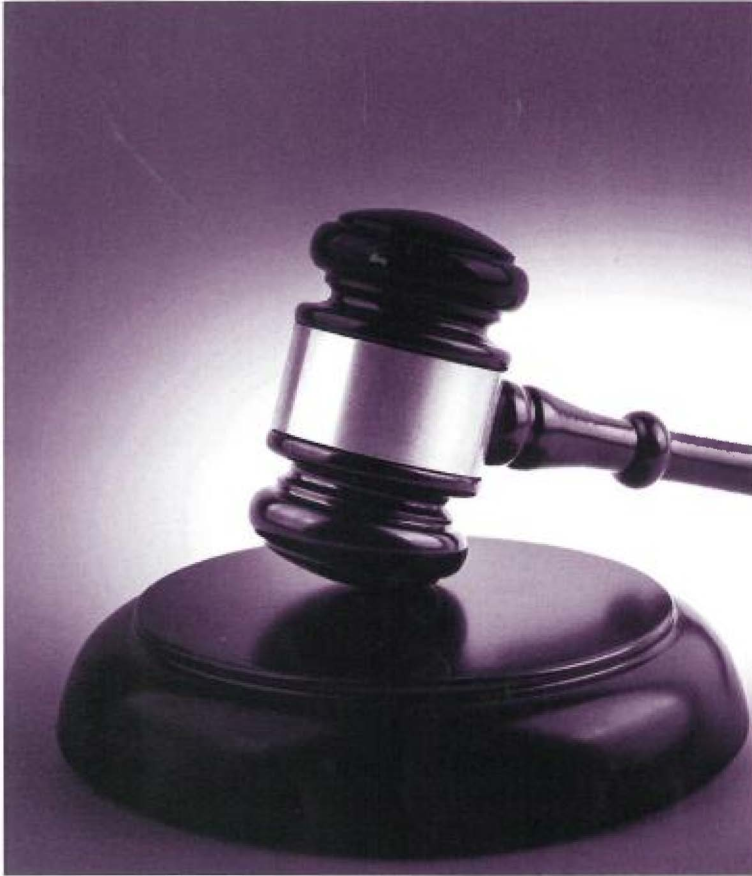

Is Your Company a Joint Employer?

RISKS AND TIPS

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Companies using temporary workers, leased employees, or subcontracted workers may not consider those individuals to be their own employees. However, the law may disagree and treat the company as a "joint employer" along with the subcontractor or company supplying the temporary workers or leased employees. As a result, joint employers may be liable for lawsuits arising from claims related to discrimination, harassment, violation of the National Labor Relations Act, and/or withdrawal liability. The question of whether a company is a joint employer may depend on which of the violations listed above is alleged. As discussed below, different laws may apply different tests to determine a joint employer relationship.

In general, a joint employer relationship will exist: (1) if the secondary employer (i.e., the company leasing employees or subcontracting additional workers) exercises direct or indirect control over significant terms and conditions of employment of the primary entity's employees; (2) where the secondary employer possesses the unexercised potential to control such terms and conditions of employment; or (3) where "industrial realities" otherwise made the company an essential party to meaningful collective bargaining. A joint employer relationship also can arise from a contractual agreement between the company (as a secondary employer) and the primary employer (e.g., the lease agreement may specify that the company receiving leased employees is a joint employer with the leasing organization).

In the trade show industry, it is not uncommon for an exhibitor to lease union employees to set up, tear down, and maintain the exhibitor's booth on the floor. Who directs and controls the union employee's work for the duration of a show? What if the same union employees work many booths for different exhibitors? Are all exhibitors who use such union employees joint employers? Not many persons outside the industry understand how a tradeshow operates and it may easily appear to an outsider that a joint employer relationship exists when it does not. The degree to which control over the union employee is exercised by any one exhibitor could lead to a joint employer relationship. It is very important that the exhibitor limit control over any leased union employees to minimize the possibility of an adverse joint employer finding.

The general test described above may be refined or altered by specific laws dealing with discrimination or employee benefits. Below we outline several important laws and how they refine the general test.

Under the Fair Labor Standard Act ("FLSA"), the employee's work hours for joint employers are aggregated and considered as one employment when evaluating the number of weekly work hours, employee's regular rate of pay, and the amount of overtime. All joint employers are jointly and severally liable for FLSA compliance. The standard for determining the existence of a joint employer is the "economic reality" test to determine the existence of a joint employment. The economic reality test requires a consideration of "whether the employees in question are economically dependent on the putative employer." The court usually will consider the extent of the employers' power: (1) to hire and fire the employees; (2) to supervise and control employee work schedules or conditions of employment; (3) to determine the rate and method of payment; and (4) to maintain the employment records.

