JOINT EMPLOYERS/CO-EMPLOYERS/ALTER EGOS/ SINGLE EMPLOYERS/STATUTORY EMPLOYERS: A GUIDE THROUGH THE CONFUSION

WILLIAM R. D'ARMOND
KEAN, MILLER, HAWTHORNE, D'ARMOND, MCCOWAN & JARMAN, L.L.P.

Statutory Employer - A Workers' Compensation Act Concept

- "Statutory employer" is a term used only under the Workers' Compensation Act. Under this doctrine, a person on the payroll of one company may be considered to be employed by another company also for Workers' Compensation Act purposes.

- Significance: If employee A is on the payroll of company B but is the statutory employee of company C, A cannot sue C in tort for on-the-job injuries. On the other hand, C is liable to A under the Workers Compensation Act.

- Example: If Employee is hired by and on the payroll of Maintenance Contractor and does routine maintenance work at a plant owned by Plant Owner, and the facts make Plant Owner the statutory employer of Employee, then Employee cannot sue Plant Owner in tort but can recover workers comp benefits from Plant Owner if Employee is hurt on the job.

- A statutory employer relationship may arise when a business owner contracts with a contractor to execute work which is part of the owner's "trade, business or occupation," which is defined as work that is "an integral part of or essential to the ability of the principal [business owner] to generate that individual's goods, products and services." R.S. 23:1601. A classic distinction is between a contractor doing routine maintenance work (statutory employer applies) and one doing new construction work (statutory employer does not apply).

- With certain exceptions, for a statutory employer relationship to exist there must be a written contract between the principal and the contractor recognizing the principal as a statutory employer. Such a contract creates a rebuttable presumption of statutory employer status. R.S. 23:1061.

! If a statutory employer relationship exists, the injured employee can still receive workers' compensation benefits from his immediate employer (contractor) instead of the statutory employer. R.S. 23:1062. Also, if the statutory employer has to pay the comp benefits, it has a claim for indemnity against the contractor. R.S. 23:1063.

JOINT EMPLOYMENT

I. NOT UNLAWFUL TO BE JOINT EMPLOYER

! Applies in most areas of employment-related law except workers' compensation

! Not unlawful to be a joint employer - just a status.

! But you are considered to be an employer, and that has lot of consequences

II. CONSEQUENCES/RISKS

! As owners, you probably have several relationships in which you may be a joint employer of certain workers with another company

- maintenance contractor - routine maintenance
- operations, packaging, rail car loading contractors
- suppliers of temporary clerical staff, engineering personnel

! To outline some of consequences, lets assume a plant owner has a maintenance contractor, and the relationship is such that the owner is a joint employer of the contractor's personnel. Consequences include:

A. UNION CONSIDERATIONS

1. Secondary Boycott

Secondary boycott rules do not apply.

"Separate gate" doctrine is an application of secondary boycott rules. These rules say that if a union has dispute with one employer, it cannot go out and entangle other employers in the dispute. Specifically, if the union is striking Company A, it can't go out and picket Company B to get B to bring pressure on A to settle strike.

If contractor is union and its union strikes, normally the union cannot picket plant owner. But can if plant owner is joint employer. Can picket gates used by owner's employees and suppliers - could interfere with:

- union employees of plant owner
- unionized drivers of delivering vehicles

Also, can picket plant owner's other plants.

2. Union Organization Effort and Bargaining

a) If union is organizing the contractor, can name owner as employer in election petition. If union wins, can demand owner participate in bargaining and be signatory to contract.

b) If contractor is already union and joint employer relationship develops, union can require owner to participate in bargaining and be signatory to contract.

c) Union can require owner to supply information relevant to bargaining, including wage and benefit data for owner's employees.

d) Owner cannot terminate contractor and bring in new contractor with new employees because of employees' union activities, as it could under Malbaff absent joint employer status. It has even been held that, once the contractor's employees are unionized, it is an unlawful refusal to bargain for the joint employer owner to replace the contractor and terminate its employees without bargaining with the union on the issue, and that the remedy for such a violation is termination of the new contractor, restoration of the joint employer relationship with the former contractor, and reemployment of the former union workforce. See Hillside Manor, 257 NLRB No. 134, 108 LRRM 1023 (1981).

e) Union can group contractor and owner employees in same bargaining unit and organize both at same time. If strong among contract employees but weak among owner's employees, can play numbers game and sweep owner's employees into combined

unionized maintenance unit.

f) If owner is union and contractor is not, owner's union can require contract personnel to be covered under contract if they fall within unit definition - e.g., if contract covers "all maintenance employees" of owner, union can require that contractor's maintenance employees be covered by contract.

g) If contractor commits an unfair labor practice, owner will be liable.

