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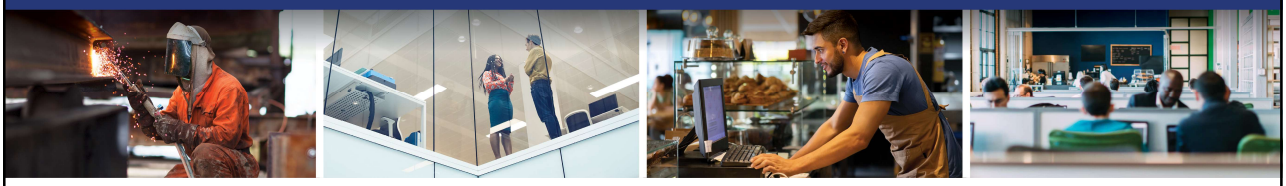

Update on Joint Employer Tests

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Overview

- Experienced commercial litigator who represents individuals and companies involved in disputes related to real estate, creditor's rights, corporate divorces, employment matters, and theft of trade secrets.
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Overview

- Represents employers in employment litigation, including cases related to harassment, discrimination, retaliation, breach of contract and fraud.
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What Will We Discuss Today?

- DOL Definition of "Joint Employer"
- National Labor Relations Board – Joint Employer History
- Joint Employer Circuit Court Tests Under the FLSA
- New Potential Theory of Liability in California
- Joint Employer Liability
- Best Practices

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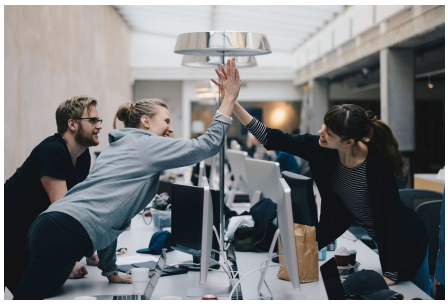
What is a Joint Employer?

- Joint employment typically occurs when two or more business entities share, control, or oversee an employee's work.



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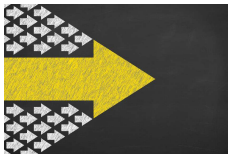
Horizontal Joint Employment

- Horizontal joint employment exists where an employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee.
  - **Example:** An employee is employed at two locations of the same restaurant brand. The two locations are operated by separate legal entities. But the same individual is the majority owner of both. Managers at each restaurant share the employee between the locations and jointly coordinate the scheduling of the employee's hours. The employers use the same payroll processor to pay the employee, and share supervisory authority.



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Vertical Joint Employment

- Vertical joint employment exists where an employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work.
  - **Example:** A laborer works for ABC Drywall Company. The general contractor arranged for ABC Drywall to provide drywall labor. ABC Drywall hired and paid the laborer. The general contractor provided all of the training, necessary equipment and materials, workers' compensation insurance, and is responsible for the health and safety of the laborer. The general contractor reserves the right to remove the laborer from the project, controls the laborer's schedule, and provides assignments on site, and both ABC Drywall and the general contractor supervise the laborer. The laborer has been continuously working on the general contractor's construction projects.

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U.S. Department of Labor
Definition of Joint Employer

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DOL Joint Employer Definition

- The DOL regulations (25 C.F.R. § 825.106(a)) define a "joint employer" as follows:
  - (a) Where two or more businesses **exercise some control over the work or working conditions of the employee**, the businesses may be joint employers.
  - Joint employers may be separate and distinct entities with separate owners, managers, and facilities.
- Example: A joint employer relationship could occur where a hotel contracts with a staffing agency to provide cleaning staff, which the hotel directly controls.

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Joint Employer Definition (con't)

- Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
  - (1) Where there is an arrangement between employers to share an employee's services or to interchange employees;
  - (2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or
  - (3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

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Joint Employer Liability Standard and Professional Employer Organizations

- The DOL implementing regulations that define "joint employer" also have a specific subpart that defines a "Professional Employer Organization".
- A Professional Employer Organization (PEO) is described as follows:
  - A type of company that is often called a PEO contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. **The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances**.
  - A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions.
  - On the other hand, if in a particular fact situation, a PEO has the right to **hire, fire, assign, or direct and control** the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances. 25 C.F.R. § 825.106(2) (emphasis added).

