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Expansion of Joint Employment Doctrine May Affect Health-Care Companies That Outsource

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Introduction

The decision to outsource a particular business function is rarely straight-forward. Health-care organizations and other companies must weigh the potential advantages to outsourcing work against the potential drawbacks and risks. One risk that a company that outsources work faces is the possibility that it will be legally liable as a joint employer of its outsourcing vendors' employees.[i.] This risk has increased during the past year as government agencies have tried to change the legal standards. Companies that utilize outsourcing vendors should take heed and review their operations and outsourcing contracts in light of these developments.

Expansion of the joint employment doctrine can affect many common outsourced arrangements utilized by health-care companies. These include the following types of outsourcing contracts:

- Information technology, such as EMR development and implementation, data center hosting and co-location, and desktop and help desk support;
- Clinical services, such as ED staffing, anesthesiology, radiology, pathology and hospitalist contracting, temporary nurse staffing, and physician management services;
- Revenue cycle management, scheduling and registration, coding, billing and collections, utilization management, and compliance; and
- Non-core processes, such as laundry, housekeeping, cafeteria, grounds keeping, and facility management.

As discussed below, there are measures that a company can take to reduce the risk of being found a joint employer and to limit its legal liability in the event it is found to be a joint employer.

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Implications of Joint Employment

Under the joint employment doctrine, in certain circumstances, a worker may have more than one legal employer. In the outsourcing context, a worker could be deemed an employee of both the outsourcing vendor *and* its customer (that is, the company that outsourced the work to the vendor). As a practical matter, this means that a company found to be a joint employer with its vendor may be jointly liable for the vendor's violations of labor and employment laws, including failing to properly pay employees pursuant to the Fair Labor Standards Act (FLSA) and engaging in discriminatory acts under equal employment statutes, such as Title VII of the Civil Rights Act (Title VII), the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

The impact of being deemed a joint employer can be significant. For instance, in October 2015, a national snack manufacturer agreed to pay $1.3 million in back wages and liquidated damages after a U.S. Department

of Labor (DOL) investigation found the manufacturer was a joint employer of 465 temporary workers who were provided by a staffing firm that failed to pay the workers the statutory minimum wage and overtime. Similarly, after a DOL investigation determined that a plastic products manufacturer and a staffing company jointly employed 566 workers who had not been properly paid overtime, the companies entered into a consent judgment in May 2016 in which they, jointly and severally, agreed to pay $1.4 million in back wages and liquidated damages. Notably, a DOL Regional Administrator said that case should ''send a strong message'' to employers.

Joint employers may also be subject to obligations as employers under the National Labor Relations Act (NLRA), including a duty to bargain, provide information to union representatives, and allow union activity on their property. In July 2016, the National Labor Relations Board (NLRB) further heightened the implications of being deemed a joint employer by holding that a company's solely employed workers and workers it jointly employs with a staffing agency may combine to create a single collective bargaining unit without obtaining the consent of either employer. *Miller & Anderson, Inc.*, 364 NLRB No. 39, at *20 (July 11, 2016). Before this decision, employees who wished to create a multi-employer collective bargaining unit had to obtain the consent of both employers. *See Oakwood Care Center*, 343 NLRB 659 (2004). This change opens the door for ''inherent confusion and instability'' as the resulting multi-employer units may encompass employers and employees with diverging interests.[ii.]

Companies can mitigate these risks by understanding the applicable legal standards and taking affirmative steps to avoid being deemed a joint employer under those standards.

The Different Tests for Joint Employment

Though the joint employment doctrine is a longstanding one, courts and agencies use a variety of legal tests to define its reach. To determine whether a company is a joint employer under statutes that do not define the term ''employee,'' such as ERISA and Title VII, the U.S. Supreme Court has adopted a case-specific, multi-factor common-law ''control test'' test (also known as the ''*Darden* test''). *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992).

The control test weighs several factors to determine whether an employment relationship exists, such as the source of the tools and equipment the worker uses, whether the worker hires and pays his or her own assistants, the extent of the worker's discretion over when and how long to work, and the service recipient's right to control the means and manner by which the final result or product is achieved.[iii.] No one factor is necessarily decisive, and not all or even a majority of the factors need to be met; rather, the determination is based on all of the circumstances surrounding the relationship between the company and the worker. *See* EEOC Compliance Manual, Section 2, Threshold Issues, Part 2-III(A), Covered Parties).

