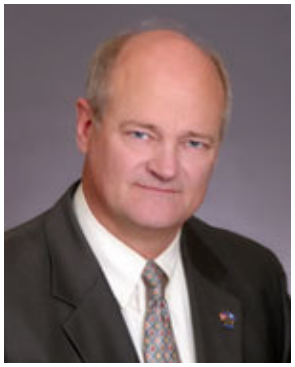
Harry Garmon

From: David H. Creasy, CPA <david@creasycparichmond.com>
Sent: Tuesday, September 08, 2015 2:03 PM
To: Harry Garmon
Subject: The NLRB Does an About Face

The Creasy Report

David H Creasy, CPA

Business and Personal Tax Solutions



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SEPTEMBER 2015

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Dear Harry,

The Creasy Report is a monthly accounting and finance newsletter for individuals, small/mid-size businesses and not-for-profit entities. Our objective is to deliver helpful, topical information that will save you time and money navigating the shoals of IRS requirements and sound financial management.

We'll be respectful of your time with short articles and tips plus provide links to resources that provide more in-depth analysis.

This month we'll deal with a game-changing new ruling by the National Labor Relations Board presenting particularly painful potential affects on small and mid-size businesses. Plus, we'll ponder on the question,

IRS Website

"Who can you trust?" in an article that outs IRS workers being busted for identity theft and filing false returns

Your comments and suggestions to increase the value of the newsletter are encouraged. I promise to review each and every submission and respond promptly.

Sincerely,

David Creasy

P.S. Feel free to forward this enewsletter to anyone you think might find it useful.

NLRB DOES AN ABOUT-FACE

Word Count: 993
Reading Time: 4.0 minutes

Negates Four Decades of Precedent

The Scenario

OK. You are an employer and contract with Fictitious Staffing Company (FSC) to provide you with temporary employees. Your agreement with FSC specifies that FSC is the employer of the employees and responsible for all disciplinary matters as well as hiring, firing and determining wages. You retain the right to prohibit FSC employees to work at your facility and set upper limits on certain employees' wages, but never acted on either option.

Prior to August 27, 2015, your company would be considered a "joint employer" with the staffing company if you exercised, "direct operational and supervisory control" over employees. That means to be considered a joint employer, an employer would have to both possess and actually exercise direct and immediate control over the terms and conditions of employment. In the scenario above, clearly that would not have been the case, as FSC would be deemed the sole employer.

Based on a National Labor Relations Board (NLRB) ruling last month, the decisive factor that determines joint employer status has been expanded. The NLRB considers a company to be a joint employer when the company exercised control over employees "indirectly through an intermediary, or whether it has reserved the

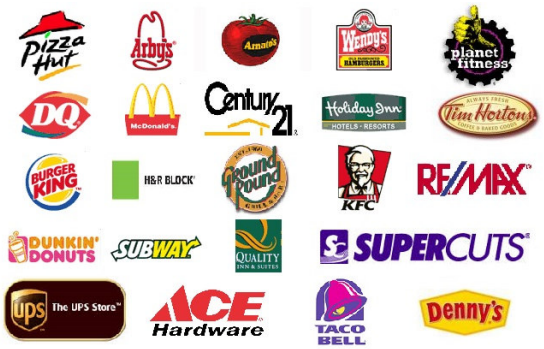
authority to do so". **Click here for Ruling**

The Net Effect of Being a Joint Employer

Now a company can be considered a joint employer by the NLRB if it merely has the potential to exercise control over working conditions, regardless whether that control is used. That is precisely the type of control typically exercised by businesses which employ temporary employees through staffing agencies.

The potential affect on businesses, especially small businesses and start-ups, may be painful. Essentially a company that hires a subcontractor to do work could be considered a joint employer with the sub. Based on the contractual relationship, the NLRB ruling determines that companies using workers hired by another business, e.g. temp agencies and contractors are jointly responsible for labor violations.

Temporary workers in the U.S. have mushroomed to more than 3.4 million, representing about 2% of the American workforce. So it is obvious that staffing agencies and other contractual employment arrangements have proliferated. Smaller companies and start-ups, particularly, will find it much riskier and more expensive to hire people. For example, the ruling could force companies to hire workers they currently get from staffing companies.



Franchise Inclusion

The number of businesses that could be burdened with unfair labor practice findings has been significantly expanded by the NLRB ruling. While the ruling did not mention franchises, both dissenting members of the five-member Board identified franchisors and franchisees would be affected.

As evidence of this likelihood, the NLRB Office of General Counsel contends that McDonald's has enough control over its franchisees' operations to be considered a joint employer with individual franchise owners. It will be instructive to see how these hearings pan out.

Organized Labor Implications

The NLRB ruling included a statement that it was merely applying common law precedent to "encourage the practice and procedure of collective bargaining ... when otherwise bargainable terms and conditions of employment are under the control of

more than one statutory employer." Potentially, firms affected by the ruling may be required to bargain with unions representing outsourced employees along with the staffing agency that hires them.

Labor unions have faced years of declining membership. This ruling may be a catalyst to reverse that trend. On a case-by-case basis, labor may have grounds to claim that business outsourcing, vendor relationships and franchising are candidates for joint employer status.

Department of Labor (DOL) Weighs-in ... Similar to the NLRB

In a related matter, the DOL has expressed concern as to whether contingent workers and temporary workers can truly be classified as independent contractors by the DOL and the IRS. Staffing agencies employ temp workers, so the DOL interpretations may have additional impact on the issue of joint employers.

The DOL's Wage and Hour Division has an active national initiative to uncover employee misclassification as independent contractors. **Click here to see**

As you will see, the concerns of the DOL are strongly worded. *"The misclassification of employees as something other than employees, such as independent contractors, presents a serious problem for affected employees, employers, and to the entire economy."*

Historically, the DOL independent contractor criterion was based on the degree to which an individual's work was controlled by the organization for which he/she performed services. That has now changed.

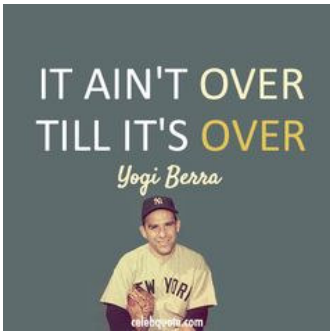
The DOL has issued a new Administrative Interpretation that applies an "economic realities" test to determine a workers classification as either an independent contractor or an employee. The determination will be based on whether the worker is economically dependent on the employer or actually in business for him or her self. **Click here** for the complete text of the Administrative Interpretation.

That means that many workers currently classified as Form 1099 independent contractors, but judged to be not truly in business, will need to be reclassified as employees. **Click here** for the DOL blog.

The net effect is potentially serious implications for independent contractors as well as those who contract for their services.

The lesson for employers contemplating using freelancers ... do your homework!

What to Expect on the NLRB Ruling



As Yogi Berra said, "It ain't over 'til it's over." There will be plenty of back and forth in the courts and perhaps Congress on the NLRB ruling. Regardless of how it all plays out, employers should brace themselves for a significant acceleration in determinations of joint employer status.

IRS Workers Busted . . .

IRS Workers Busted for ID Theft, Filing Bogus Returns
Who Can You Trust?

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David H. Creasy, CPA
David@CreasyCPARichmond.com
http://www.creasycparichmond.com

Created by Top of Mind Communications LLC info@tomcrva.com

David H. Creasy, CPA | 2214 Westwood Avenue | Richmond | VA | 23230