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Joint Employers: Changing Liability For A Changing Workforce

By JORDAN W. SIEV AND KIRSTEN M. ERIKSSON

Given the explosion of workplace-related litigation over the past decade, most companies are now aware of the steps they must take to avoid liability to their own employees under laws prohibiting sexual harassment, discrimination and the like. Many companies, however, remain unaware of the risk that they may be liable under the same laws to the employees of other companies or associations with whom they have relationships. Consider the following scenario: Company A, a computer software manufacturer, contracts with Agency B, a temporary help agency. Company A needs to hire several people with foreign language skills to assist it in translating its software for sale overseas. Company A permits the workers on its property, gives them identification badges, offices and e-mail addresses, and assigns them to work on "teams" with regular employees of Company A. Company A does not provide any benefits to these workers, and does not even pay them directly, instead paying Agency B on a monthly invoice for the services rendered by the workers. The employees sue both Company A and Agency B for employee benefits. Who is the employer of these workers—Company A or Agency B? The answer, in all likelihood, is "both."

Such a result would undoubtedly surprise many companies who routinely rely upon temporary agencies to fill staffing needs. It certainly surprised Microsoft, whose long-running legal battle with former temporary staff and independent contractors provided the model for the factual scenario used above. In May 1999, the Ninth Circuit Court of Appeals in California held that temporary workers employed by an agency were not precluded from also being employees of Microsoft, as the two were not "mutually exclusive"—the companies could jointly employ the workers. The appeals court thus ordered a lower court to determine whether the workers should have been entitled to the benefits Microsoft offered to its regular employees, such as a stock purchase plan.

While Microsoft encountered the problem of joint liability for employees in the context of providing employee benefits, the same problem may arise in other contexts, such as liability for harassment or discrimination. In addition, the problem is not limited to temporary staffing arrangements, such as the arrangement used by Microsoft, but can occur anytime an employer alters a traditional employer-employee relationship to involve third parties. Moreover, the problem may also arise when a company associates itself with another company for reasons unrelated to staffing needs. For example, parent/subsidiary, franchisor/franchisee, contractor/subcontractor and joint

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Internet Libel Statute of Limitations Runs from First Posting: In an apparent case of first impression in New York, a Court of Claims Judge has ruled that the statute of limitations for a defamation claim based on an internet posting runs from the date of first publication. In so holding, the Court declined to distinguish publication of a book or report through traditional printed media from publication through electronic means, and rejected the plaintiff's claim that the maintenance of the posting constituted a "continuous publication," thereby extending the statute of limitations. *Firth v. State of New York.*

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ventures are all relationships in which a company may unexpectedly find itself responsible for another company's employees. While there are, of course, valid business reasons for using alternative staffing arrangements or entering into business relationships with other companies, a company should exercise caution when doing so lest it be subject to unexpected liability for another company's employees.

Legal Theories

The two most common legal theories applied to create liability in such a situation are the "single employer" and the "joint employer" theories. Both of these theories find their origin in the labor context, as they arose as tests used by the National Labor Relations Board to determine whether a worker was the employee of a particular company for matters arising under its jurisdiction. More recently, courts have applied these legal theories in employment cases arising under Title VII, the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), the Employee Retirement Income Security Act ("ERISA") and the Fair Labor Standards Act ("FLSA"). It may only be a matter of time before the application of these tests is further expanded in the workplace. A wise employer knows the tests and carefully structures its relationships so as to avoid liability.

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The Single Employer Test. Two or more companies may be found to be a single employer when the companies, while nominally separate, are actually part of a single integrated enterprise so that, for all purposes, they function as a single employer. Under this test, courts will look at four factors to determine whether the companies form a single, integrated enterprise: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership.

The Joint Employer Test. By contrast, the joint employer test assumes that the companies are in fact separate, independent entities that have merely chosen to jointly handle some aspects of their employer-employee relationships. In a joint employer situation, a company will be considered the employer if it retains sufficient control of the terms and conditions of employment. To determine whether this is the case, courts will examine three categories of evidence: (1) authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits and hours; (2) day-to-day supervision of employees, including employee discipline; and (3) control of employee records, including payroll, insurance, taxes and the like.