Under other statutes, such as the FLSA, some courts utilize a broader ''economic realities'' test, which considers whether a worker is ''economically dependent on the business to which he or she renders service.'' *See, e.g.*, *Zheng v. Liberty Apparel Co. Inc.*, 55 F.3d 61, 71-76 (2d Cir. 2003); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1495 (11th Cir. 1993). Still other courts have fashioned hybrid tests, combining the control and economic realities tests. *See, e.g.*, *Alexander v. Avera St. Luke's Hosp.*, 768 F.3d 756, 763-64 (8th Cir. 2014) (holding that, as a matter of first impression, a hybrid test, combining the common-law and economic realities tests, was appropriate in construing term ''employee'' under FMLA); *accord In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468-69 (3d Cir. 2012) (applying the control test in FLSA case as the ''starting point'' in determining ''the total employment situation and economic realities of the work relationship''). The Second Circuit, assessing joint employer status under the FLSA, has advised that such determinations should be limited to ''ensure[] that the statute is not interpreted to subsume typical outsourcing relationships.'' *See Zheng*, 355 F.3d at 76.

In January 2016, the DOL issued an Administrator's Interpretation that showcased its joint employment enforcement efforts and emphasized its view that the scope of employment relationships subject to the protections of the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) is broad. In the DOL's view, the test for joint employment under the FLSA and the MSPA, which share an identical definition of the term ''employ,'' is notably broader than under the common law control test that is used under other statutes. Noting that the variety and number of business models have made joint employment more common,[iv.] the DOL explains that the Administrative Interpretation is guidance for employers regarding joint employment under the FLSA and the MSPA.

The guidance's discussion of ''vertical'' employment relationships is relevant to companies that outsource work.[v.] According to the DOL, vertical employment relationships may exist where an employee performs work for an intermediary employer, such as a staffing agency or subcontractor, but is also ''economically dependent on another employer'' that benefits from the work. An example of a vertical employment relationship is a construction worker who is employed by a subcontractor but is economically dependent on a general contractor.

Although the DOL has stated that its new guidance reflects existing policy, it advocates for a broader application of joint employment in the vertical employment context in at least two ways. *One*, the guidance takes the position that an ''economic realities'' test must apply under the vertical employment analysis and that this test cannot focus only on control,[vi.] rejecting two federal appellate decisions (*Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998), and *In re Enter. Rent-A-Car*, 683 F.3d 462) that considered only the factors that focused on the potential joint employer's control. The ''core question,'' the DOL advises, is ''whether the employee is economically dependent on the potential joint employer who, via an arrangement with the intermediary employer, is benefitting from the work.''

Two, the guidance advises that the specific ''economic realities'' test in the MSPA regulations is useful when analyzing potential vertical joint employment relationships under the FLSA. According to the DOL, although the MSPA regulations address joint employment status in the ''context of a farm labor contractor acting as an intermediary employer for a grower,'' the regulations are still useful guidance in FLSA cases because they are ''probative of the core question of

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whether an employee is economically dependent on the potential joint employer who . . . is benefitting from the work.'' Thus, the DOL seems to be is going beyond merely educating employers and is instead advancing a more expansive view of joint employment.

The NLRB has also recently adopted a new, significantly more expansive joint employer standard for cases under the NLRA. *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 at *2 (Aug. 27, 2015). For more than 30 years, the NLRB required that a joint employer not only possess ''sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining,'' but also *directly exercise that control*. *See TLI, Inc.*, 271 NLRB 798 (1984); *Laerco Transp.*, 269 NLRB 324 (1984). In August 2015, in *Browning-Ferris*, the NLRB ''revisit[ed] and revise[d]'' its standard, holding that a company can be a joint employer under the NLRA by *merely possessing* control over another's workers, even if it never actually exercises it.[vii] Further, a company may be deemed a joint employer under the NLRA if it exercises such control indirectly through an intermediary, rather than directly. In other words, a customer company may be deemed a joint employer with its vendor if it directs the vendor when to discipline its employees, dictates the wages of the vendor's employees, or otherwise governs the vendor's employees' terms and conditions of employment. Browning-Ferris demonstrates the NLRB's goal to expand the reach of the National Labor Relations Act and the joint employer doctrine generally.

Practical Steps to Avoid Joint Employer Status

Before entering into an outsourcing arrangement, companies should consider carefully what steps they can take, both contractually and operationally, to mitigate against the risk of being deemed a joint employer. While contractual terms are important in delineating the boundaries of employment relationships by and among parties, the labels parties attach to workers and work relationships will not control in the event of litigation. *See, e.g.*, *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (labels and contract terms do not govern employment status under FLSA); *Ellington v. City of E. Cleveland*, 689 F.3d 549, 554-55 (6th Cir. 2012) (status ''not fixed'' by labels); *Thibault v. Bellsouth Telecomms., Inc.*, 612 F.3d 843, 845-46 (5th Cir. 2010) (contractual designation ''not necessarily controlling''). In other words, courts and agencies examine the actual facts associated with work relationships, and not the labels and terms that are ascribed to them in written agreements. Therefore, while companies that wish to avoid joint employment relationships certainly should include relevant provisions in their contracts, they must also continually monitor their operations to ensure such terms are being followed.