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National Labor Relations Board – History of the Joint Employer Standard

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Beginning of "Right to Control" Standard

- In its 2015 decision in *Browning-Ferris Industries of California*, the NLRB abandoned long-standing common-law precedent, and held that a joint-employer relationship may be found merely based on the putative joint employer's **right to control** terms and conditions of employment, irrespective of whether such control is directly exercised or exercised at all.

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2020 Rule

- In February 2020, the NLRB promulgated the 2020 Rule, under which an employer will be deemed a joint employer under the NLRA only when the employer "possess[es] and exercise[s] such **substantial** direct and immediate **control over one or more essential terms or conditions of employment** of another employer's employees."

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2023 Rule – Expands Definition of Joint Employment

- On October 27, 2023, the NLRB issued the 2023 Rule, which looks at whether the "employer possesses the authority to control (whether directly, indirectly, or both) or exercises the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment, regardless of whether the employer exercises such control or the manner in which such control is exercised."
  - Expands definition of joint employer to include the exercise of **indirect putative control**

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Invalidation of the 2023 Rule

- *In U.S. Chamber of Commerce v. NLRB*, Judge J. Campbell Barker of the U.S. District Court for the Eastern District of Texas invalidated the 2023 Rule in a 31-page opinion.
- Judge Barker held that the 2023 Rule was contrary to law as it exceeded common-law principles of joint-employer status
  - He further held that the NLRB's decision to rescind its 2020 Rule was arbitrary and capricious.
- The Court noted that the 2023 Rule "would treat virtually every entity that contracts for labor as a joint employer because virtually every contract for third-party labor has terms that impact, at least indirectly, at least one of the specified 'essential terms and conditions of employment.'"
- This ruling effectively restores the 2020 Rule.

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Current Status of 2023 Rule

- NLRB Chairman Lauren McFerran released a statement shortly after the ruling, indicating "[t]he District Court's decision to vacate the Board's rule is a disappointing setback, but it is not the last word on our efforts to return our joint-employer standard to the common law principles that have been endorsed by other courts."
- According to Ms. McFerran, the NLRB "is reviewing the decision and actively considering next steps in this case," including whether to appeal the decision or to attempt to issue a new rule.

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Joint Employer Circuit Court Tests Under the Fair Labor Standards Act

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Third Circuit

(Delaware, New Jersey, Pennsylvania, and Virgin Islands)

Under the "***Enterprise* test**", courts are directed to consider whether the alleged joint employer:

(1) had the "authority to hire and fire" the employee;

(2) had the "authority to promulgate work rules and assignments and to set the employee's conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment;"

(3) was involved in the employee's "day-to-day supervision, including employee discipline;" and

(4) had "actual control of employee records, such as payroll, insurance, or taxes."

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Second Circuit

(New York, Connecticut, and Vermont)

The Second Circuit determines joint employment under the FLSA based on six non-exhaustive factors:

(i) The duration of the relationship between the parties;

(ii) Whether the hiring party has the right to assign additional work to the hired party;

(iii) The extent of the hired party's discretion over when and how long to work;

(iv) Whether the alleged employer paid the employee's salary;

(v) Whether the alleged employer hired and fired the hired party; and

(vi) Whether the alleged employer had control over the daily employment activities.

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Felder v. United States Tennis Association (2d Cir. 2022)

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Fourth Circuit

(Maryland, North Carolina, South Carolina, Virginia, and West Virginia)

The Fourth Circuit has adopted a broad joint employer standard and explicitly rejected the four-factor totality of the circumstances test applied in *Bonnette* (see Ninth Circuit (FLSA)).

The Fourth Circuit instead adopted a two-step framework and identified the specific factors courts should consider when determining joint employment under the FLSA. Under this framework, the court must:

1) First determine whether two entities should be treated as joint employers or separate employers, starting with the DOL regulations.

2) Then analyze whether the putative joint employers' combined influence over the essential terms and conditions of the worker's employment renders the worker an employee or an independent contractor.

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Ninth Circuit

(Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands)

In *Bonnette v. California Health and Welfare Agency*, the Ninth Circuit adopted a **totality of the circumstances test** focusing on the **economic realities** of the relationship for determining joint employer status. The analysis focuses on four factors, including whether the secondary employer:

1) Had the power to hire and fire the employees;

2) Supervised and controlled employee work schedules or conditions of employment;

3) Determined the rate and method of payment; or

4) Maintained employment records.

