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Fifth Circuit Again Denies Arbitration for Pipeline Inspectors' FLSA Claims

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On May 27, 2022, in *Hinkle v. Phillips 66 Company*,[1] the Fifth Circuit Court of Appeals issued the latest in a string of opinions on arbitrating Fair Labor Standards Act (FLSA) claims, and it is one that should grab the attention of any employer that uses contractors in its operations. As many companies know firsthand, a single FLSA class (collective) action can be costly—not just in defense costs but also in damages. Multi-state employers also face the daunting task of complying with varied (and at times arcane) state wage-and-hour laws that can impose additional penalties for violations. Given the potential for significant damages, businesses should not be surprised that claimants are testing new FLSA theories, including the one at issue in *Hinkle*.

A. Recent Fifth Circuit Cases: *Newman I*, *Newman II*, and *Hinkle*

In several related opinions from the Fifth Circuit Court of Appeals, *Newman I*,[2] *Newman II*,[3] and most recently *Hinkle*, a pipeline-inspection firm hired some inspectors and required them to sign arbitration agreements. The firm sent the inspectors to work for client companies. The inspectors then sued the *client companies* for FLSA violations—and did not include the inspection firm. In *Newman I*, the client company sought to compel arbitration under the agreement between the inspection firm and inspectors, and in *Newman II* and *Hinkle* the pipeline-inspection firm intervened and moved to compel arbitration. However, in each case, the court denied the request to compel arbitration. The court found that the arbitration agreement only covered claims between the inspection firm and the inspectors, not claims against a third-party client. By only suing the client and not the inspection firm (the actual employer), the inspectors were able to avoid arbitration of their overtime claims. While some companies have been successful fending off similar claims, others have not, as these cases demonstrate.

B. Best Practices to Protect Against FLSA Claims by Contractors

So, what can businesses do to minimize the risk of FLSA and other wage claims by contractors? To start, and to address the arguments in the *Newman* and *Hinkle* cases, any company that uses contractors should do the following:

1. Ensure agreements with contractors clearly indicate that the contractor is responsible for compliance with all employment laws, including federal and state wage and hour laws. The contractor should agree to pay its workers all wages, including overtime due (if any). The easiest way to avoid wage-and-hour claims is for the contracting company to pay wages and overtime, if it's due, timely.
2. Require contractors to indemnify *and defend* against wage-and-hour claims by any individual working on behalf of the contractor. This defense and indemnification obligation should also extend to claims by individuals working for subcontractors as well.
3. Require a collective action waiver from any individual providing work on behalf of the contractor. The company can incorporate this requirement into the master services agreement with the contractor and include a form (and enforceable) agreement to be used between the contractor and its workers.

4. Require the contractor to implement arbitration agreements with its workers and expressly provide that the company is a third-party beneficiary of and can enforce the arbitration agreement. Assuming the arbitration agreement is otherwise valid, this should prevent the situation in *Newman* and *Hinkle* where the worker avoided arbitration by only suing the client company, not the contractor-employer.

To be sure, *Newman* and *Hinkle* represent only one tactic claimants are using or will use in wage-and-hour litigation. But the cases serve as a reminder to be mindful of developments in wage-and-hour litigation and ensure contractor agreements are fortified against third-party FLSA claims.

[1] *Hinkle v. Phillips 66 Company*, --- F. 4th ---, 2022 WL 1711660 (5th Cir. 2022)

[2] *Newman v. Plains All Am. Pipeline, LP*, 23 F.4th 393 (5th Cir. 2022).

[3] No. 21-51089, 2022 WL 1114407 (5th Cir. April 14, 2022) (per curiam).

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