

Batting, Roberta

From: Horwitz, Charles
Sent: Wednesday, February 25, 2004 10:16 AM
To: Batting, Roberta
Subject: registration for a professional employee leasing agency--for labor standards opinion files

NEW YORK STATE DEPARTMENT OF LABOR

Inter-Office Memorandum

February 25, 2004

To: Charles DeSiervo, Chief, Apparel Industry Task Force

From: Charles Horwitz, Counsel's Office

Re: Request for Opinion concerning registration under Labor Law, Article 12-A

You asked whether JRB Finishing Inc. (JRB) and/or a professional employer organization (PEO), or both, must register as a garment contractor under Labor Law, Article 12.

For the reasons discussed below, until you have ascertained JRB and PEO's employment relationship, your question cannot be answered.

JRB

JRB employs 19 garment production workers, and it is retained by manufacturers who supply fabric and other materials in fulfillment of a wholesale purchase contract. JRB produces women's apparel for manufacturers that is sold to the public by them or by retailers.

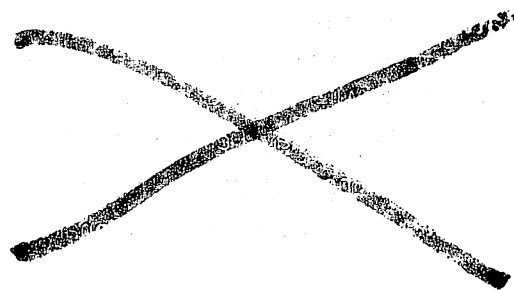
JRB retains a PEO to hire, fire and pay its production workers and pay all government taxes and workers' compensation insurance. You are presently investigating other aspects of PEO's contractual relationship with JRB concerning this matter.

Section 340, Article 12-A provides in pertinent part:

d) "Manufacturer" shall mean any person who (i) in fulfillment or anticipation of a wholesale purchase contract, contracts with a contractor to perform in New York state the cutting...or otherwise producing any...women's apparel...designed or intended to be worn by any individual which, pursuant to such contact, is to be ...sold or offered for sale to a retailer or other entity, or ii) cuts...or otherwise produces in New York state any ...women's ...apparel...designed or intended to be worn by any individual which is to be sold or offered for sale.

(e)"Contractor" shall mean any person who, in fulfillment of a contract with a manufacturer, performs in New York state the cutting...or otherwise producing any ...women's... apparel... designed or intended to be worn by an individual which is to be sold or offered for sale.

2/25/2004



Section 341.1 provides in pertinent part that: "No manufacturer or contractor shall engage in the apparel industry unless he or she registers with the commissioner, in writing, on a form provided by the commissioner...document[ing] that a workers compensation insurance policy is in effect for the registrant's production employees working in New York state..."

As JRB contracts with manufacturers in New York state to produce women's apparel that is sold by manufacturers or retailers and that is worn by individuals, it must register as an apparel contractor. To register however, it must document that it has obtained a workers' compensation insurance policy for its New York state production employees.

Because JRB has contracted with a PEO to obtain such a policy for its New York state production employees, if it complies with all of the other Section 341 registration requirements, it would be in compliance with the law.

But, as mentioned above, before we can determine whether JRB alone, PEO alone, or whether both firms must register, it is necessary to ascertain JRB's relationship with PEO.

PEO

Labor Law, Article 31, Section 915 requires professional employer organizations to register with the New York State Department of Labor and Section 922. 1 provides that:

...A professional employer organization shall meet the following standards: (a) Have a professional employer agreement between the client and the professional employer organization setting forth the responsibilities and duties of each party...(i)...However, the client shall maintain such direction and control over the worksite employees as is necessary to conduct the client's business and without which the client would be unable to conduct its business...

In addition, Section 922.6 (b) provides that:

Worksite employees are not automatically deemed pursuant to this section to be employees of the professional employer organization...unless the worksite employees are included by specific reference to the professional employer agreement and applicable prearranged employment contract, insurance contract or bond.

Accordingly, if PEO did not specifically contract with JRB to relieve JRB of direction and control over JRB's worksite or deem JRB's employees as its employees, it would not be considered as an employer and therefore would not be required to register as an apparel contractor under Article 12-A.

On the other hand, if PEO did enter into such an agreement with JRB, then it would be required to register because, for the reasons mentioned above, it would be an employer of worksite employees who produce apparel.

If your investigation discloses that PEO contracted with JRB to deem JRB's worksite employees as "joint employees" then both firms would have to register under Article 12-A. Although the term "joint employer" is not defined under the Labor Law, courts have explained that such a relationship exists when two firms co-determine the essential terms and conditions of employment. The tests for determining such essential terms and conditions include whether both firms supervise or monitor employees' work on a regular basis, jointly own or have financial interests in the firms and jointly hire and fire workers. Courts weigh all of the factors and generally do not consider one factor alone to be

determinative of whether a joint employer relationship exists.

Please contact me if you have further questions.