

THE GIG WORKFORCE: HIDDEN RISKS & THE DEFEND TRADE SECRETS ACT

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FRANK HARTY put himself through college and law school by playing football and working. He received a B.B.A. with honors in Industrial Relations from the University of Iowa School of Business and graduated Order of the Coif from Drake University Law School where he was Editor in Chief of the Drake Law Review. Frank is a Fellow of the American College of Labor and Employment Lawyers. He is also recognized as a Leading Individual Labor and Employment Lawyer in Iowa by Chambers and Partners and is recognized by The Best Lawyers in America and Great Plains Super Lawyers. Frank is a fellow of the Iowa Academy of Trial Lawyers and the American Board of Trial Advocates. He has taught trial advocacy and employment law at the Drake University Law School. Frank is Past Chair of the Labor and Employment Law Section of the Iowa State Bar Association.

THE WORKFORCE OF THE FUTURE: MINIMIZING LEGAL RISK

INTRODUCTION

- The disappearing “job”
- BLS statistics and the growth of the “gig” and “shadow” workforce
- There are numerous legal traps awaiting
- Knowledge and planning are key



Illustration by Chris Gash

THE NATIONAL LABOR RELATIONS ACT AND JOINT EMPLOYMENT

- The disappearing “job”
- Browning-Ferris Industries
- Traditional standards under the NLRA
- The new standard:
 - Is there a common law employment relationship
 - Control over essential terms and conditions of employment
- Impact of BFI and future developments



WAGE AND HOUR RISKS AND THE SHADOW WORKFORCE

- “Employees” under the FLSA
- Enforcement priorities
- The definition of employee



VOLUNTEERS



PROACTIVE MEASURES: INDEPENDENT CONTRACTORS

- Use written agreements
- Set minimum qualifications
- Monitor compliance
- Require indemnification



PREVENTATIVE MEASURES: INTERNS AND TRAINEES

- Identify and document the benefits to the trainees
- Require affiliation with a school or training program
- Control expectations regarding pay and future employment
- Keep interns separate from employees



AVOIDING RISK: VOLUNTEERS

- Educate managers
- Keep separate
- Don't replace employees



THE DEFEND TRADE SECRETS ACT OF 2016

THE DEFEND TRADE SECRETS ACT OF 2016

- **Prior to DTSA**
 - **\$300 billion annually in loss to economy from trade secret theft**
 - **Issues resulting from lack of uniformity**

OVERVIEW OF SOLUTIONS

- Federal cause of action
- Ex parte seizure
- Protections from unnecessary disclosure
- Whistleblower protections
- Increased criminal penalties

A NEW FEDERAL CAUSE OF ACTION

- **Jurisdiction**
 - “used in, or intended for use in, interstate or foreign commerce”
- **Provides uniformity**
 - “Trade secret” under DTSA
 - Discovery disputes
 - Period of limitations
- **Does not preempt state trade secret law**
- **Remedies**

EX PARTE SEIZURE ORDER

- Available in “extraordinary circumstances”
- Additional protections for party whom order is directed against
- Seizure hearing
- Consequences of wrongful or excessive seizure

PROTECTIONS FROM DISCLOSURE

- Trade secret materials in custody of the court
 - Prohibition on connecting to internet or network
 - Encryption
 - Unrelated materials
- Protections during litigation
 - Protective orders
 - Court ordered disclosure protection
 - Express consent needed to waive trade secret protections
 - Interlocutory appeal

WHISTLEBLOWER PROTECTIONS

- Two circumstances which disclosure of a trade secret is protected
 - “in confidence” to a government official “solely for the purpose of reporting or investigating a suspected violation of law”
 - Retaliation claim
- Employer notice requirement
 - Consequences of non-compliance

INCREASED CRIMINAL PENALTIES

- Increased maximum penalty
- RICO Act

QUESTIONS?

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