

Joint Employment, Contractor Rules & Frequency of Pay Changes

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*From the desk of **Rachel Demarest Gold***

Three things I want to make sure are on your radar, the:

- NEW NLRB Joint Employment Rule
- NEW USDOL Independent Contractor Rule
- NYS Frequency of Pay Law Changes

Joint Employment

Starting in February, a NEW RULE on JOINT EMPLOYERS will control the National Labor Relations Board. The Rule says that any business that has the authority to control any of the “essential terms and conditions” of a worker’s employment will be deemed a joint employer. You can learn more about the details of the rule here: <https://www.nlr.gov/sites/default/files/attachments/pages/node-9558/joint-employer-fact-sheet-2023.pdf>

In the meantime, however, take note: *This applies even if the authority is never exercised.*

The Independent Contractor Standard

Taking effect March 11, 2024, US DOL will implement its new Rule on classifying workers. That means that industries that rely on the IC model need to make sure their models are compliant. The truth is, they rarely are. To be a true IC, the worker generally must have their own bona fide business with more than one client, and be doing a job that is completely unrelated to the business where they work (for example, painting walls at a law firm). You can learn more about the details here:

<https://www.dol.gov/agencies/whd/government-contracts/small-entity-compliance-guide>

Details aside, however, these Rules have far-reaching implications as each of them significantly expands their agency's reach. The NLRB jurisdiction extends to any business with a certain annual gross income and is not just about unions – it includes any employee activity that is considered “concerted”. US DOL already has universal jurisdiction and this expansion of its analysis has the potential to sweep even more business into their enforcement fold. Even here in New York, where our standards are already liberal and obtuse, we now have the ***Freelance Isn't Free*** law which has been in effect in NYC since 2017 but will become the law *statewide on May 20th*.

What does it all mean?

Government agencies that enforce worker protection laws are ramping up to target the “gig economy”. So much of our workforce now works for multiple entities on varying schedules and often remotely – that tracking down minimum wage, overtime, payroll taxes, UI contributions, and other expenses avoided with illegal employment models – is becoming more and more difficult. All these laws are designed to protect workers who do not have a full-time in-person relationship with a single employer. Each of them is focused on making sure that there are a wider range of businesses and individuals to pursue and hold accountable when a worker's rights are violated — or a worker's benefit is evaded.

What should you do about this?

Check your agreements. Do you have the authority to control staff at another location? Is any of your staff subject to control by others? Who are your independent contractors? Verify them: What do they do? Are they genuinely a separate entity in business for themselves? Do the agreements you have with them meet the requirements under the new laws? Invest in finding out.

“Frequency of Pay” Lawsuits

On a more optimistic note, a few months ago I mentioned I had clients who were sued under New York's Frequency of Pay provision. The law says that “manual laborers” must be paid every week. A judge had found that the law included a “private right of action” which allowed employees to sue employers who paid them every 2 weeks, and get damages that included all their wages again plus interest, attorneys' fees, etc. Last week, in a long-awaited decision, a different judge ruled that there is NOT a private right of action and only DOL can enforce the law with penalties.

While the decision means that the law you have to follow now depends on the jurisdiction you are sued in, it also means that the Court of Appeals will hopefully get the opportunity to weigh in and resolve this. If it does not, however, elimination of this dangerous interpretation of the law is proposed in the Governor's Budget and will hopefully resolve this once and for all.

In the meantime, evaluate your workforce. If you pay people bi-weekly instead of weekly, analyze their job duties. If their day has them doing manual labor – even just standing – then you must change your practice to paying them every week. Please let us know if you need any help.

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