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ACWI ADVANCE

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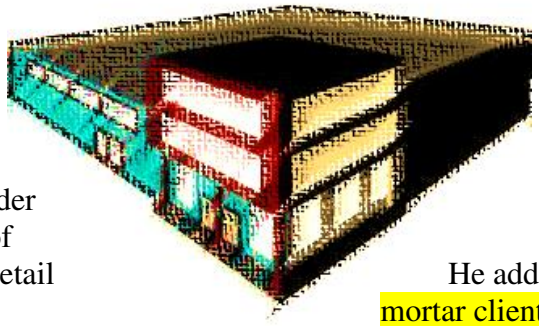
Store Warehousing Remakes Retail Distribution

Rretailer use of brick-and-mortar store back rooms as warehouses and fulfilment centers is growing along with the burgeoning trend in Internet order package pick-up and ship-from-store services, according the commercial real estate firm Jones Lang Lasalle.



As more retailers evolve their ship-from-store strategy, JLL said it expects to see a growing demand for space in the form of an e-fulfillment center (EC) with a broader inventory offering and up to 15% of fulfilment space inside traditional retail locations.

"More stores will be used as mini-distribution centers where they can fulfil online orders in-store," said Kris Bjorson, Head of Retail/e-commerce Distribution at JLL. "Customers expect a seamless shopping experience where they can choose the most convenient way to order, receive and return their purchases, and retailers are responding with a ship-from-store option."

According to JLL, 45% of Internet customers for brick-and-mortar retailers are using in-store fulfilment, making the role of the store essential to a retailer's distribution strategy.

The seamless integration of physical stores and the virtual marketplace is what retailers are striving to reconcile as consumer shopping habits continue to evolve. Balance across multiple channels is the end-goal because 60% of retailers are still formulating their omnichannel approach, JLL noted.

While all brick-and-mortar retailers replenish their store inventories from distribution centers, some also plan to invest in ECs, the company said. Others will use existing store inventories to ship directly to shoppers (in addition to their ECs), while some may add a new type of facility such as an urban logistics center or cross-dock.

"There isn't a one-size-fits-all strategy," Bjorson observed. "But we expect stores to become an important part of the customer fulfilment strategy supporting larger DC and EC networks."

He added, "Among JLL's brick-and-mortar clients with ship-from-store capabilities, 10–15% are using this option, and there is strong interest in growing the channel."

Using ship-from-store will give the customer more flexibility, faster delivery times and lower shipping costs, JLL said.

Transportation Cost Edge

Retailers that already have prime real estate in the form of brick-and-mortar stores, enjoy a huge competitive advantage against e-tailers that are without a physical presence on our nation's main shopping streets and centers, JLL pointed out.

It said retailers will experience lower transportation costs and increased inventory turnover, which could enable them to bypass markdowns.

"The ship-from-store model not only increases delivery speed but also creates a store pick-up option that often brings the e-commerce shopper back into the store, creating a new sales opportunity

(Continued on next page)

that didn't previously exist," said Lew Kornberg, head of Retail Tenant Representation at JLL.

"This revenue opportunity is the beauty of omnichannel; it unifies the brand's physical and virtual/online storefronts and marketplaces, and creates new customer opportunities."

However, JLL is not the first to note that retailers' omnichannel strategies are not only driving reconfigurations at the store level but throughout the entire supply chain as well.

According to a recent survey of retail executives by KPMG, seamless omnichannel selling is at the forefront of their minds, with, 70% saying they have adopted omnichannel strategies to link the consumer's in-store experience with the company's website, mobile devices and social media platforms.

In addition, 53% of the retail executives said they believe they are ahead of their peers when it comes to omnichannel adoption.

"Organizations that have adapted well to the rise of ecommerce, customer mobility and other technological disruptions of the last decade are showing some early signs of breaking away while others are still near the starting line," said Mark Larson, KPMG U.S. and Global Retail Sector Leader.

HRC Advisory, a strategic retail advisory firm, also found that outdated organizational structures and processes, non-integrated IT platforms and a lack of a clear road map are blocking customer data enabling for retailers' omnichannel efforts.

