ABRAHAMS KASLOW & CASSMAN LLP
80 YEARS
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CORPORATE TRANSPARENCY ACT RULED UNCONSTITUTIONAL IN ALABAMA

What does that mean for my business?

By Alex Montoya

Millions of businesses across the United States have begun grappling with the Corporate Transparency Act's (CTA) new ownership reporting requirements.

Since the CTA became effective on January 1, 2024, owners of legal entities subject to the CTA have started the process of gathering and reporting ownership information to the Department of Treasury's Financial Crimes Enforcement Network (FinCEN).

However, such information gathering and reporting has not come without protest from some affected by the CTA.

The National Small Business Association (NSBA) and an individual, Isaac Winkles, sued the Department of Treasury, the Treasury Secretary Janet Yellen, and the Acting Director of FinCEN, arguing the CTA is unconstitutional.

The case asserted that Congress lacked the authority under the U.S. Constitution to enact the CTA's information disclosure and reporting requirements.

On March 1, 2024, the U.S. District Court Judge for the Northern District of Alabama held that the requirements of the CTA fell outside of limits placed on Congress and the legislative branch by the U.S. Constitution. As a result, the Court ruled that FinCEN is unable to enforce the requirements of the CTA against the plaintiffs in the case—the NSBA, members of the NSBA, and Isaac Winkles and his entities.

It can be expected that there will be considerable future legal action in both NSBA v. Yellen and in similar cases across the country, as evidenced by a Notice of Appeal filed by the government in NSBA v. Yellen on March 11, 2024.

Though the future of the CTA is uncertain, for now, the beneficial ownership reporting requirements are still required by all entities subject to the CTA and that are not involved in NSBA v. Yellen. FinCEN has indicated that reporting is still required in a Notice issued on March 4, 2024, on its website.

The attorneys at Abrahams Kaslow & Cassman LLP are prepared to help guide you through the requirements of the CTA, provide information on the most recent legal and legislative developments related to the CTA, and file with FinCEN on behalf of your business. Please contact Alex Montoya at amontoya@akclaw.com for more information.

AKC Law Welcomes Hallie A. Hamilton

Abrahams Kaslow & Cassman is pleased to welcome Hallie A. Hamilton to our litigation team. Hallie is joining us following two judicial clerkships. She clerked for Judge L. Steven Grasz on the U.S. Court of Appeals for the Eighth Circuit and for Justice Jonathan J. Papik on the Nebraska Supreme Court.

Hallie earned her J.D. at Creighton University School of Law in 2021, where she graduated magna cum laude and served as the Editor in Chief of the Creighton Law Review. During her academic tenure, Hallie received several honors, including the Creighton 2019 Moot Court Team Champion and the Creighton 2019 Best Appellate Brief Award. She was also recognized with the Nebraska State Bar Foundation 2020 Silver Quill Award and received multiple CALI Awards.

At AKC Law, Hallie's practice will focus on civil litigation, medical malpractice defense, employment law, and appellate practice.

Hallie's extensive experience working on appellate matters during her clerkships at the Federal Court of Appeals and Nebraska Supreme Court will be a great asset to our team. We warmly welcome Hallie and look forward to working with her!

EMPLOYMENT LAW

DOL Issues Final Rule on Independent Contractors

By Payton Hostens

Earlier this year, the U.S. Department of Labor (DOL) published a final rule that revises its guidance regarding the classification of employees and independent contractors under the Fair Labor Standards Act (FLSA).

The FLSA governs the minimum wage and overtime requirements that apply to employees but not to independent contractors. The FLSA does not define "independent contractor" or provide any framework for distinguishing an employee from an independent contractor. In January 2021, to provide such framework, the DOL published the first formal independent contractor rule.

The final rule went into effect March 11, 2024 and ***rescinds*** *the January 2021 rule.*

Under the final rule, six factors are considered when determining whether a worker is an independent contractor or an employee under the FLSA:

1. opportunity for profit or loss depending on managerial skill;
2. investments by the worker and the potential employer;
3. degree of permanence of the work relationship;
4. nature and degree of control;
5. extent to which the work performed is an integral part of the potential employer's business; and
6. skill and initiative.

