Joint Employer Compliance: What Growers & FLCs Need to Know

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Joint Employer

- "Joint Employer" is the ever-expanding theory of liability.

- There are now two versions of joint employer:
  - Common Law; and
  - Statutory.

"Common Law" Joint Employer

- FLSA Tests: Most courts apply some version of the below test:
  - The nature and degree of control of the workers;
  - The degree of supervision, direct or indirect, of the work;
  - The power to determine pay or methods of pay;
  - The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and
  - The ability to maintain the employee's employment records.

"Common Law" Joint Employer

Title VII. The Title VII tests tend to be more invasive:

(1) the skill required of the employee;

(2) the source of tools;

(3) the location of the work performed;

(4) the duration of the relationship between the parties;

(5) whether the hiring party has the right to assign additional projects;

(6) the extent of the hired party's discretion over when and how long to work;

(7) the method of payment;

(8) the hired party's role in hiring and paying assistants;

(9) whether the work is part of the regular business of the hiring party;

(10) whether the hiring party is in business;

(11) the provision of employee benefits;

(12) the tax treatment of the hired party.

"Statutory" Joint Employer

- Section 2810:

  Prohibits companies from entering contracts with vendors providing farm labor, garment, janitorial, security guard, or warehouse contractor services if it knows or should know the contract does not provide funds sufficient to allow the vendor to comply with all laws.

"Statutory" Joint Employer

- Section 2810.3:
  - A "Client Employer" (Grower) is liable for unpaid wages owed to employees of "Labor Contractors" and for failure to secure valid workers' compensation coverage.
  - A "Labor Contractor" is virtually any company (FLC) that supplies a Client Employer with workers to perform labor within the Client Employer's usual course of business.

Joint Employer

- Why Should I Care?”
  - June 2018 – State Labor Commissioner fined restaurant chain $4.57 million for unpaid wages for 559 janitorial workers who were supplied through a cleaning company and their subcontractor under 2810.3.
  - State found the restaurant was a “joint employer” of the janitorial workers hired through the contractor.
  - Restaurant’s night managers “approved” the cleaning crew’s work.

Joint Employer - Considerations

- How dependent is the FLC on the grower?
- How is the business model as a whole dependent on the FLC?
- How much interaction will the FLC's employees have with the grower's employees? And what kind of interactions?
- Who will provide directives to employees of an FLC?
- Will the employees of the FLC hold themselves out to be employees of the grower?

Joint Employer - Considerations

- Where will the work be performed?
- What equipment will be used to complete the work?
- Does the grower have the ability to tell the FLC to stop using or start using specific workers?

Joint Employer – Best Practices

- Minimize interactions: Employees of the grower should not approve or direct work that is being performed by FLC employees.
- Growers should remove themselves as much as possible from hiring, firing, and making discipling decisions.
- Employees of the grower should perform work that is distinct from the FLC's work.
- Establish a point person with whom all communications are directed.
- Growers should not directly evaluate or train FLC employees.

Joint Employer – Best Practices

- Written Contract:
  - Strong indemnity language;
  - Require FLCs to comply with legal requirements (including employment obligations)
  - Do not prohibit FLCs from providing services to competitors; and
  - Confirm lack of control.

Joint Employer – Some Good News

- There might still be a way out *even if* you are a joint employer:

"…even if a joint-employment relationship exists, one joint employer is not automatically liable for the actions of the other. Liability may be imposed for a co-employer's discriminatory conduct only if the defendant employer knew or should have known about the other employer's conduct and failed to undertake prompt corrective measures within its control."

U.S. Equal Empl. Opportunity Commn. v. Glob. Horizons, Inc., 915 F.3d 631, 641 (9th Cir. 2019)

AB 2183: Card Check Bill

- "Card check" permits unions to solicit employees to sign a card authorizing the union to represent them in collective bargaining.
- The union then presents these "cards" to the ALRB as evidence that the majority of the employer's workforce has authorized the union to bargain for them.
- The ALRB checks to ensure the cards represent more than half of the employer's workforce (after obtaining an employee list from the employer), and then certifies the union.

AB 2183: Card Check Bill

What Steps Should FLCs and Growers Immediately Take?

- Determine who is authorized to accept service at the Companies. (The Majority Support Petition will be personally served on the Company—does the front office know who to call/what to do?)
- Train management (and critically frontline management including forepersons) on what they can and cannot say regarding unionization.
- Develop a script for management on what a union means for your workforce.
- Get out in front of the issue during onboarding—start to tell your Company's narrative about why a union would hurt employees and what your Company already does to keep employees happy.
- Roll out an open-door policy and engage with your workforce early.
- Have counsel ready.

Questions?

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Thank You!

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