B. WAGE-HOUR

See Joint Employment Relationship Regulations of U.S. Department of Labor, 29 CFR 791.

If owner is joint employer and contractor does not pay overtime properly, owner is liable as well as contractor. Same for child labor and record-keeping violations.

C. ADA

Owner will be liable for any contractor violation, such as discrimination (failure to hire, etc).

Big item: owner will have duty of reasonable accommodation.

D. TITLE VII

Remember have up to $300,000 in compensatory/punitive damages for larger employers (over 500) - incentive for plaintiff suing a small contractor to allege a larger company is a joint employer

E. FAMILY AND MEDICAL LEAVE ACT

See Final Rules Implementing the Family and Medical Leave Act issued by U.S. Department of Labor, 29 CFR Part 825, especially joint employment rules at 29 CFR Section 825.106. The following parts of Section 825.106 are of special interest:

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the "primary" employer include authority/ responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

* * *

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, whether or not the secondary employer is covered by FMLA (*see* § 825.220(a)). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with *all* the provisions of the FMLA with respect to its regular, permanent workforce.

F. BENEFITS

- Coverage requirements for qualified pension plans

- Coverage by health insurance
  - possible ERISA suit for recovery of benefits if owner wrongfully failed to insure contractor employee

G. IRS

IRS has 20-factor test for employee status. See Rev. Rul. 87-41.

III. TESTS FOR JOINT EMPLOYER STATUS

- ! May vary somewhat between statutes - e.g., between NLRB rules and rules courts apply under other laws.

- ! But main factors will be similar for most purposes. Much of the litigation in this area has been under the NLRA, so the factors identified in those cases are a useful guide for cases arising under other statutes.

A. DISTINCTION BETWEEN "JOINT EMPLOYER", "SINGLE EMPLOYER" AND "ALTER EGO" DOCTRINES.

"Joint employer" status is different from "single employer" or "alter ego" status.

"Single employer" relationship exists where two ostensibly separate entities are actually part of a single integrated enterprise. See NLRB v. Browning - Ferris Industries, 691 F.2d 1117 (3rd Cir. 1982). Common ownership and control of the two companies are important factors. The four factors that are traditionally analyzed to determine "single employer" status are 1) interrelation of operations, 2) common management, 3) centralized control of labor relations, and 4) common ownership. Carpenters Local 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982).

An "alter ego" status often involves an effort to avoid a collective bargaining obligation through a sham transaction. Carpenters Local 1846 v. Pratt-Farnsworth, Inc., supra.

By way of contrast, "joint employers" are assumed to be separate and independent legal entities and common ownership and control of the companies is not central to the analysis. Rather, two companies are held to be joint employers of a group of workers when one company that contracts in good faith with another retains sufficient control over the terms and conditions of employment of the other company's workers. Clinton's Ditch Co-op

Co., Inc. v. NLRB, 778 F.2d 132 (2nd Cir. 1985).

B. TEST FOR JOINT EMPLOYER STATUS UNDER NLRA

The Supreme Court has held that the question whether a company is a joint employer with another one is essentially a factual one. Boire v. Greyhound Corp, 376 U.S. 473, 55 LRRM 2694 (1964). Therefore no specific formula is available for deciding the issue; each case turns on its own facts.

The test was expressed by the NLRB in TLI, Inc., 271 NLRB No. 128, 117 LRRM 1169 (1984) as follows:

> As noted by the judge, the appropriate standard for determining joint employer status was recognized by the Third Circuit in NLRB v. Browning-Ferris Industries. There the court found that, where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act. Further, we find that to establish such status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing discipline, supervision, and direction. Laerco Transportation & Warehouse, 269 NLRB No. 61, slip op. at 6, 115 LRRM 1226 (Mar. 21, 1984).

