Joint Employment: Issues, Challenges and Potential Solutions

California Hospital Association Labor and Employment Law Seminar

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What is Joint Employment and Why Worry Now?

**Joint employment is:**
- Legal concept used to determine whether more than one employer is legally responsible for actions taken or not taken with respect to an employee

**Rapidly evolving area of the law**
- Until recently, few changes: common law agency test — “direct and immediate control”
- Now rapidly developing movement to bring other employers into the mix
- Why the focus on co-employment? Changing nature of economy and workforce
  - Specialization
  - Flexible staffing
Quintessential Cases

Recent cases highlight expanding law:

• McDonald’s franchisee cases: joint employment in franchisor/franchisee context
  – Is McDonald’s an employer of franchisee employees?
  – Many franchisees are very large and sophisticated

• *Browning-Ferris Industries of Cal.*, 362 NLRB No.186 (August 27, 2015): joint employment of contractor employees
  – Dramatically expanded concept of joint employment from actual control to theoretical control
Why Should Hospitals Worry About Joint Employment?

- Affects many areas of employment: wage-hour, NLRA, EEO, etc.
- Very important for the hospital industry due to the nature of workforce and staffing: nurse registries, traveler agencies, housekeepers, security guards, food service, grounds and business office
- New focus for plaintiff’s attorneys — provides deeper pockets
  - Multimillion dollar claims and settlements where hospital and traveler agency alleged to be joint employers
What Does a Finding of Joint Employment Mean?

**National Labor Relations Act**

- Joint employer must bargain over terms and conditions over which it possesses authority to control

- Supplier and user employees may be combined without the consent of both employers. *Miller & Anderson*, 364 NLRB No. 39 (July 2016)

- Impact not limited to employers with represented employees

- Impact on public employers: California Public Employment Relations Board and other state agencies may follow NLRB test
What Does a Finding of Joint Employment Mean? (cont.)

**Wage-Hour Compliance:** Joint responsibility for wage-hour compliance

- Accurate pay, including overtime
- Meal and rest period compliance
- Alternative work schedules (AWS)
- Wage statements
- Final pay?
- Leaves of absence
- Notices and recordkeeping
What Does a Finding of Joint Employment Mean? (cont.)

**EEO Compliance:** Joint responsibility for third-party EEO compliance

- Hiring
- Discipline
- Accommodation of disabilities
- Terminating the worker
- Pay equity
- Reporting and recordkeeping requirements
What Constitutes Joint Employment?

- Horizontal joint employment: commonality
- Vertical joint employment: control
- While tests are slightly different, outcome is the same
Horizontal Joint Employment — What is it?

- DOL has been active in this area

**Test:** Where an employee works for two or more employers at different times during the workweek, joint employment exists:

1. Where arrangement to share the employee's services;
2. Where one employer acts directly or indirectly in the interest of the other employer; or
3. Where the employers are not completely disassociated with respect to the employment of a particular employee
Horizontal Joint Employment in the Hospital Industry

2005 DOL Opinion Letter finding joint employment by related hospitals

1. Sharing a common president and board of directors;
2. One entity periodically provided administrative support to other;
3. Having the same personnel policies at some of the facilities

Joint employment even though each entity had its own human resources department, employee handbook, payroll system, pay scales, retirement plan and tax ID
Horizontal Joint Employment: What to Do?

• Identify entities that may be horizontal joint employers
  – Do they have common management?
  – Do they share employees?
  – Do they have common policies, payroll systems, timekeeping systems?

• If yes, then ensure that the hours of shared employees are aggregated for overtime (OT) purposes

• Difficult issues:
  – Meal and rest breaks
  – Sick leave accrual/use
  – Wage statements
  – Who gets charged for the OT?
Vertical Joint Employment: NLRA

*Browning-Ferris:* Entities share or codetermine those matters governing the essential terms and conditions of employment

- Look to see if a “right” to control, whether or not actually exercised
- Control need not be exercised directly and immediately
- Reserved authority and indirect control are sufficient
- Currently pending before the D.C. Circuit
- What about the new NLRB?
Vertical Joint Employment: Wage-Hour

Martinez v. Combs, 49 Cal. 4th 35, 64 (2010). An entity will be considered “employer” if the entity:

- Exercises control over wages, hours or working conditions
- Suffers or permits the worker to work, or
- Engages the employee to work under the common law test of employment

Facts: Employees of a bankrupt strawberry farmer sued produce merchants who contracted with the farmer for unpaid wages. Farmer (and not produce merchant) hired and fired, trained and supervised, determined rates and form of pay, set work hours and location, and when to take breaks.
Vertical Joint Employment: Wage-Hour (cont.)