No single factor or subset of factors is dispositive. Instead, the final rule focuses on the totality of the circumstances to determine whether an individual is an independent contractor or employee.

The DOL recognizes that one or more of these factors may be more relevant than others depending on the facts and circumstances and that additional factors may be relevant.

Ultimately, the final rule indicates that the outcome depends on the worker's economic dependence on the employer—individuals who are economically dependent on the employer for work are employees, and individuals who are in business for themselves are independent contractors.

According to the DOL, the final rule is intended to "reduce confusion, improve compliance, and better protect working people." Employers should keep in mind that the penalties for misclassifying a worker can be substantial, and simply calling a worker an independent contractor or even having a contract is not enough.

Be sure to contact an attorney who is knowledgeable about employment law and the DOL's new rule if you intend to hire someone as an independent contractor. Contact Payton Hostens at phostens@akclaw.com with any questions.

AKC LAW NEWS

Andy Deaver Named to Sheltering Tree Board

There is no better way to show our appreciation to the clients and communities we serve, than to give back.

This is why we are proud to announce that Andy Deaver, a Partner at Abrahams Kaslow & Cassman was recently voted onto the Sheltering Tree Board of Directors.

Andy is a member of the AKC Law Estate Planning Team. One of his areas of expertise is in Supplemental Special Needs Trusts.

Special Needs Trusts are a valuable estate planning tool that many people who have family members with developmental disabilities use to provide the beneficiary with a lifetime of legal, financial, medical, and educational needs.

Sheltering Tree is an Omaha-based organization that provides safe and affordable, consumer-controlled apartment communities for adults with developmental disabilities.

Denise Gehringer, the Executive Director of Sheltering Tree said "Andy's presence on our team is truly exciting and I eagerly anticipate his contributions in addressing the urgent housing needs of adults with developmental disabilities."

Congratulations Andy!

SHELTERING TREE
ShelteringTreeCommunity.org





When do I need to update my Estate Plan?

By Sam O'Neill

Frequent review of your estate plan is crucial for protecting your assets and ensuring your wishes are carried out effectively.

To help you determine if it's time for a review, here are five essential questions to consider:

1. **Have you experienced any significant life changes?** Life events like marriage, divorce, the birth of a child, or the passing of a loved one can significantly impact your estate plan. It is essential to review your current estate plan to determine if any life changes necessitate an update to your estate plan.
   If you have minor children, it is vital to review your Will to make sure any guardianship provisions are current and reflect your preferences for who should care for your minor children in the event of your incapacity or death.
2. A**re your beneficiaries and fiduciaries current?** Over time, relationships may evolve, and individuals named in your estate plan may change. Reviewing and updating your beneficiaries and fiduciaries (Personal Representatives, Trustees, Financial Power of Attorney, and Health Care Power of Attorney) ensures that your assets are distributed according to your wishes and responsible individuals are designated to manage your affairs. Consideration should also be given to any advanced healthcare directives, such as your Living Will or Health Care Power of Attorney, to ensure you have appointed trusted individuals to make medical decisions on your behalf if you become incapacitated.
3. H**as there been a change in your financial situation?** Have you received an inheritance, purchased or sold property, or started a business? Any of these situations may require adjustments to your estate plan. Ensuring that your estate plan reflects your current financial circumstances is essential for effective asset management and tax planning.
4. **Do you have any digital assets?** With the increasing prevalence of digital assets such as cryptocurrency, social media accounts, and online financial accounts, ensuring your estate plan contains provisions for managing and distributing these assets appropriately is important.
5. **Have you planned for charitable giving?** If you have, it is important to review your estate plan to ensure it is consistent with your current wishes. The charitable landscape is constantly evolving with the creation of new organizations, causes, and initiatives. Regularly reviewing and updating your charitable giving provisions ensures that your philanthropic goals align with your current passions and beliefs.

If you have any questions regarding your estate plan, gaining the assistance of an estate planning attorney can be beneficial.

Abrahams Kaslow & Cassman LLP has been assisting families with estate planning since 1944.

Contact Sam O'Neill at soneill@akclaw.com for more information.

Traditional Values INNOVATIVE VISION

2024 is a big year for Abrahams Kaslow & Cassman LLP. It marks AKC Law's 80th Anniversary and Partner Howard Kaslow's 60th Year of Practicing Law.

