Who's Responsible for Working Conditions when Labor Contractors are Hired?

by Don Villarejo

One of the most vexing problems in agriculture, cut-and-sew garment and a handful of other industries is the determination of who has responsibility for conditions of employment. The problem up to now has been that farm labor contractors and "mom and pop" sewing sub-contractors, who work as independent contractors for farm operators and large garment companies, have shielded the real owners of these businesses from any employment responsibility. For example, when serious labor or safety law violations are found in situations where a labor contractor crew has performed the work, the firm for which the product has been produced is normally able to avoid any liability. This is because the firm is not the employer of record, even though everything has been produced for it and sold under its name. Whether it is payment of required employment taxes, compliance with labor and safety law, or enforcement of laws governing the hiring of undocumented workers, many businesses have been able to "pass-the-buck" to their sub-contractors and shield themselves from liability.

But in 1997, both the courts and the Clinton administration undertook new initiatives that are designed to remove all ambiguity: under the joint employer doctrine, nearly all parties directly involved in crop or garment production will fully share liability for conditions of employment. Most recently, on October 23, 1997, nearly 150 Thai and Mexican nationals who worked under slave-like conditions in two Los Angeles area sweatshops received a $2 million settlement from five major companies, including Mervyn's and Montgomery Ward. The companies had allegedly sub-contracted production to a number of firms, including the two sweatshops. While not admitting any wrong-doing, a spokesperson for Mervyn's stated that the company wanted to do the right thing for the workers, but had not previously been aware of the conditions in the sweatshops.

Julie A. Su, attorney for the workers, hailed the settlement as a victory that could portend a new era of accountability for the big firms that are the real "deep pockets" in the industry. She stated that the joint employer doctrine provided the leverage needed to win the out-of-court agreement with the major players.

In agriculture, a key U.S. Court of Appeals decision rendered on April 9, 1997 held that Bear Creek Farms, a cucumber grower, was jointly liable for its labor contractor's violations of record keeping, safety, reporting and minimum wage regulations. The concept of holding the farmer to be a joint employer in this case was based not on who actually hired or supervised the workers, but instead on the fact that the farm operator did "suffer or permit to work" with respect to the employees who were actually hired and directly supervised by a farm labor contractor.

Independently, on March 12, 1997, the U.S. Department of Labor (DoL) published final regulations under the Migrant and Seasonal Agricultural Worker Protection Act that clarified the meaning of "joint employment" under the act. In essence, the new rules identify five key factors in seeking to identify "joint employment" relationships:

1. The nature and degree of control of the labor force.
2. The nature and degree of supervision of the labor force.
3. The power to determine rates and methods of payment of workers.
4. The right, directly or indirectly, to hire, fire or modify conditions of employment.
5. The preparation of payroll and payment of wages.

These factors were also considered in the Bear Creek Farms case, but the Court of Appeals based its decision on three additional factors:

1. The grower's ownership or control of the land used to grow the crop.
2. A grower's investment in equipment and facilities.
3. Whether the farm worker performed a line-job integral to the grower's business.

Obviously, a grower needs to own or control land to grow a crop, and the work performed by contract laborers is normally clearly essential to the grower's business. Thus, it may be difficult to identify cases in which a farmer would **not** be held responsible for the actions of his labor contractor.

The concern of agricultural employers in response to the new rules has been sufficiently great to cause the Western Growers Association, representing several thousand farming operations in California and Arizona, to hold educational sessions for its members to explain the implications of the new regulations. At the same time, there have not yet been any new initiatives by DoL's enforcement staff to cite farmers for the improper conduct of labor contractors who work for them. In the meantime, WGA advises its members: be sure that your contractor is legitimate and is in full compliance with all safety and labor laws.

For employees, the new regulations offer the possibility that large-scale businesses can be forced to pay for employment infractions occurring during the course of work from which they ultimately profit. But very few employees, whether in the farm sector or the cut-and-sew garment industry, have any idea that the new regulations exist, let alone how to pursue a complaint. Hopefully, settlements like those reached in the Los Angeles sweatshop cases will become known to workers and employers throughout the nation, and will help to send a strong message to industry that violations of labor and safety laws cannot be tolerated.

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