Not So Happy Together? How Expanding Employers Can Avoid Single or Joint Employer Liability

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Corporate expansion is often a good thing, resulting in new opportunities and financial growth. However, corporate expansion can also result in the unintentional shouldering of liability and legal risk, particularly when one company becomes a parent to subsidiaries or enters into relationships with franchisees. When companies in such relationships become sufficiently intertwined, the parent or franchisor may be held liable for the federal employment law violations of a subsidiary or franchisee, even if the parent/franchisor had no involvement in the violation itself.[1] With proper structuring and delegation of authority, however, expanding entities can protect themselves from the actions of their relatives—and from plaintiffs seeking deeper pockets during litigation. This Questions—and Answers column defines single and joint employer liability, explains when it can attach to companies that have expanded to include subsidiaries or franchisees, discusses the ramifications the doctrines pose, and prescribes several strategies on how to reduce exposure and risk.

WHAT DO THE DOCTRINES "SINGLE EMPLOYER LIABILITY" AND "JOINT EMPLOYER LIABILITY" MEAN?

The doctrines of "single employer liability" and "joint employer liability" are legal mechanisms by which a parent company or franchisor ("Senior Company") may be held liable for the federal employment law violations of subsidiaries or franchisees ("Junior Company") because the two companies are so operationally interconnected that they both qualify as an individual's

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"employer."[2] Application of the doctrines can also arise from common ownership of two separate entities by a single entity, such as a holding company.[3] If either doctrine applies, a reviewing court can hold the two companies jointly and severally liable to the complaining plaintiff, allowing the plaintiff to recover up to 100 percent of the damages from either company.[4]

ARE THE TWO DOCTRINES DIFFERENT?

Yes. Under the single employer liability doctrine, "liability may be found 'when two nominally separate entities are part of a single integrated enterprise.'"[5] For instance, single employer liability might attach where a holding or parent company manages employment responsibilities for a subsidiary, or where a franchisor extensively controls operations for a group of franchisees (as with chain restaurants).

Liability attaches under the joint employer liability doctrine where "separate legal entities have chosen to handle certain aspects of their employer-employee relationship jointly."[6] This doctrine is generally directed toward unrelated companies that work closely together, such as a construction-site management company and a contractor, or an airline and baggage handlers. Practically, the results are the same: a Senior Company may be held liable for the federal employment law violations of a Junior Company, even though the Senior Company did not engage in the alleged acts.

WHY SHOULD THIS BE A CONCERN?

Courts and administrative bodies—especially the National Labor Relations Board (NLRB), which has the power to affect both organized and nonorganized employers—have devoted heightened attention to the applicability of single and joint employer liability in recent years.[7] For instance, an NLRB Administrative Law Judge recently classified McDonald's Corporation as a joint employer with its franchisees, holding it jointly and severally liable for alleged labor law violations of franchise operators.[8] The focus on the scope of these doctrines is likely to continue and potentially intensify in the future for expanding employers.

WHICH FEDERAL EMPLOYMENT STATUTES ARE IMPLICATED BY SINGLE AND JOINT EMPLOYER LIABILITY?

A Senior Company could potentially be liable under these doctrines for violation of several federal statutes, including the National Labor Relations

Act (NLRA), federal discrimination laws (such as Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act), the Worker Adjustment and Retraining Notification (WARN) Act, the Family and Medical Leave Act (FMLA), the Employee Retirement Income Security Act (ERISA), and the Occupational Health and Safety Act (OSHA). Although a Senior Company can be held liable as a single employer under each of the above-listed statutes, joint employer liability is also implicated under the NLRA and the FLSA.

WHY DO PLAINTIFFS INVOKE SINGLE AND JOINT EMPLOYER LIABILITY?

The single and joint employer liability doctrines are advantageous to plaintiffs asserting federal employment claims, and can be used for several purposes. First, plaintiffs can use the doctrines to meet jurisdictional thresholds for statutes that require employers to be of a certain size before they can be subject to liability. Second, because some federal statutes (such as Title VII) permit employees of larger companies to recover increased damages, plaintiffs may combine the number of employees of a Senior Company and Junior Company to reach a higher damages cap.[9] Third, plaintiffs can use the single and joint employer liability doctrines to reach the "deeper pockets" of a Senior Company and ensure recovery of any damages awarded. Finally, invocation of the doctrines allows plaintiffs to expand the number of parties bound by particular legal obligations imposed by a reviewing court or administrative body.