Retailers aren't operationally structured for omnichannel, HRC argued. More than 87% surveyed said they have taken initial steps or are planning to initiate an organizational change to better integrate processes across all purchase channels. But for 88.2% of the retailers surveyed, ecommerce operations and marketing largely remain separate silos.

Inventory isn't being fulfilled effectively, HRC said. About 85% of retailers surveyed said they are focused now or over the next 12 months on enabling new fulfillment options to avoid the lost sale. However, only 10% of retailers surveyed have the capabilities to effectively fulfill from store, although it is a way for them to contain fulfillment and return costs, as well as avoid some markdowns.

UPS Introduces Its Own Form of In-Store Pickup

UPS found the perfect solution to the last-mile delivery challenge: Make consignees come to them.

In October the company announced it was expanding its UPS My Choice service and UPS Access Point network from Europe – where both originated -- to New York City and Chicago, and in 2015 to cover all major U.S. metropolitan markets.

UPS My Choice members receive advance notification of package delivery timing. Consumers also can reroute eligible packages to another address or reschedule deliveries for a future date. A vacation setting permits packages to be held and delivered when the person returns home.

UPS Access Point provides alternate delivery locations for consumers when they are not at home. These lockers are staged at local businesses, primarily convenience and grocery stores with evening and weekend hours, designed to be about 10 minutes or less from the consumer's address.

UPS drivers unable to deliver a package at the consumer's residence will leave a note with a tracking number informing them when they can collect the package at a nearby Access Point.

The parcel delivery giant said there are nearly 300 UPS Access Point locations in New York City and Chicago with more locations added each week. In January 2015, the company plans to add all 4,400 locations in the U.S. to the Access Point network.

Executive Vice President Alan Gershenhorn said the two services "are a powerful duo that give e-tailers new solutions for personalizing their customer's package delivery experience. We have more than 375 shippers in the U.S. utilizing this feature, including some of the most widely recognized names in retail."

Members can send qualifying shipments to an Access Point location as their preferred delivery address. Consumers can also drop off pre-labeled and prepaid packages at Access Point locations.

Kansas FedEx Driver Case May Signal Wider Change

Normally a state court decision will have little impact beyond that state's borders, but that may not the case after a Kansas Supreme Court ruled FedEx delivery drivers are company employees instead of independent contractors.

In August the U.S. Ninth Circuit Court of Appeals found that FedEx Ground delivery drivers were not independent contractors under California and Oregon laws, and other states are re-examining drivers' contractor status (AA, 10-15-14, P. 5).

So why the particular concern with the Kansas decision? "While the Ninth Circuit tends to lean pro-employee in its decisions, Kansas is decidedly more conservative," says attorney Todd H. Lebowitz of the Baker & Hostetler LLP law firm.

"The Kansas Court's decision, therefore, may prove more influential to other courts across the country, as independent contractor misclassification cases continue to populate their dockets," he believes.

The bottom line, Lebowitz said, is that this decision, "issued by a moderate-to-conservative court, should heighten the concern of companies who classify their delivery drivers as independent contractors."

Under Kansas wage law, a 20-factor test similar to the IRS test, must be applied to determine whether drivers are employees or independent contractors. The primary focus in Kansas test is on an employer's right of control.

Applying these 20 factors, the Kansas Supreme Court declared that "FedEx has established an employment relationship with its delivery drivers but dressed that relationship in independent contractor clothing."

As has happened in recent decisions in other courts, the final determination came down to how much control the company exerted over the drivers.

The Kansas Supreme Court said, "if a worker is hired like an employee, dressed like an employee, supervised like an employee, compensated like an employee, and terminated like an employee, words in an operating agreement cannot transform that worker's status into that of an independent contractor."

For Whom Does the SOX Whistle Blow? Maybe You

If you think federal legal protection for financial whistleblowers applies only to publicly-traded companies, think again.

Last March the U.S. Supreme Court held that the Sarbanes-Oxley (SOX) law whistleblower provisions also extend to employees of the contractors who do work for public companies.

The majority of the justices held that the law holds that no officer, employee, contractor, subcontractor or agent of a public company may fire, demote, suspend, threaten, harass or in any other manner discriminate against an employee because of whistleblowing or other protected activity.

