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What do you control?

- PEOs should be careful to NOT assume more control or responsibility under the CSA than absolutely necessary.
- Focus on compliance with state licensing statute requirements. Ex: Tex. Labor Code 91.032(a).
- But – disclaim responsibility for things you do not and cannot control.
- Scope of your control is a critical issue in the developing Joint Employer law under the National Labor Relations Act. (Browning Ferris, McDonald's cases)

Joint Employer - NLRB

- Browning Ferris operated a recycling plant. Some of work was outsourced to a staffing firm, which provided on-site supervision.
- NLRB decision held Browning Ferris was a joint employer of the staffing firm employees.
- NLRB focused on rights of control, both potential right to control as well as actual control. “Indirect control.”
- Concern – Would this apply in the PEO context?
- Remember – PEOs intentionally create an employment relationship with the employees.

Joint Employer - NLRB

- *Freshii* Advice Memo gives clues to ways to structure the arrangement to minimize the joint employer risk.
- Another franchise case, but this time the NLRB position was that the franchisor was **not** a joint employer with the local franchisee.
- NLRB issues advice memos in cases where it does not litigate the complaint, but wants to develop the law.



Freshii

- Freshii had no role in hiring, firing, disciplining or supervising the franchisee's employees. While prospective restaurant employees could submit applications online, Freshii simply forwarded applications to the local franchisee without any screening.
- Only the franchisee was responsible for determining its employees' wages, raises and benefits. Franchisees could change wages without consulting Freshii.

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- Freshii had no involvement in scheduling and setting work hours through use of software and application of algorithms or otherwise.
 - While Freshii's operations manual and sample handbook contained hiring, scheduling and disciplinary suggestions, franchisees were not required to follow Freshii's recommendations and many did not.



Workers Comp.

- Under the 2013 amendment to the Texas PEO statute, PEO and Client can choose whether the WC for the Covered Employees will be held by the Client or by the PEO.
- **Action Item**
 - Make sure the CSA expressly states whether PEO or Client will hold the WC coverage.



WC - Endorsements

- WC 42 03 11
 - On the PEO's WC policy, to provides coverage for Covered Employees.
- WC 42 03 12
 - On Client's WC policy, to exclude coverage fo rhe Covered Employees who are insured under the PEO's policy.



WC - Endorsements

- WC 42 03 13 - Executive Employee Inclusion Endorsement
 - On the PEO's policy to provide coverage for some or all of the executive employees of the clients listed on the endorsement. Separate endorsement is required for each client.

WC - Endorsements

- WC 42 03 14 - Executive Employee Exclusion Endorsement
 - On the PEO policy to exclude coverage for the client's executive employees if the CSA specifies that an executive employee is not a covered employee; or if an executive employee is a covered employee and requests to be excluded from coverage, or is an executive employee is excluded from coverage at the option of the carrier.

WC - Endorsements

- WC 42 03 15 - Advance Notice of Cancellation
 - On Client's policy that is covering both direct (sole) employees of Client and Covered Employees. Requires the carrier to provide advance notice *to the PEO* before cancellation of the Client's policy.



Texas Mutual Q/A

- Q: Can executive officers, members/managers, sole proprietors, partners, and spouses of sole proprietors/partners be excluded from coverage on a policy?
- A: Yes, but subject to two restrictions:
 - Are automatically *included*, unless specifically excluded by endorsement.
 - Must own at least 25% of the business to be excluded upon written request. (Otherwise, requires underwriter's approval.)



Texas Basic Manual

- Exclusion of executive officers is covered in the Basic Manual under Rule IX, page R-24.

Texas SUTA & Restarts

- HB3150 - Texas statute, affects ONLY Texas SUTA.
- Prior wages are credited for purpose of the taxable wage base.
- Refers to the definition of the taxable wage base, so HB3150 is limited to wage base restart issues.
- Not tied to whether or not taxes have been paid.
- Not connected to Certified PEO program under the SBEA. PEO does not have to be a Certified PEO under SBEA to take advantage of HB3150.



SBEA – CSA requirements

- Bad News – There are six elements required in the CSA to comply with §3511.
- Good news – Looks a lot like what we've been required to do under the Texas PEO statute since 1993.



SBEA – CSA Requirements

- Contract must be in writing.
 - Tex. Labor Code 91.031(a)
- PEO must assume responsibility for payment of wages to such individual, without regard to the receipt or adequacy of payment from the customer for such services.
 - Tex. Labor Code 91.032(a)(2)



SBEA – CSA Requirements

- Assume responsibility for reporting, withholding, and paying any applicable taxes under subtitle C, with respect to such individual's wages, without regard to the receipt or adequacy of payment from the customer for such services.
 - Tex. Labor Code 91.032(a)(3).



SBEA – CSA Requirements

- Assume responsibility for any employee benefits which the service contract may require the certified professional employer organization to provide, without regard to the receipt or adequacy of payment from the customer for such benefits
 - Not specifically required under the Texas PEO licensing statute.



SBEA – CSA Requirements

- Assume responsibility for recruiting, hiring, and firing workers in addition to the customer's responsibility for recruiting, hiring, and firing workers.
 - Tex. Labor Code 91.032(a)(1).



SBEA – CSA Requirements

- Maintain employee records relating to such individual.
 - Not exactly required under the Texas licensing statute.
 - Tex. Labor Code 91.048(1) does require the PEO to “maintain adequate books and records regarding the license holder's duties and responsibilities.”
 - Might require tweaking your CSA to specifically address this SBEA requirement.



SBEA – CSA Requirements

- Agree to be treated as a certified professional employer organization for purposes of section 3511 with respect to such individual.
 - Nothing comparable under Texas PEO statute.