PULLMAN &COMLEY

Risks In Being A Joint Employer

Working Together

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Joint employment of one worker by two businesses can create risks of liability for both employers in a variety of ways. Both businesses may be liable, for example, on claims for employment discrimination and/or violations of wage and hour laws.

A recent Guidance issued by the U.S. Department of Labor describes two forms of joint employment with respect to compliance with the Fair Labor Standards Act. The DOL defines "horizontal joint employment" as a situation in which two employers ostensibly employ a worker separately, but are in fact so closely associated or related to each other that the work hours of the employee should be combined to determine overtime and minimum wage pay requirements. Such companies typically have common ownership, share control over operations or supervisory control over employees, share clients and customers, and treat their employees as a pool available to both employers.

For example, construction firms often incorporate different companies to bid on work, depending on whether the work is public or private, or union or non-union. But if operations are not sufficiently separate and employees and supervisors are assigned to one job or another as needed by any of the related companies, there can be wage-hour issues; for example, payment of overtime when an employee works for two different companies during the week and works more than 40 hours in total. Additionally, if one of two companies under common ownership and control is doing union work under a collective bargaining agreement and the companies co-mingle their employees, there can also be issues involving representation of the employees by the labor union.

The DOL will find "vertical joint employment" when the employee is economically dependent not on the employer-of-record, but on the other business that benefits from the employee's work. These relationships are judged by the economic realities test, the question being whom the employee is really working for. The DOL would consider such factors as which entity controls or supervises the work, the permanency and duration of the assignment, the location of the assignment, and the power to hire and fire.

For example, hospitals in Connecticut often employ hospital-based physicians in a separate corporation organized as a medical foundation, but the hospital is the physician's place of work, the administration of the hospital controls assignments, the hospital has final authority for hiring and termination, and it is the hospital that benefits from the work of the physician. Another example of vertical joint employment is the staffing company that nominally employs workers who perform important functions for another business. Because of relationships like this, employment law recognizes that both companies in a vertical joint employment

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relationship may be liable in discrimination or wrongful termination lawsuits.

There is another form of joint employment imposed by the Workers Compensation Act. The Act provides that when any principal employer obtains work to be done by a subcontractor as part of the regular work of the principal employer, the principal employer is liable for payment of workers compensation claims for injuries to employees of the subcontractor. So even if the principal employer and the subcontractor are otherwise separate businesses and do not meet any of the joint employment tests, they are deemed joint employers by law for purposes of workers compensation coverage.

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