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Eleventh Circuit

(Alabama, Florida, and Georgia)

The Eleventh Circuit adopted an eight-part **economic realities** test in *Layton v. DHL Express (USA), Inc*. (686 F.3d 1172, 1178 (11th Cir. 2012)).

1) The nature and degree of control of the workers.

2) The degree of supervision, direct or indirect, of the work.

3) The power to determine the pay rates or the methods of payment of the workers.

4) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers.

5) Preparation of payroll and the payment of wages.

6) Ownership of facilities where work occurred.

7) Performance of a specialty job integral to the business.

8) Investment in equipment and facilities.

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New Potential Theory of Liability in California

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"Agency" Liability

- *Raines v. U.S. HealthWorks Medical Group*, 15 Cal. 5th 268, 291 (Cal. 2023).
  - A recent decision out of the California Supreme Court analyzed the definition of "employer" in the context of a third-party administrator under a California employment discrimination statute.
  - The *Raines* court held that an employer's business entity "agent" could be held directly liable under California's Fair Employment and Housing Act ("FEHA") for employment discrimination when the agent carries out "FEHA-regulated activities" on behalf of an employer.

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"Agency" Liability (con't)

- The *Raines* court determined that business agents of an employer can be held liable under anti-discrimination laws when they "exercise an **administrative function** traditionally exercised by the employer."
- Examples of such **administrative functions** include: (i) determining access to employment opportunities; (ii) providing employee benefits; (iii) establishing pay plans; (iv) formulating minimum standards for jobs; (v) evaluating employees; (vi) transferring, promoting, or demoting employees; and (vii) terminating employees.

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Joint Employer Liability

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Joint Employers Must Comply with Federal, State, and Local Laws

- Joint employers must comply with various federal, state, and local labor and employment laws regarding their direct employees and the employees deemed to be jointly employed by them.

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Joint Employer Implications

- The implications and risks of being a joint employer vary by statute and jurisdiction, but may include:
  - Aggregation of the employer's direct employees and joint employees for purposes of determining threshold coverage issues under certain statutes. This specifically affects small employers that are not otherwise subject to certain laws but for the aggregation.
  - Substantive liability as an employer under various federal, state, and local labor and employment laws concerning the joint employees.

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Implications (con't)

- In certain circumstances, there can be joint and several liability for wrongful acts against a joint employee by either the primary or secondary employer.
  - However, some courts have held that finding that two entities are joint employers only affects each employer's liability to the employee for their own actions, not for the actions of the other joint employer.
  - *See, for example, Virgo v. Riviera Beach Assoc., Ltd*., 30 F.3d 1350, 1359-63 (11th Cir. 1994) (finding a joint employer relationship, but using agency principles to determine the extent of the joint employer's liability under Title VII).

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Best Practices

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Economic Realities/Benefits

- Potential Joint Employers should consider the economic realities of their relationship with the employee(s) at issue.
- Employers should also consider whether the benefits of exercising control over the employees at issue outweigh the cost of potential liability as a joint employer.
- An employer that wants to avoid being deemed a joint employer should determine what steps it can take to minimize the risk concerning the potential joint employees.

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Joint Employer Considerations

- For example, the employer should consider whether it can refrain from:
  - Hiring and firing, providing other input about the hiring and firing process to the primary employer, or reserving the right to hire or fire the primary employer's employees.
  - Supervising the employees directly or on a day-to-day basis.
  - Disciplining the employees.
  - Assigning specific work assignments to the employees.
  - Directly or indirectly setting compensation and other terms and conditions of employment.
  - Participating in the payroll and recordkeeping functions.
  - Providing benefits to the employees.
  - Requiring the employees to work on their premises.

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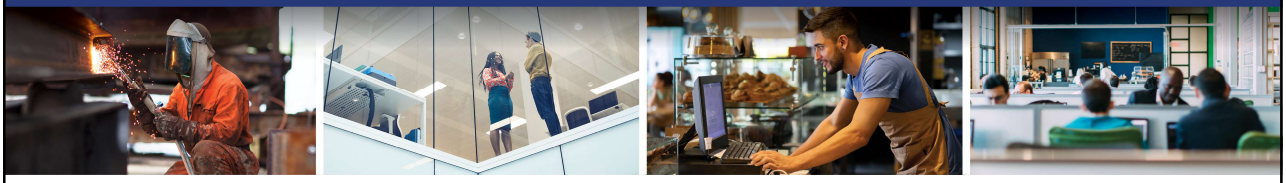

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