Given that joint employer tests vary by statute and jurisdiction and that such tests are highly fact-dependent, a list of recommendations to reduce joint employer liability is necessarily general in nature. Companies should consider the following:

- If possible, have outsourced work performed off site. If work must be performed on site, ensure that the outsourcing vendor supervises its own employees.
- Outsource entire functions or projects, rather than just workers. If possible, the work should be of short duration.
- Avoid becoming involved in a vendor's hiring, firing, training, discipline, or supervision of its workers. In addition, refrain from setting wages for an outsourcing vendor's workers or otherwise becoming involved in compensation and benefits decisions for these workers. Ensure that these responsibilities are clearly articulated in the outsourcing agreement.
- Limit control only to the results of work, not day-to-day activities.
- Require the outsourcing vendor to maintain workers' compensation insurance that covers all workers performing outsourced work.
- Require the outsourcing vendor to use its own equipment, tools, etc.
- Avoid requiring that an outsourcing vendor's workers wear the company uniform, adhere to a schedule set by the company, be assigned to a specific route or location by the company, or use reports or forms that would be required of a company employee.
- To the extent possible, limit interaction between regular employees and workers performing outsourced work.
- Train employees and management how to interact with workers performing outsourced work, stressing that these workers should not be treated as if they were employees (e.g., do not provide these workers with the company's employee handbook, issue them separate access badges or identification, or direct any complaints from these workers back to the company performing outsourced work (although in some cases, the company itself should investigate a complaint, such as if the complaint is about a company employee)).

In keeping with these recommendations, companies should review their contracts with outsourcing vendors to ensure that the agreements clearly define the responsibilities of each party.

Minimizing Downside Risks

In addition to having carefully crafted contractual obligations backed by strong indemnification provisions, customers of outsourcing vendors should consider other proactive ways to guard against the downside risks of joint employer liability. They should maintain awareness of their vendors' financial health. Vendor insolvency not only can render indemnification protection useless, but also can be a strong incentive for plaintiffs' counsel and government agencies to pursue a joint employment theory. Companies should also understand and proactively monitor their vendors' obligations under and compliance with federal employment laws, especially those statutes, such as the FLSA, that present the potential for high-dollar class action lawsuits.

Conclusion

Companies should not assume that they have no liability for employment-based claims once work has

been outsourced. The joint employment doctrine applies across the spectrum of labor and employment law and, in some cases, courts and agencies appear ready to apply it more liberally than before. Still, companies that are well-versed in the factors that determine joint employer status, and that take the necessary steps to execute agreements and establish operational practices that account for these factors, will be able to minimize these risks that result from their outsourcing transactions.

NOTES

[i.] Joint employer status is not always disadvantageous. In some instances, a company may want to be deemed a joint employer, for example, to maximize the likelihood that it will be protected by the ''exclusive remedy'' provisions of state workers' compensation laws, which generally preclude employees' tort-based claims stemming from workplace injuries or fatalities.

[ii.] Before these combined units will be deemed an appropriate unit for union elections and collective bargaining purposes, the units must satisfy the Board's traditional ''community of interest'' test. In addition, each employer will only be required to bargain with the unit members it employs, either jointly or solely, and over the terms and conditions it posses the authority to control. However, it is unclear how these standards will be applied or the practical implications such units will create.

[iii.] Other control test factors include: the skill required to accomplish the task; the location where the task is performed; the duration of the relationship between the parties; whether the hiring party has the right to assign the worker additional projects; whether the worker is paid by the job; whether the work performed is part of the hiring party's regular business; whether the hiring party provides the worker with traditional employee benefits; and the tax treatment of the hired party.

[iv.] In a blog, DOL Wage and Hour Division Administrator Dr. David Weil noted that the DOL often encounters staffing arrangements such as sharing employees or using third-party management companies, independent contractors, staffing agencies or other labor providers in the construction, agricultural, janitorial, distribution and logistics, staffing, and hospitality industries.

[v.] The guidance differentiates between ''horizontal'' and ''vertical'' joint employment relationships. ''Horizontal'' joint employment relationships ''may exist when two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee.'' In this type of joint employment, ''there is typically an established or admitted employment relationship between the employee and each of the employers, and often the employee performs separate work or works separate hours for each employer.'' According to the guidance, examples of horizontal joint employment may include separate restaurants that share economic ties and have the same manager controlling both restaurants or home health care providers that share staff and have common management. This article focuses on the guidance's discussion of ''vertical'' joint employment because it aligns with the traditional outsourcing model through which a company contracts with another corporate entity for the provision of services.

[vi.] The guidancenotes that the following seven factors should be applied under the ''economic realities'' test: (1) the extent to which the potential joint employer directs, controls, or supervises the work performed; (2) the extent to which the potential joint employer controls employment conditions; (3) the permanency and duration of relationship with the potential joint employer; (4) the extent to which the nature of the work is repetitive and rote; (5) the extent to which the employee's work is integral to the business of the potential joint employer; (6) the extent to which the work is performed on the joint employer's premises; and (7) the extent that the potential joint employer performs administrative functions commonly performed by employers.

[vii.] The NLRB identified several ''matters of fact'' that are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

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