Who Cares if You’re a Joint Employer?
Employees’ Rights, Generally

- Fair Labor Standards Act (FLSA)
  - Minimum Wage ($7.25 per hour worked)
  - Overtime Wages (1.5 times the “regular rate” for all hours worked over 40, unless exempt)
- National Labor Relations Act (NLRA)
  - Right to Engage in “Concerted Activity”
- Discrimination Laws
  - Title VII (sex, gender, religion, race, national origin)
  - Americans with Disabilities Act (ADA)
  - Age Discrimination in Employment Act (ADEA)
  - Equal Pay Act (EPA)
- Worker Safety (OSHA, state worker’s compensation)
- Security and Benefits (ACA, ERISA, state unemployment insurance)
Joint and Several Liability

- All joint employers are “jointly and severally” liable for compliance with labor and employment laws
  - Courts treat all joint employers as if they are really a single employer
  - If your co-employer makes a mistake or decision that violates an employee’s rights, you are on the hook for the entire amount of the resulting liability
  - Does not matter that it was not your decision that gave rise to the claim or liability
Joint Employment Concepts
Key Concepts and Distinctions

- Direct vs. Indirect Control
- Potential vs. Actual Exercised Authority
- Economic Dependency of the Employee
1. Horizontal Joint Employment: Worker has Two or More “Technically Separate but Related or Associated” Employers

2. Vertical Joint Employment: One Employer Provides Labor to Another and Workers Economically Dependent on Both Employers
Horizontal Joint Employment Factors

Focus is on the degree of association between the multiple potential employers as related to the employee

- Who owns or operates the potential joint employers?
- One act in the interest of the other?
- One controlled by the other?
- Same or overlapping officers, directors, or managers?
- Treat the employees as a pool of workers for both employers?
- Share clients or customers?
- Agreement to share workers?
- Operations intermingled?
Horizontal Joint Employment Example
Vertical Joint Employment Factors

- Exists where “as a matter of economic reality,” a worker is economically dependent on an “intermediary employer” such a staffing agency and another employer who “engages the intermediary to provide workers.”

- Focus is on the employee’s relationship with the principal and intermediary employers
Vertical Joint Employment Example
Application to Officers & Executives

An individual with general operational control of a company will generally be an “employer” along with the company; continuous or absolute control is not required.
Application to Officers & Executives: Examples from Recent Case Law

Jeong Woo Kim v. 511 E. 5TH St., LLC, 133 F. Supp. 3d 654 (S.D.N.Y. 2015):

- Company’s managing partner and sole member was an “employer” where he
  - Admitted that he “operated the corporation” and was responsible for day-to-day operations
  - Was responsible for hiring, firing, managing staff
  - Was responsible for payroll and human resources functions
  - Was responsible for employer's finances.
Application to Officers & Executives: Examples from Recent Case Law

Roche v. S-3 Pump Serv., Inc., 154 F. Supp. 3d 441 (W.D. Tex. 2016)

- Corporation's CEO was an “employer” where he
  - Controlled employee work schedules and conditions of employment
  - Engaged in daily monitoring of the profit and loss statements
  - Engaged in daily review of contracts with third parties
  - Engaged in daily monitoring of the payroll practices in the industry and personally made the decision to pay employees on a salaried basis.
Application to Officers & Executives: Examples from Recent Case Law

Contrast with *Schneider v. Cornerstone Pints, Inc.*, 148 F. Supp. 3d 690 (N.D. Ill. 2015):

Company’s officers were *not* employers where they

- Were unaware that supervisor was deleting hours or that employees' wage was set below legal minimum
- Acted immediately to fix violations when they learned of them
- Did not control company’s operations
- Never hired or fired any employees
- Never supervised or controlled employees' work schedules
- Did not determine rate and method of payment
- Delegated operational authority to supervisor
Use Of Staffing Agencies

- Classic example of creation of a joint employer relationship (staffing agency and client company)
- EEOC guidelines illustrate many obligations and issues that can arise in such a relationship
Examples Of Major Issues To Be Aware Of When Using Temporary Employees

• Creates obligation to reasonably accommodate disabled employees by both entities
• Obligates client to allow for and follow applicable leave laws
• If client becomes aware of harassment or discrimination by staffing agency, client has an obligation to correct and address which could require a severing of the relationship with the staffing company
What are the risks of being wrong?
Potential costs of a misclassified worker

- The Bank would be responsible for ALL employer and employee taxes, plus potential:
  - Interest
  - Penalties
  - Attorney’s fees
  - Overtime
  - Expenses
  - Lost productivity
  - Negative publicity

- Potential liability could be four years!