HOW DO COURTS AND ADMINISTRATIVE BODIES DECIDE WHETHER A COMPANY IS A SINGLE OR JOINT EMPLOYER?

It varies depending on which federal statute the plaintiff sues under. Many of the statutes require application of a specific test to determine whether a Senior Company is a single or joint employer. However, the most commonly applied test was originally developed for use under the NLRA, and prescribes court consideration of the following four factors when deciding whether to apply the single or joint employer doctrines:

1. Common ownership;
2. Common management;
3. Interrelationship of operations; and
4. Centralized control over labor relations.

The first factor (common ownership) is generally the least important; conversely, the fourth factor (centralized control over labor relations) is

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usually deemed the most important.[10] Courts apply the NLRA test (either exclusively or in tandem with additional tests) in the context of federal discrimination, FMLA, ERISA, and OSHA claims. Other factors for consideration under the federal laws listed above include interchange of employees between the Senior and Junior Company; the Senior Company's ability to direct and supervise employees, modify terms and conditions of employment, or affect wages; the location where the work is performed; the beneficiary of an employee's work; which entity's equipment is used; and which company performs payroll, human resources, and similar functions.[11]

WHAT AFFIRMATIVE STEPS CAN MY COMPANY TAKE TO AVOID SINGLE OR JOINT EMPLOYER LIABILITY?

A Senior Company can take several practical steps to structure and operate its relationship with a Junior Company to avoid the future imposition of single or joint employer liability. Specifically, a Senior Company should:

1. Include affirmative statements in materials provided to a Junior Company clearly setting forth that it has no control over employment matters including personnel decisions, direction of the workforce or terms and conditions of employment.
2. Make any Junior Company solely responsible for training its own workforce. The Senior Company should keep its own training programs at parent level, and make it optional, if available, for a Junior Company.
3. Include an indemnity provision in an agreement with each Junior Company explicitly setting forth that the Junior Company assumes all responsibilities with respect to employment liabilities.
4. Eliminate or minimize commonality among officers and directors serving roles at both the Senior Company and a Junior Company.
5. Exercise only broad and general "control" over the day-to-day operations of a Junior Company, or the policies and practices in place at that company.
6. If the Senior Company provides office space, equipment, or supplies to a Junior Company, memorialize the same in written agreements and sell, lease, or loan the space/equipment at fair market rates. Similarly, any loans from the Senior Company to a Junior Company should be memorialized in writing and should be supported with adequate security and be subject to market interest rates.
7. If any employees of a Junior Company are transferred to the Senior Company or transferred to another subsidiary or franchise, the move should be characterized and documented as a "termination" and a "new hire," as opposed to a "transfer."

8. If the Senior Company houses certain functions, such as HR, characterize the resource as "available" rather than "mandatory" and permit the Junior Company to exercise as much discretion as possible over such matters with generalized oversight from the Senior Company only. Consider requiring a Junior Company to enter into agreements with the Senior Company for use of these services for which a Junior Company will pay fair market value.
9. Represent to the public and in all publications (e.g., on the Internet, public advertising, tax disclosures, and business cards) that the Senior Company and the Junior Company are separate.
10. Maintain independent vendor agreements for the Senior Company and each Junior Company and ensure that each assume their own bills/operating costs.
11. If the Senior Company provides a benefit plan to the Junior Company, allow the Junior Company to formally adopt the plan on a voluntary basis.
12. Ensure that each Junior Company maintains an independent payroll account separate from that used by the Senior Company.

WHAT PRACTICES SHOULD MY COMPANY AVOID TO HELP ENSURE THAT SINGLE OR JOINT EMPLOYER LIABILITY WILL NOT ATTACH?

Senior Companies should avoid the following activities to limit the risk of exposure to single or joint employer liability:

- ❏ Sharing employee handbooks. A Junior Company should develop its own employee handbooks. Although the handbooks can mention the Senior Company and its relationship to the Junior Company, a disclaimer should clearly indicate that the Senior Company does not exercise control over the employees or the terms and conditions of their employment.
- ❏ Participating in the Junior Company's screening or approving employees for hire, implementing discipline, making schedules, setting wages, or otherwise affecting the terms and conditions of their employment.
- ❏ Exercising control over the day-to-day operations of a Junior Company.
- ❏ Including the Senior Company's name and/or logo on the Junior Company's marketing materials, employee pay stubs, or other publications.
- ❏ Requiring that senior employees of a Junior Company report to persons employed by the Senior Company regarding granular matters. Generalized reporting on broad topics such as corporate health, profit and loss, and business strategy, however, is usually acceptable.

