

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

5-14-2014

Internalizing The Costs Of Employment Law Violations

Michael C. Harper

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Law Commons](#)



Internalizing The Costs Of Employment Law Violations

Author : Michael C. Harper

Date : May 14, 2014

David Weil, [The Fissured Workplace](#) (Harvard University Press, 2014).

David Weil's new book on the fragmenting of internal labor markets in many American industries, *The Fissured Workplace*, should be read by all who wish to understand how the challenges to enforcing laws designed to protect American workers have become greater as the institutional structures and processes through which American businesses produce and deliver goods and services have continued to evolve. This book should be read not primarily because President Obama last year nominated Weil, a Boston University School of Management Professor, to head the Wage and Hour Division of the Department of Labor or because the book includes several chapters stressing the importance of strategic public enforcement and the role of unions and other non-governmental worker advocacy groups in changing workplace culture. Rather, the primary value of the book is its rich description of the variant ways by which successful American businesses that sell branded goods and services have externalized the costs of employment law violations by delegating to other businesses the responsibility for providing and supervising the labor input for their branded products. This description supports the book's most important recommendation, a recommendation that would require—beyond stronger enforcement of current laws—a re-internalization of the costs of employment law violations to those businesses that monitor and control the production of goods and services sold under their brands.

Weil describes three kinds of externalization: subcontracted workplaces, outsourced supply chains, and franchised retail operations. For each, he provides examples of lead businesses that use externalization to concentrate on their core competencies of branded product design, development, and marketing, as well as to escape certain costs, including labor costs, that would have to be incurred without externalization. Weil explains how externalization has been facilitated by technological developments that enable lead businesses to protect differentiated brands, and associated high profit margins, through close monitoring and coordination of the quality and timely production of branded goods and services. Modern computer-based technology provides this brand protection without some of the higher labor costs of non-union, as well as unionized, large internal labor markets. Furthermore, as long as the lead company delegates actual control over a subcontractor's or franchisee's workforce to the subcontractor or franchisee, it can escape at least some of the costs of compliance with employment laws like FLSA and OSHA, in addition to potential workers' compensation liability. There is good reason to think that subcontractors and franchisors often cannot pass on employment law compliance costs to the dominant branding companies with which they are in business. While subcontractors' and franchisors' reduced concern with reputational costs and their tight profit margins encourage their non-compliance, their relatively small size and less permanent work forces make enforcement less likely. Further, lead companies with differentiated brands generally can transfer their business to competing contractors or other potential franchisees.

Franchising in the fast food industry provides a particularly revealing example for Weil's central branding thesis. Franchising in the fast food industry—unlike some of the franchising in janitorial services that Weil also describes—cannot be dismissed easily as a misclassification under current law of employees as independent contractors or businesses. Furthermore, at least ostensibly, most fast food franchisors delegate to each of their franchisees control over the compensation, work time, working conditions, and supervision of the workers at the franchisee's retail outlets. Yet, at the same time, in

order to protect their brands, the fast food franchisors maintain strict control over the food and services delivered by the franchisees. Weil reports the consequences of franchising for employment law compliance with federal minimum wage and overtime laws in the fast food industry: “The probability of noncompliance is about 24% higher among franchise-owned outlets than among similar company-owned outlets.” (P.131). Weil tells a similar, albeit somewhat more complicated story, about franchising in the hotel industry, finding that hotels managed by a branding company generally having higher non-compliance rates.

Under current law, in order to hold a franchisor responsible for employment law violations as a joint employer of a worker at a franchisee’s outlet, there probably would have to be some demonstration of the franchisor having at least effective partial control of the worker’s compensation, hours, working conditions, or supervision. But Weil’s analysis begs the question of whether the law should require such control to be demonstrated. Why should a franchisor that uses technology to ensure the quality of the products marketed under its brand, not also be required to ensure the quality of the workplaces that sell its product? Why is it not more efficient, as well as equitable, to treat the costs of compliance with employment laws as part of the costs of marketing branded products? Franchise agreements, and other contracts delegating control of employees, of course may include indemnification clauses as part of the allocation of returns, but if only the branding company can pay, should the costs of violations not be internalized to provide proper incentives for compliance?

Weil is not a lawyer; he is sometimes not precise in his explanation of current law and does not explore possible legal problems with some of his analysis. Beyond approval of some liberal judicial rulings and an explanation of how involvement of a branding company with reputational concerns can ensure much more effective implementation of employment laws like the FLSA, the book does not explore what might be workable limits on joint employer liability. The reality of fissured employment Weil describes and the consequent legal problems he highlights, however, are ones that should be of concern to any policy maker interested in the effective enforcement of employment law in the modern economy.

Cite as: Michael C. Harper, *Internalizing The Costs Of Employment Law Violations*, JOTWELL (May 14, 2014) (reviewing **David Weil, The Fissured Workplace** (Harvard University Press, 2014)), <https://worklaw.jotwell.com/internalizing-the-costs-of-employment-law-violations/>.