This standard was rephrased by an appellate court in NLRB v. Western Temporary Services, Inc., 821 F.2d 1258, 125 LRRM 2787 (7th Cir. 1987) to be that "joint employer status exists if two employers `exert sufficient control over the same employees.'"

The Fifth Circuit Court of Appeals has phrased the test in the same language that the NLRB did in TLI - i.e., whether the company sought to be held a joint employer would "share or co-determine" those matters governing essential terms and conditions of employment. Ref-Chem Co. v. NLRB, 418 F.2d 127, 72 LRRM 2733 (5th Cir. 1969).

In Clinton's Ditch, supra, the Second Circuit Court of Appeals weighed the following five factors in determining joint employer status:

1. Hiring and firing

2. Discipline

3. Pay, insurance and records

4. Supervision

5. Participation in the collective bargaining process

Many commentators have observed that both the NLRB and the courts tend to confuse the single employer and joint employer doctrines, and sometimes rely on factors not properly relevant to the issue being decided. Therefore, the following more expansive list of factors should be considered by plant owners who want to avoid a joint employer relationship with a contractor. Both the terms of the written contract and actual practice should be reviewed since both are considered by the NLRB and courts. There are, of course, practical limits to the things that can be done to avoid a joint employer finding. To the extent the relations between the owner and the contractor can be arranged as follows, your position in a joint employer situation will be enhanced:

1. There should be no common ownership of the companies.

2. There should be no common control of the companies at the top management or lower levels.

3. There should be no common control over labor policies. This is a very important factor. The owner should not expressly retain or actually exercise the right to determine wages or benefits or approve changes therein, to participate in the selection (hiring) of employees or the determination of their qualifications, or to require the termination of particular employees. All matters of employee relations should be left exclusively to the contractor. If possible, your contract should not specify wage rates to be paid to employees; it should merely specify the amount to be paid to the contractor for each hour worked with the contractor deciding what part of that to pay the employee.

4. The contractor's employees should not be supervised by the owner's supervisors. This is a very important factor. The contractor should have its own supervisors, and to the extent possible contact between the owner and the contractor should be at the management or supervisory level.

5. The contractor's employees should not be integrated into the production process or other normal operations. In the maintenance contractor situation, this adverse factor is necessarily present to a considerable degree. At least care should be taken that the employees of the contractor do not perform incidental and unimportant duties in the production process, and to the extent possible the type of maintenance work performed by the owner's maintenance employees should differ from the types performed by the contractor. Also, to the extent possible owner and contractor maintenance employees should not "work together."

6. The owner should exercise no day-to-day control over the operations of the contractor of his employees, including control over the number of employees and the hours worked (including overtime). To the extent possible the contractor should be given an area of responsibility and the method of implementation should be left to him.

7. There should be no interchange of employees. The contractor should not borrow employees from the owner or hire them from the owner's payroll, or vice-versa.

8. There should be no common facilities. To the extent possible all physical facilities, such as time clocks and lockers, should be separately located and owned. The contractor's employees should not be on the owner's payroll. Office facilities, clerical staffs and books and records should be separate.

9. To the extent possible the owner should not pay the operating expenses of the contractor of furnish the materials or own the equipment used by the contractor.

C. TEST UNDER EMPLOYMENT DISCRIMINATION STATUTES

Some cases under Title VII and the ADEA do not use the term "joint employer," but simply decide whether the principal (e.g., plant owner) is "an employer" of the plaintiff within the meaning of the statute. In the Fifth Circuit, a "hybrid economic realities/common law control test" is used to determine whether there is an "employment relationship" between the plaintiff and the alleged employer. The right to control the employee's conduct is the most important component of the test. When examining the control component, the

Court focuses on whether the alleged employer has the right to hire and fire the employee, to supervise the employee, and to set the employee's work schedule. The economic realities component focuses on whether the alleged employer paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment. Deal v. State Farm, 5 F.3d 117 (5th Cir. 1993). A leading federal district court cases states the test to be whether the alleged employer "exercises substantial control over significant aspects of the compensation, terms, conditions or privileges of plaintiff's employment." Magnuson v. Peak Technical Services, Inc., 808 F.Supp. 500 (E.D. Va. 1992). The Magnuson decision has been cited with approval in a case under the Louisiana employment discrimination statute. Duplessis v. Warren Petroleum, Inc., 672 So. 2d 1019 (La. App. 4th Cir. 1996).