- Worker payment: $90,000
- Employer Reclassification Costs:
  - Employer Taxes(sample) $7,379
  - Employee Taxes(sample) $30,876
  - Benefits(sample) $22,500
- Total cost: $60,755
Joint employer risks

- Because of joint and several liability as a joint employer, the Bank can be on the hook if:
  - The third party misclassifies the worker as an independent contractor
  - The third party fails to pay all required overtime
  - The third party fails to provide meal and rest periods
  - The third party fails to provide compliant wage statements
  - Business expenses are not properly reimbursed
Benefit risks

- Whether benefits are owed to a misclassified worker largely depends upon the plan’s own language
  - Can minimize benefit risk by excluding reclassified workers under plan’s own language
  - Need to check all plans, not just the big ones
  - Tuition reimbursement plans, for example
Steps to Minimize Risk
Mitigate Known Risks

- Weigh benefits of arrangement and joint employer risk
- Choose vendors carefully (solvency/competency)
- Insist staffing agency/labor provider be “W-2” employer
- Reduce “reserved control” in agreements
- Reduce “actual control” on the ground
- Indemnity clauses
- Avoid contracting for “same work”/side-by-side arrangements (staff augmentation)
- Limit duration of arrangement
- Avoid “cost plus” or other billing arrangements tending to show control over wages
- Consider EPLI insurance
Understand Key Risk Areas

- Written agreements that reserve more control than necessary with respect to terms and conditions of employment
- Lack of training and auditing of “on the ground” practices and supervision
- Nature of work performed/interaction with “regular” employees (performance of core functions)
- Management overlap/shared services/procedures (parent/sub – franchisor/franchisee)
Diligence, Reps and Warranties

- Essential to contract with a reputable company with good service, financial wherewithal and record of positive employee relations
- Investigate (independently)
- Obtain reps and warranties regarding legal compliance
Analyze and Revise Applicable Documents

- Any agreements, handbooks, policies, manuals, communications, etc. that may apply to the arrangement should be reviewed
- Remove or modify red flag provisions that impose or reserve control over terms and conditions of employment or dictate manner and method of the work performed
Negate Indicia of Control

- Include disclaimer language: end-user and supplier are not joint employers – supplier is independent contractor, sole employer of the workers in question and solely responsible for wages, benefits (e.g., health insurance, workers’ compensation), etc. of supplier’s workers
- Provide that supplier has right to control the workers with sole right and obligation to provide and exercise supervision
- Provide that end-user shall not participate in wage rates, hiring, firing, promotion, demotion or disciplinary decisions of supplier’s employees
Negate Indicia of Control

- Include fee structure for services rendered not based on wage rates and hours of work rendered by non-employees – i.e., use alternatives to cost plus pricing if feasible
- Where minimum standards of performance and screening standards are deemed necessary, frame as “recommendations”
- Where standards must be mandatory, include language that describes their relationship to a legal requirement or need (e.g., franchisor) to protect a trade name, professional methods, goodwill or commercial image
Conduct Periodic Reality Checks

- Periodically review how arrangement is working in practice and take steps to restructure to eliminate or reduce discovered joint employer risks
- Ensure that your managers/supervisors contact with supplier’s non-management is limited if possible
- Dealings should be with contractor/franchisee or their supervisory personnel; directives should not be issued directly to their employees
If you’re going to be a joint employer, do it all the way and do it right

Greatest liability risk comes from half-baked employment, where there’s enough control to create an employment relationship, but not enough effort to comply with employment laws

If you can’t give up on-the-ground or reserved control, accept that you’re more likely to be deemed a joint employer

- Not the end of the world if prepared to properly address that risk
- Consider arbitration agreements, class waivers for all employees
- Conduct compliance audits for wage and hour issues, OSHA, benefit plans, ACA, EEO issues, bargaining rights, taxation/withholding issues
- Provide meaningful employee grievance process to minimize risk of retaliation claims
- Don’t tolerate noncompliance by franchisees
- **Definitely obtain EPLI insurance**