In her dissent, Supreme Court Justice Sonia Sotomayor expressed the view that under this interpretation the law might even extend to housekeepers and gardeners of the employees of public companies, which she termed "absurd."

But while attention was riveted on SOX, more wide-ranging provisions in the 2010 Dodd-Frank law have gone relatively unnoticed.

SOX protection focuses on whistleblower disclosures regarding specified activities, including securities fraud, bank fraud, mail or wire fraud, or any violation of Securities and Exchange Commission rules. It protects employees who disclose to a supervisor, the SEC or Congress.

The Dodd-Frank provision defines a whistleblower as any individual who provides information about securities laws violations to the SEC. Those whistleblowers who provide the SEC with "high-quality," "original" information that leads to an enforcement action netting over $1 million in sanctions can receive an award of 10-30% of the amount collected.

However, after the passage of Dodd-Frank, the SEC developed rules that could be interpreted to include those who simply report internally or to some other entity, notes attorney Brian E. Casey of the law firm of Barnes & Thornburg LLP.

In a Sept. 17 speech, outgoing Attorney General Eric Holder urged Congress to increase the monetary rewards available to whistleblowers.

OSHA May Greatly Widen List of Unsafe Chemicals

OSHA is seeking private and public sector input about a long-range plan to greatly expand the list of chemicals included in workplace permissible exposure limits (PELs).

"Many of our chemical exposure standards are dangerously out of date and do not adequately protect workers," said OSHA Administrator Dr. David Michaels.

He noted that 95% of OSHA's current PELs, which cover fewer than 500 chemicals, have not been updated since their adoption in 1971, which he also said represents a "small fraction of the tens of thousands of chemicals used in commerce, many of which are suspected of being harmful."

As a result, Michaels said OSHA is asking public health experts, chemical manufacturers, employers and unions to identify new approaches for addressing an expanded list of possible workplace chemical hazards

The notice in the October 10 *Federal Register*, said the agency is "reviewing its overall approach to managing chemical exposures in the workplace and seeks stakeholder input about more effective and efficient approaches that addresses challenges found with the current regulatory approach."

OSHA says it will examine possible updates to existing chemical PELs, and other potential means of addressing worker chemical safety, such as by adopting more task-based approaches.

These include a possible streamlined, three-tiered approach for risk assessment, and exploring other ways of streamlining feasibility analyses when developing health standards to better assess their economic and technical feasibility.

The agency said it also is looking at possible alternative approaches for managing chemical exposures, including control banding, task-based approaches and "informed substitution," i.e., replacing the use of hazardous chemicals with safer substances or non-chemical alternatives.

Comments are due April 8, 2015. For more information, see: https://federalregister.gov/a/2014-24009.

Supreme Court Tackles Warehouse Security Case

The Supreme Court will decide soon whether employers will be required to pay their employees for time spent going through a security clearance at the end of each shift.

Involving Amazon.com warehouse operations, the case is called Busk v. Integrity Staffing Solutions, Inc. and the court heard oral arguments on Oct. 8.

Integrity Staffing Solutions provides warehouse staffing to clients like Amazon.com. The plaintiffs are two former Integrity Staffing hourly employees who worked in two Nevada Amazon.com warehouses.

The Integrity Staffing employees had to pass through a security clearance at the end of each shift, a measure intended to prevent theft. During these security checks the employees were searched, required to remove their wallets, keys and belts, and passed through metal detectors.

The employees were not paid for the time it took to go through this security clearance, which they said sometimes required waiting up to 25 minutes.

In addition, the employees spent 10 minutes of their 30-minute lunch periods walking to and from the cafeteria and undergoing security clearances.

They were not paid for the 10 minutes it took to go through security during meal periods, received less than 30 minutes for lunch, and were warned by managers to eat quickly so they could clock back in.