Post-Martinez cases:

Guerrero v. Superior Court (Cal. App. 2013): In-home support services worker was employee of county and public authority (in addition to the program recipient for whom she actually worked). Entities controlled duties, hours of work and rates of pay of worker.

Arredondo v. Delano Farms Company (E.D. Cal. Feb. 2013): Employees of a farm labor contractor (who was an independent contractor of Delano Farms) were also Delano Farms employees. Contractor and the farm negotiated and set the workers’ rates of pay, and Delano Farms “expressed a desire to control those rates so that it would attract the best workers possible.”
Vertical Joint Employment: Wage-Hour (cont.)

_Salinas v. J. I. General Contractors, Inc._ (4th Cir. 2017): Employees of subcontractor found to be employees of contractor where contractor:

- Set work schedules, start and end times
- Assigned unscheduled hours
- Decided where employees would work
- Included its name on time cards for subcontractor employees
- Supervised the work of subcontractor employees
- Provided all tools and equipment to subcontractor employees
- Threatened subcontractor employee with termination

**Test:** Are entities “completely disassociated” from each other with respect to the employment of the employee?
Vertical Joint Employment: EEO Laws

_Vernon v. State_, 116 Cal. App. 4th 114 (2004). Right of control is most important factor. Other factors include:

- Payment of salary or other employment benefits
- Ownership of the equipment necessary to perform the job
- Location where work is performed
- Obligation to train the employee
- Authority to hire, transfer, promote, discipline or discharge
- Authority to establish work schedule or assignments
- Determination of compensation levels
- Skill required to perform the job and extent of supervision
- Whether the work is part of the entity’s regular business operations
- Duration of the parties’ relationship
Does Joint Employer Law Really Matter Anymore for Wage-Hour Purposes?

- AB 1897 (2014): Added 2810.3 to the California Labor Code
- Provides that “client employers” required to share with a labor contractor liability for workers supplied by the contractor for (1) payment of wages and (2) failure to secure valid workers’ compensation coverage
- Control does not matter
- Legislative history of A.B. 1897 indicates that it was designed to address the increase in “contingent work,” which the Legislature noted had expanded from manufacturing and agricultural industries to “professional occupations like nursing . . .”
Does Joint Employer Law Really Matter Anymore for Wage-Hour Purposes? (cont.)

- Shared liability for workers performing the “regular and customary work of the business”

- Not clear how broadly courts will interpret the “regular and customary work of a business”

- Will this term be interpreted to include work that is outside of the business’ main function, (for hospitals, providing health care) such as security, cleaning services and similar ancillary functions?
One of the bill’s stated purposes is to prevent interference with the right to organize.

While reducing the number of labor contractors that provide workers for an entity may facilitate unionization, the fact that employers will now be liable for wage claims from employees of contractors is a much more significant union issue.

Unions will now be in a stronger position to use the threat of wage-hour class action litigation to persuade entities to recognize the union.
Joint Employer Status — What to Do?

So, what does this really mean for hospitals?

- Protect yourself from joint employer status where you can (e.g., food service)
- Not always possible to avoid joint employment
- Minimize liability where there is likely joint employment
Avoiding Joint Employment

• Disclaim joint employer status
• Specify that contractor/supplier responsible for all aspects of employment, including wages and benefits
• Specify that supplier responsible for hiring, supervision and discipline, and user has no right to comment
• Include strong indemnification provision
• Do not deal with small companies
• Do not dictate number of employees or enforce productivity standards
Minimizing Risk

- Include strong indemnification provision
- Do not deal with small companies
- Investigate entities’ wage-hour practices
- Consider auditing payments to registry/traveler workers to ensure payment for all recorded hours
- Consider requiring proof of AWS elections, meal period waivers
- Create contractor forms of hospital AWS agreements and meal period waivers
- Advise registry/traveler workers of the hospital’s policy to provide meal and rest periods
- Provide hospital contact for registry/traveler employee to notify of issues
Will Congress Fix This?

Several legislative attempts to reverse *Browning-Ferris* and rein in expansion of joint employment concept

Most recent: “Save Local Business Act” (H.R. 3441)

- Would amend the NLRA and FLSA
- Would require “actual, direct and immediate control” of worker
- Recently passed in House Education and Workforce Committee
- No bill in Senate yet — harder to pass
Questions?
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