

# Remind Me Again - Who Do I Work For?



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# WHAT IS THE JOINT EMPLOYMENT DOCTRINE

- An employee formally employed by one employer (Company A) may be deemed constructively employed by another employer (Company B) if Company B has sufficient control over the terms and conditions of employment.

# WHEN DOES THE JOINT EMPLOYMENT DOCTRINE COME INTO PLAY?

The question of whether an employer is a joint employer arises in various situations. Common examples include when an employer:

- Hires a contractor to provide workers to perform services on the employer's premises.
- Uses temporary employees from a staffing agency.
- Leases employees from an employee leasing firm.

# WHEN DOES THE JOINT EMPLOYMENT DOCTRINE COME INTO PLAY?

- Engages a professional employer organization (PEO) to administer certain human resources functions, such as:
  - payroll processing;
  - administering benefits; and
  - securing workers' compensation and unemployment insurance coverage.

# WHAT IS A JOINT EMPLOYER?

Usual contexts are:

- An employer and a contractor or subcontractor performing services for the employer.
- An employer and a staffing agency that supplies employees to the employer.
- An employer and a PEO engaged to perform certain administrative and human resources functions for the employer.

If a joint employer relationship exists, Company B is a joint employer of the Company A's employees over which the Company B exercises sufficient control.

# SINGLE (INTEGRATED) EMPLOYER DOCTRINE

- The single employer doctrine is a related concept that is very relevant to BBNC companies.
- Under the single employer doctrine if two or more nominally distinct entities (such as a parent and subsidiary or sister subsidiaries) effectively operate as one integrated employer, they may be treated as one employer of all of their employees both for meeting the minimum employee threshold for coverage under the FMLA and Title VII and for imposing liability thereunder.

# SINGLE (INTEGRATED) EMPLOYER DOCTRINE

Most courts consider four factors:

- The interrelation of operations.
- Common ownership and financial control.
- Common management.
- Centralized labor relations and personnel.

# WHEN MIGHT COMPANY B BE DEEMED A JOINT EMPLOYER?

Varies by State, but generally:

- The degree of control Company B exercises over the employees at issue.
- The economic realities of Company A and Company B's relationship.
- A combination of factors indicating the degree of control and the economic realities, generally viewed in light of the totality of the circumstances.

# WHY DOES IT MATTER?

Companies can be deemed joint employers for multiple purposes including:

- Liability
- Title VII
- NLRA
- FLSA
- FMLA
- OSHA

# STEPS TO AVOID BEING DEEMED A JOINT OR SINGLE (INTEGRATED) EMPLOYER

There are ways to minimize the risk of being deemed a Joint or Single Integrated Employer. For example, a company should consider whether it can **refrain** from:

- Hiring and firing, providing other input about the hiring and firing process to the primary employer, or retaining the right to hire or fire the primary employer's employees.
- Supervising the employees directly or on a day-to-day basis.

# STEPS TO AVOID BEING DEEMED A JOINT OR SINGLE (INTEGRATED) EMPLOYER

- Disciplining the employees.
- Assigning specific work assignments to the employees.
- Directly or indirectly setting compensation and other terms and conditions of employment.
- Participating in the payroll and recordkeeping functions.
- Providing benefits to the employees.
- Requiring the employees to work on their premises.

# STEPS TO AVOID BEING DEEMED A JOINT OR SINGLE (INTEGRATED) EMPLOYER

- Retaining the right to:
  - implement workplace policies;
  - require employees to attend training; and
  - review the primary employer's books and records.

# STEPS TO AVOID BEING DEEMED A JOINT OR SINGLE (INTEGRATED) EMPLOYER

- Treating the primary employer's employees like their own employees, such as by:
  - providing them with business cards or otherwise indicating that they are direct employees of the employer;
  - providing them with a corporate email account or access to the employer's internal computer systems;
  - requiring them to follow the employer's employee policies;
  - conducting performance reviews or evaluations; or
  - providing professional development training or opportunities.

# CAN YOU AVOID ALL OF THESE?

## No Way.

- **What can you avoid?**
- Don't assign employees that work for Company A to Company B jobs. Company B should formally hire the employee.
- Make sure the employee identifies solely with his or her actual employer, not with other subsidiaries or the parent company.
- This includes business cards, email addresses, phone numbers, timekeeping...the list goes on and on.

# QUESTIONS?



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