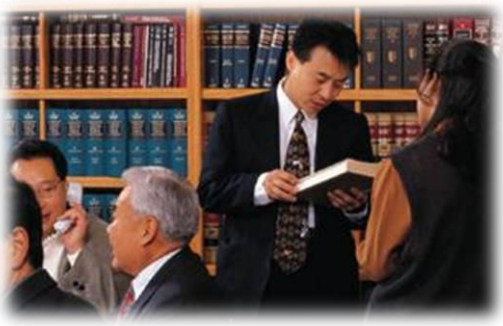
The plaintiffs' attorneys assert that because the security clearances were necessary to their work as warehouse employees and done for Integrity Staffing's benefit, the company violated the Fair Labor Standards Act by not paying them.

"Depending on the Supreme Court's ruling, employers may have to consider whether the cost of security is worth the additional compensation that must be paid to its hourly employees who are subjected to such security measures," said attorney Nefertari S. Rigsby of the Akerman LLP law firm.

EEOC Proves Its Aggressive Agenda Is Real

EEOC has a trend of filing a flurry of lawsuits in the last days of its fiscal year, which ends Sept. 30. This year EEOC filed a spate of lawsuits as time ran out, enmeshing dozens of employers in litigation, according to attorneys for Seyfarth Shaw LLP.

EEOC filed 58 lawsuits in September alone, up 10 over September 2013, pushing the annual total of suits filed from last year's 134 to 142 in 2014.



EEOC has continued its battle against employers and at least one state over the legality of using credit and criminal background checks to make hiring and employment decisions. At least one of those cases ended this year in a stunning defeat for EEOC, while others continue.

In 2012 EEOC issued a Strategic Enforcement Plan outlining its enforcement priorities through 2016. One of EEOC's most important strategic objectives is increased focus on pattern or practice, policy or class cases where discrimination is seen having a broad impact. These so-called "systemic" cases are becoming its single most important litigation driver, the Seyfarth Shaw attorneys say.

But this year, the agency focused substantial resources on tackling legal issues that could, if successful, sweep away procedural prerequisites to filing suit that EEOC believes get in the way of its enforcement efforts.

Perhaps chief among those procedural brakes is EEOC's statutorily mandated obligation to conciliate in good faith before bringing suit. The Supreme Court agreed to hear the Mach Mining case, a possible game-changer because EEOC is seeking to immunize itself from attack for failing to meaningfully conciliate with an employer before it brought suit.

The Seventh Circuit held such pre-suit obligations were beyond judicial scrutiny as long as EEOC complied with other procedures. Other courts disagreed, landing the case before the high court. EEOC also is challenging courts' ability to inquire into the scope of EEOC's pre-suit investigations.

In March a District Court judge dismissed an EEOC case against Sterling Jewelers, rejecting the agency's contention that a court may not inquire into the scope of its pre-lawsuit investigation. The judge had found no evidence that EEOC actually investigated nationwide claims it charged Sterling with prior to bringing suit. EEOC has appealed.

EEOC also is attempting to add new enforcement weapons to its arsenal. It challenged CVS Pharmacy's severance agreement for interfering with an employee's right to file charges, communicate voluntarily and participate in EEOC and state investigations.

In addition to the general release and the covenant not to sue – also areas of concern for EEOC – the agency also challenged the agreement requiring employees notify CVS of any legal proceedings or administrative investigations, its non-disparagement provision, and the agreement's prohibition on the disclosure of confidential information without the company's consent.

EEOC also has increased its use of subpoena power to gather as much information as possible from employers prior to filing suit. In 2014 it filed 24 subpoenas versus 17 last year. Although some employers succeeded in reigning in this subpoena power, many courts give the agency considerable leeway to conduct pre-suit investigations, even if they have little or no connection to the underlying charge, the Seyfarth Shaw attorneys noted.

Among other enforcement trends, the lawyers say sex and pregnancy issues now dominate employment cases. EEOC filed six pregnancy discrimination cases in September alone, and has emphasized that this is a priority for it.

On Sept. 25 EEOC also blazed a new trail by filing its first ever lawsuit against an employer for discriminating on the basis of sex by acting against an employee who identified as transgender.

By contrast, while disability cases made up 34% of all filings this year, they are down slightly from 36% in 2013. Race cases were down from 17 in 2013 to 14 this year. However, age discrimination filings are up to nine this year from five in 2013.