BakerHostetler

Brief

Five Things You Should Know About Joint Employment

1 What Is Joint Employment?

Joint employment means that more than one entity is a worker's employer — at least under some law.

In joint employment, there is usually a direct employer and a secondary business. The direct employer is the company that hires, schedules and pays the workers and provides their W-2s. The secondary business is the potential joint employer. It does not hire or pay the direct employer's employees, but it benefits from their services.

Examples of direct employers may include staffing agencies, subcontractors or franchise operators. Examples of secondary businesses include companies that subcontract work or retain staffing agency employees to perform labor. Franchisors are also sometimes alleged to be joint employers of a franchise owner's employees. Depending on the test, the secondary business might or might not be a joint employer of the direct employer's W-2 employees.

2 Why Is Joint Employment a Concern?

Because "I didn't do it" is not a defense for a joint employer. A joint employer can be held legally liable for errors made by another company. Even though the secondary business expects the direct employer to pay a minimum wage, to properly calculate and pay overtime, and to provide employee benefits to its direct employees, a secondary business can be held jointly liable if the direct employer fails to do any of these things.

Joint employment is a backup plan for what happens when the direct employer doesn't do what it's supposed to do. If a direct employer goes bankrupt and doesn't pay wages, or if it miscalculates overtime, or if it doesn't pay for off-the-clock work, both the direct employer and the secondary business can be fully liable – if the secondary business is deemed a joint employer.

3 Is Joint Employment Illegal?

Nope. Joint employment is not against the law. Nor is it necessarily a problem. Joint employment becomes a problem for a secondary business only if the direct employer fails to fulfill its legal obligations. With joint employment, the law doesn't care who was supposed to do something. Both companies are responsible.

4 How Do You Know Whether You're a Joint Employer?

Unfortunately, there is no single test that determines joint employment. Different tests apply to different laws. Incredibly, different tests sometimes even apply to the same laws. For example, in determining whether a business is a joint employer under the Fair Labor Standards Act (FLSA), the Fourth Circuit Court of Appeals applies a different test than that of the other federal Courts of Appeal. The tests for determining joint employment under the FLSA, the National Labor Relations Act and employee benefits law all differ from one another. Varying state law tests further complicate the analysis.

5 What Can Businesses Do to Protect Themselves From Joint Employment Liability?

There are a few options, some legal and some contractual.

From a legal standpoint, a secondary business can distance itself from the direct employer's employees, relinquishing all control over how their work is performed. But sometimes that's not practical. A secondary business might engage a staffing company to provide temporary workers but, as a practical matter, the secondary business needs to supervise the temps. Legally, the two companies may be joint employers under the law.

Even if the law deems two companies to be joint employers, a well-drafted contract can disentangle the two companies' liabilities. A carefully written agreement should (a) clearly define each company's responsibilities, and (b) provide for indemnification if these responsibilities are not fulfilled. Clarity and specificity are important. Off-the-shelf templates are almost always inadequate. Our team's extensive knowledge of the factors that tend to sway the analysis allows us to draft sophisticated, creative contract clauses to fit our clients' business needs.

BakerHostetler's clients include direct employers and secondary businesses. We see both sides of the coin, and our experience helps us to advise our clients on how best to protect their interests, limit their exposure and minimize risks.

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