The Department of Labor ("DOL"), the governmental agency assigned to enforce the FLSA, has interpreted

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current laws to provide that joint employment can be horizontal or vertical. Horizontal joint employment means two employers share an employee's service or are associated regarding their workers and share common control over them. The analysis focuses the relationship between two employers. The DOL identifies the non-exclusive factors relevant to analyzing potential horizontal joint employment, including whether and to what extent the potential joint employers: (1) are commonly owned or have no overlap in ownership; (2) have overlapping officers, directors, executives, or managers; (3) share control over operations, including hiring, firing, payroll, advertising, and other overhead costs; (4) intermingle their operations; (5) supervise or have supervisory authority over the work of the other's employees; (6) treat the employees as part of a common labor pool available to both of them; (7) share clients or customers; and (8) are party to any agreements between them.

A vertical joint employment exists when an employee of an intermediary employer is economically dependent on the potential joint employer. The analysis focuses on the relationship between the employee and a potential joint employer. Factors to consider include the degree to which the potential joint employer: (1) directs, controls, or supervises the work performed; (2) controls employment conditions; (3) engages in a permanent, indefinite, or long-term relationship with the employee; (4) uses the employee for repetitive, rote, or unskilled work; (5) uses the employee to perform work that is integral to its business; (6) has the work performed on its premises; and (7) performs administrative functions commonly performed by employer.

Under Title VII, there is no clearly defined standard for determining the existence of a joint employment relationship. Title VII applies two tests to examine whether the companies are joint employers: (1) the common law right of control test; and (2) a "hybrid" test, which is a combination of the common law right of control test and the economic realities test. Under the common law right of control test, entities are considered to be joint employers when they "share or co-determine" the essential terms and conditions of a worker's employment.

The Equal Employment Opportunity Commission ("EEOC") issued enforcement guidance about joint employment under Title VII. Accord-

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ing to the guidance, the test is whether the company exercises sufficient control over the individual employee. Factors to be considered include: (1) whether the company (as a secondary employer) controls when, where and how the employee performs the job; (2) whether the work requires a high level of skill or expertise; (3) whether the company provides the tools, materials, and equipment; (4) where the work is performed; (5) the length and continuing nature of the relationship between the company and employee; (6) whether the company can assign additional projects to the individual employee; (7) whether the company sets the hours of work and duration of the job; (8) how the employee is paid; (9) whether the employee has any role in hiring and paying assistants; (9) whether the work performed is part of the company's regular business; (10) whether the employee is engaged in the employee's own occupation or business; (11) whether the company provides benefits, such as insurance, leave, or workers' compensation, to the employee; (12) whether the employee is considered an employee of the company for tax purposes; (13) whether the company can discharge the employee; and (14) whether the company and the employee believe that they are creating an employer-employee relationship.

The Family Medical Leave Act ("FMLA") applies an "integrated employer" test for determining whether separate entities may be held liable as a single employer. The integrated employer test considers four factors: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) common ownership. Keep in mind that the FMLA explicitly states that "joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer." This is true regardless of whether the labor supplied is union or non-union, and if union, whether or not the second employer is a signatory to the collective bargaining agreement.

Finally, under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), a company that is not a signatory to a collective bargaining agreement under which contributions to a multiemployer plan are required may be a "joint employer" if, under the National Labor Relations Act ("NLRA"), the company would be bound by the agreement and therefore, be "obligated to contribute" to the plan. A company becomes a "joint employer" for purposes of the NLRA if it exercises such close supervision over day-to-day working conditions of the "employer's" employees. Thus, for separate entities to be "joint employers": (1) each company must exert significant control over the same employees; and (2) the evidence must show that the separate entities share or "co-determine those matters governing the essential terms and conditions of employment." The joint employer relationship is deemed to arise in situations where the parties contractually agree to be joint employers.

The potential consequences of being a joint employer can include: (1) joint liability for unfair labor practice charges; (2) being required to collectively bargain about the putative employees' employment terms and conditions that entity is found to potentially control; (3) being lawfully picketed by unions; and/or (4) liability associated with withdrawal liability to union benefit plans. Liability and penalties related to these consequences can reach millions of dollars.

If your company is in a potential joint employer relationship, the following steps should be taken to minimize potential liability. Firstly, the company should consult with their attorneys to learn the relevant case law in their jurisdiction. Second, the company should consider the economic realities of their relationship with the leased or subcontracted employees and how much control they must exercise over such employees. Thirdly, the company should conduct a cost-benefit analysis to determine whether such control is absolutely necessary. For example, the company may consider whether the benefits of exercising control over the leased or subcontracted employees outweigh the cost of potential liability as a joint employer. The company also should avoid potential joint liability by: (1) stating in any leasing or subcontracting agreement that they are not an employer or a joint employer of the leased or subcontracted employee; (2) clearly assigning responsibility and liability for compliance with specific laws; and (3) adding indemnification protection provisions in the agreement between the company and the primary employer. ECN

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