods")**

Overview: Calculating Overtime Pay

- **Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek.**
- **Compliance is determined by workweek, and each workweek stands by itself**
- **Workweek is 7 consecutive 24 hour periods (168 hours)**
- **The Regular Rate is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek**
  - The Regular Rate may not be less than the applicable minimum wage.
  - There are some exclusions that apply to the regular rate.

What now?

- **The DOL's new salary test for exempt employees is set to take effect December 1, 2016. The new test raises the salary level to qualify for certain exemptions from $455/week to $913/week.**
- **BUT, two lawsuits, filed September 20, 2016, may delay or outright stop the rules from taking effect.**
  - **Texas** joined **20 states** in a lawsuit against the DOL, its secretary, and other federal officials seeking to halt the new overtime rules.
    - The other states are Alabama, Arizona, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nebraska, New Mexico, Nevada, Ohio, Oklahoma, South Carolina, Utah, and Wisconsin.
  - Separately, but in the same Texas federal court, a coalition of more than **50 business groups** filed a similar lawsuit.
    - These groups include the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, National Automobile Dealers Association, and the National Federation of Independent Business.

Some practical advice

- **Take advantage of your resources:**
  - Legal blogs and forums, trade organizations, seminars
- **Get educated**
- **If you think you might be out of compliance, conduct an audit.**
  - Law firms consult with companies regularly to audit their pay practices and employee classifications and work with employers to get them in compliance.
  - A legal advisor can help you stay on top of changing developments in the law. Which may be especially important in the coming year.
  - Remember, hiring an attorney before litigation ensures a court will not find you acted willfully, and you will be liable for less in damages.

QUESTIONS?