Identifying the Risks

Once a company knows how and why it might be considered to be the employer of another company's employees, it should closely examine its own relationships to determine whether it is at risk. The following is a list of factors that may indicate a risk for liability:

Structure: sharing or overlapping owners, officers and/or directors; sharing or co-mingling of bank accounts, assets, equipment, office space or employees, including "loaning" or "transferring" employees between companies;

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Slapping of Alleged Sexual Harasser Not Protected Activity: The United States Court of Appeals for the Second Circuit affirmed a district court's dismissal of, among other things, a claim for retaliatory firing for the exercise of Title VII-protected rights. The Court noted that the plaintiff's act of slapping an alleged sexual harasser was not a "protected activity" taken to protest or oppose discriminatory conduct. The Court added that the ability to engage in "protected activity" does not "constitute a license for employees to engage in physical violence in order to protest discrimination." *Cruz v. Coach Stores, Inc.*

Supreme Court Clarifies Accrual of RICO Statute of Limitations: In a unanimous decision, the U.S. Supreme Court resolved a split among the Circuits, and adopted an "injury-based" rule for the accrual of RICO's four-year statute of limitations. The Court held that the statute of limitations begins to run when the plaintiff discovered, or should have discovered, his or her injury, rather than when the plaintiff discovered, or should have discovered, both the injury and the pattern of racketeering activity. *Rotella v. Wood.*

Processing Systems: maintaining joint processing systems, or performing processing for another company, including accounting, bookkeeping and payroll;

Budgeting: setting a budget for another company, pre-authorizing another company's expenses;

Workplace Policies: sharing workplace policies such as anti-harassment policies, safety and security policies, or setting such policies for another company; implementing and enforcing such policies for another company through your Human Resources department;

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Discipline: disciplining another company's employees, making or influencing their procedures for carrying out disciplinary actions;

Compensation: determining or recommending the level of compensation paid to another company's employees; directly paying another company's employees.

Supervision/Direction: supervising another company's employees, providing them with assignments and training to perform assignments; setting hours to be worked by that company's employees;

Collective Bargaining: involvement in or negotiating another company's collective bargaining agreements or other labor issues;

Insurance/Taxes: paying insurance on the employees of another company, paying taxes on another company's employees, withholding taxes from such employees' paychecks;

Benefits: paying benefits to another company's employees; including employee discounts, participation in company-sponsored events such as holiday parties and company picnics; and

Contractual Right to Control: having any contractual agreement which gives one company the right to control any of the facets of employment outlined above, even if not exercised.

Avoiding Liability

The good news is that none of the factors listed above are determinative, as both the single employer and joint employer tests examine the existence of risk factors in the overall context of the relationship. The bad news is that such an elastic test provides a moving target, which offers no guarantees to a company that if it takes certain steps, it is guaranteed to be free from liability.

The flexibility of the tests offers companies some latitude in choosing what relationships they want, and in structuring those relationships in the most effective manner. Thus, a company may decide to restructure a relationship that appears

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New York Court of Appeals Upholds Dismissal of Case for Discovery Abuses: In a rare instance of New York's highest court ruling on a discovery matter, the Court of Appeals affirmed the dismissal of a personal injury case due to plaintiff's prolonged delays in responding to court-ordered discovery. Notably, the opinion was not only unanimous, but was written by the Chief Judge of the Court, sending the clear message to litigants that discovery abuses will not be tolerated. Kihl v. Pfeffer. Slapping of Alleged Sexual Harasser Not Protected Activity: The United States Court of Appeals for the Second Circuit affirmed a district court's dismissal of, among other things, a claim for retaliatory firing for the exercise of Title VII-protected rights. The Court noted that the plaintiff's act of slapping an alleged sexual harasser was not a "protected activity" taken to protest or oppose discriminatory conduct. The Court added that the ability to engage in "protected activity" does not "constitute a license for employees to engage in physical violence in order to protest discrimination." *Cruz v. Coach Stores, Inc.*

fraught with risk. If re-structuring is not an option, steps that are successful in reducing liability for regular employees are also useful in reducing liability for joint employees. Thus, for example, a company can include joint employees in anti-harassment workshops and ensure that supervisors implement the company's policies equally to traditional employees and joint employees in order to prevent harassment and discrimination claims. An employer may also be able to expand its insurance program to provide coverage for "new" employees.

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Conclusion

Joint employer liability is a relatively new concept to many companies, but it is one to which they should pay careful attention. As more and more companies creatively restructure their employment relationships, they increase the danger of unexpected liability based on the joint employer or single employer theory. Awareness of the risks before entering into an alternative employment relationship can help a company be proactive and address the risks before they become a liability. n Jordan W. Siev and Kirsten M. Eriksson are with the New York office of Anderson Kill & Olick, P.C., their practice includes representing management in employment-related matters. ■

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Permanent Injunction Staying Arbitration Obtained: AKO's client, Eastern Minerals International, Inc. ("EMI"), and Cane Tennessee, Inc. ("Cane"), entered into a timber and coal-mining lease, which provided for the arbitration of certain disputes between the parties. Cane filed a demand for arbitration with the American Arbitration Association in New York, and EMI obtained from the Supreme Court of the State of New York, County of New York, a temporary and then a permanent injunction staying the arbitration. According to the Court, the United States Government's "regulatory taking" of EMI's right to mine through the Government's extraordinary delay in acting on EMI's permits was not a "condemnation or eminent domain" proceeding which, among other things, would have triggered the parties' arbitration agreement. In the Matter of the Application of *Eastern Minerals International, Inc. v. Cane Tennessee, Inc.*

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