Since 1944, AKC Law has worked to build long-term partnerships with our clients. Together, our attorneys combine years of experience with passion and creativity to provide you with the highest quality legal advice in business law, litigation, and trusts & estates.

Read more about the firm in the March 29 issue of the *MIDLANDS Business Journal at* https://www.akclaw.com/80-years-anniversary/.

NLRB'S JOINT EMPLOYER RULE:

Which One Applies?

By Julie M. Ryan

The National Labor Relations Board (NLRB) is an independent federal agency that regulates matters such as employees' rights to engage in concerted activity with other employees to seek better working conditions and aims to prevent and remedy unfair labor practices through enforcement of the National Labor Relations Act (NLRA).

The NLRB has jurisdiction over a broad range of employers, including private employers whose activity in interstate commerce exceeds certain minimal levels determined based on the type of industry. Employers subject to the NLRB's jurisdiction need to stay current on the NLRB regulations.

From time to time, the NLRB issues regulations regarding joint employers. These regulations have a great deal of impact on employers given that if found to be a joint employer, it often carries an obligation to bargain collectively with the representative of the group of employees over which it is a joint employer.

Recently, the NLRB issued a new final rule to change the prior rule issued in 2020 for the standard for determining when a joint-employer relationship exists.

The 2020 joint-employer rule applies a higher threshold for when an employer could be found to be a joint employer. Under the 2020 rule, an employer is a joint employer when it both possesses and exercises "substantial direct and immediate control" over one or more essential terms or conditions of employment in such a way that warrants a finding that the entity "meaningfully affects matters relating to the employment relationship" with that employee.

"Essential terms of employment" is defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

Reserved rights to exercise control or indirect control over one or more of those areas could be considered as evidence that the employer is a joint employer.

But reserved rights and indirect control could not establish such joint employer status if the employer did not actually possess and exercise substantial direct and immediate control to the extent required under the test. For example, if the entity did not actually decide the wage rates paid to an individual or for a certain job classification, then the entity is not a joint employer (at least regarding wages) under the 2020 rule.

Additionally, the 2020 rule specifically states that control does not meet the threshold of being "substantial direct and immediate control" if only exercised on a sporadic, isolated, or de minimis basis.

Under the 2023 joint-employer rule, two or more employers of the same employee are joint employers if the employers "share or codetermine" matters governing that employee's "essential terms and conditions of employment." That concept exists if the employer possesses the authority to control or actually exercises the control (whether directly, indirectly, or both) over one or more of the employees' "essential terms and conditions of employment."

There, "essential terms and conditions of employment" means:

1. wages, benefits, and other compensation;
2. hours of work and scheduling;
3. assignment of duties to be performed;
4. supervision of performance of duties;
5. work rules and directions governing the manner, means, and methods of performance of duties and grounds for discipline;
6. tenure of employment, including hiring and discharge; and
7. working conditions related to the health and safety of employees.

An employer is a joint employer even if it never actually exercises control over any of one of those matters but has the authority to do so and/or even if it exercises control over one of those areas indirectly, say, through an intermediary, rather than directly.

Additionally, there is no exception for an entity that only exercises control on a sporadic, isolated, or de minimis basis.

The 2023 rule is much broader than the 2020 rule. An entity such as a franchisor that was not a joint employer under the 2020 rule may be held to be a joint employer under the 2023 rule.

The status of the legality of the 2023 rule is currently undetermined. It was scheduled to go into effect on March 11, 2024. However, in a decision entered on March 8, 2024, a federal district court vacated the 2023 rule, both as currently set forth and insofar as the NLRB may attempt to pass a new version of that regulation.

Further attempts to do so or appeals from the court's decision may occur. **In the meantime, the 2020 rule controls the joint-employer standard for NLRA-related matters.** Still, an employer may seek to perform due diligence with regard to its relationships with subcontractors or other entities to determine whether it would be held to be a joint employer under the 2020 rule and/or 2023 rule to ensure proper protections are in place and be prepared for any regulatory change.

For more information, please contact Julie M. Ryan at **jryan@akclaw.com** or 402.392.1250.

80 YEARS AK&C ABRAHAMS KASLOW & CASSMAN LLP ATTORNEYS AT LAW

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