- ❏ "Sharing" employees between a Junior Company and the Senior Company.
- ❏ Sharing office space with a Junior Company. If this practice is unavoidable, use different address information (for instance, different suite numbers) and independent telephone numbers.

Careful structuring of relationships with a Junior Company can help to reduce the likelihood that a reviewing court or administrative body will determine that a Senior Company will be held liable for federal employment law violations it did not commit. Expanding employers should be sure to monitor this rapidly developing area of the law to ensure compliance with current best practices.

NOTES

1. The single and joint employer doctrine can arise in many different employment law scenarios, and can result in liability for claims that do not involve federal employment law or employment discrimination. This Questions—And Answers column is directed toward employers who have expanded or wish to expand by affiliating with other companies, such as subsidiaries or franchisees, and which can result in liability for claims involving federal employment law or employment discrimination.
2. Laurent, D. J., & Hammerstein, E. R. (2012). If we do this, will it make us a single employer? An examination of enterprise liability and protection. 33 Energy & Min. Inst. 2, at 1-2. See also, e.g., 29 C.F.R. § 791.2.
3. See *NLRB v. Rockwood Energy,* 942 F.2d 169 (3d Cir. 1991) (parent and two subsidiaries classified as a single employer). Single employer liability can also attach under the Employee Retirement Income Security Act (ERISA) to sister companies under certain circumstances. 26 C.F.R. § 1.1563-1(1)(i)(B).
4. See, e.g., *Chao v. A-One Med. Servs., Inc.,* 346 F.3d 908, 916-17 (9th Cir. 2003) (citing *Moon v. Kwon,* 248 F. Supp. 2d 201, 236-38 (S.D.N.Y. 2002)).
5. *St. Jean v. Orient Express Hotels,* 963 F. Supp. 2d 301, 307 (S.D.N.Y. 2013).
6. Id.
7. Jargon, J., & Trottman, M. (2016, May 24). Domino's Pizza helped franchisees cheat workers, lawsuit claims. *Wall Street Journal.* Retrieved from http://www.wsj.com/articles/dominos-pizza-helped-franchisees-cheat-workers-out-of-pay-lawsuit-claims-1464116612; Fisher, D. (2015, August 27). Controversial NLRB ruling could end contract employment as we know it. *Forbes*. Retrieved from http://www.forbes.com/sites/danielfisher/2015/08/27/nlrb-declares-browning-ferris-a-joint-employer-whos-next/#49ca8ab31f44
8. Elejalde-Ruiz, A. (2016, March 9). Is McDonald's responsible for franchise workers? Labor law hearing set to begin, *Chicago Tribune.* Retrieved from http://www.chicagotribune.com/business/ct-mcdonalds-joint-employer-trial-0310-biz-20160309-story.html
9. 42 U.S.C. § 1981a(b)(3). Under Title VII, employees can recover compensatory damages within the

following statutory limits: (1) $50,000 for employers of 15 to 100 employees; (2) $100,000 for employers of 101 to 200 employees; (3) $200,000 for employers of 201 to 500 employees; and (4) $300,000 for employers with 501 or more employees. Id.

10. See, e.g., *Torres-Negron v. Merck & Co.*, 488 F.3d 34, 42 (1st Cir. 2007).
11. See, e.g., *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litig.*, 683 F.3d 462 (3d Cir. 2012) (parent not joint employer with thirty-eight subsidiaries for purposes of plaintiffs' FLSA claims where parent lacked involvement in subsidiaries' day-to-day activities); *Englehardt v. S. P. Richards Co., Inc.*, 472 F.3d 1 (1st Cir. 2006) (lack of common management and location and subsidiary's purely voluntary use of parent's benefit programs undermined single employer liability finding for plaintiff's FMLA and WARN Act claims); *N.Y. State Teamsters Conference Pension & Retirement Fund v. Express Servs.*, 426 F.3d 640 (2d Cir. 2005) (parent and subsidiary did not qualify as single enterprise for ERISA purposes due to clear separation of operations); *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773 (5th Cir. 1977) ("'Attention to detail,' not general oversight, is the hallmark of interrelated operations" for purposes of single employer doctrine under federal discrimination laws).

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