Joint Employment – Your Companies Might Not Be Separate in the Eyes of the Law

By Sarah O'Keefe

Most businesses want to grow beyond their original founders. Sometimes this means that you expand your presence through acquisition or you start another company along side your current one. As you grow, you'll need to consider organizational structure and take a closer look at the risks of joint employment.

What is Joint Employment?

Joint employment, also known as co-employment, refers to sharing control and supervision of an employee's activity among two or more separate business entities. However, it's important to note that there is no accepted single definition of joint employment. Different scenarios, actions, and interpretations of employment laws can lead to joint employment situations.

Two or more entities can employ an employee or employees simultaneously. The work the employee does is for two or more employers if the circumstances reflect that both employers share control over the employee's terms and conditions. If two employers exert significant control over the same employee or employees, then joint employment may exist. If joint employment exists, then both employers are responsible, individually and jointly, for the employee and his or her actions.

This can be a slippery slope with devastating financial results. That is why it is important to be proactive and knowledgeable about how laws can create unintended consequences for your business. Joint employment can be legally found using the joint employer test or integrated enterprise test.

Joint Employer Test

Joint employment scenarios are most common where the employee has two or more separate, but related employers. It's also common when an employer provides labor to another employer such that workers are economically dependent on both employers.

According to the Wage and Hour Division of the Labor Department, joint employment is considered in hundreds of investigations each year, most commonly in the construction, agricultural, staffing, and hospitality industries.

Separate but Associated Employers

If the employee has two separate but associated employers, joint employment may exist if the employers benefit from the employee's work and they are sufficiently related to each other, such as having an arrangement to share the employee's services. It could also occur if one employer acts in the interest of another regarding the employee.

The degree of association is heavily weighed when evaluating whether joint employment exists. Factors to consider are if:

- employers share control over operations
- one employer supervises another's work
- clients or customers are shared
- agreements exist between the employers

Subcontractors

If an employer provides labor to another employer, joint employment exists if the employee is economically dependent on the two employers. This is most common when an employer contracts with a subcontractor to provide employees for a project.

Courts look at the economic reality of the relationship between entities. They consider if the alleged joint employer:

- has the power to hire and fire employees
- supervises and controls employee work schedules or conditions of employment
- determines the rate and method of payment
- maintains employment records

Integrated Enterprise Test

The integrated employer test is based on established case law. When determining whether to treat separate entities as a single employer, the following non-exhaustive factors are considered.

- Operations: connections of operations such as shared offices, record keeping, and bank accounts
- Management: common management, directors, or boards
- Centralized Human Resources: centralized human and labor relationships such as hiring and firing of employees from one single department rather than two separate human resources departments
- Control: common ownership and financial control

Determining whether entities are separate is not determined by any single factor, but rather by the entire relationship or totality of the circumstances.

For example, if a joint employee discriminates against another employee, the victim employee can sue not just the entity he or she works for, but also the parent or affiliated entity because of joint employment of the discriminator-employee. This can greatly expand the scope of litigation and increase a claim's damage value, such as under Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 1981.

Reducing Your Risk

As a thriving business, you want to reduce your risk and protect yourself from potential lawsuits. Contracts must be clear, but your actions should be as well. The way your entities work together and apart will play a big role in determining joint employment. Additionally, be clear about who and who is not your employee. Depending on the type of business you run, this may include contractors.

Just because you have multiple entities does not mean the court or a jury will treat each entity separately. The economic realities and functional control determine if the "many" are actually "one." When it comes to liability, your entire company and your affiliates, not just one location, may be at risk.

About the Author

Sarah O'Keefe's practices in employment law, including litigation. You can read more about Sarah on our website.