

JacksonLewis

# SIZZLING TOPICS IN JOINT EMPLOYMENT

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# Introductions

- Adam Siegel, JacksonLewis
- Santiago Martin, Jr.,  PARAGON PERSONNEL
- Gladys Wotring,  J. G. Boswell Company

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# Joint Employer Basics

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# Who is a Joint Employer?

- It depends on who you ask – and it's complicated
- The National Labor Relations Board, the Department of Labor, and the Equal Employment Opportunity Commission use differing tests to determine liability – due to different policy objectives
- Federal courts sometimes look at it differently too
- State judges and agencies can also have their own patchwork of rules

# The Basics: What Factors are Considered?

- How much control an entity exercises, or has the right to exercise, over an employee
- Totality of the circumstances – who hires, fires, supervises, evaluates performance, etc.
- Economic realities (DOL) vs. right to control (NLRB and EEOC)



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# **The NLRB's New Joint Employer Rule**

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# The New Rule

Under the Board's new rule (a modified return to *Browning-Ferris*), an entity is a joint employer of another employer's employees if the two share or codetermine at least one of the employees' "essential terms and conditions of employment:

1. Wages, benefits, and other compensation;
2. Hours of work and scheduling;
3. The assignment of duties to be performed;
4. The supervision of the performance of duties;
5. Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
6. The tenure of employment, including hiring and discharge; and
7. Working conditions related to the safety and health of employees.

# Reserved or Indirect Control

- The Board determined that “possessing the authority to control is sufficient to establish status as a joint employer regardless of whether control is exercised”
  - As a result, even reserved control is sufficient to establish a joint employer relationship
- Indirect control, such as through intermediaries like staffing or temporary agencies, is also sufficient to establish joint employer status
- However, an entity’s control over matters that are immaterial to the existence of an employment relationship and do not bear on the essential terms and conditions of employment are not relevant to analysis
  - Board provided little guidance on what matters are immaterial (but perhaps went to matters such as financing which were clearly important and gave the lender substantial influence, but did not bear on the essential terms and conditions of employment)



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# The DOL and Joint Employment

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## Joint Employment Under FLSA

- An **employer** is “any person acting directly or indirectly in the interest of an employer in relation to an employee.”
- An employee may have more than one statutory employer under the FLSA.
- All employers are jointly and severally liable for wages under the FLSA.
- When are entities jointly liable as joint employers under the FLSA?

# Joint Employment Under FLSA

## Other Considerations

### Employer coverage

- Joint employment may trigger coverage under FLSA where statute would not otherwise apply.

### Certification of class/collective actions

- Some courts say joint employer status goes to merits of case; therefore, notice goes out to potential opt-ins (and whether defendant is an employer gets sorted out later)
- When certifying Rule 23 class, district court must consider whether joint employer status can be resolved on a classwide basis (*Harris v. Med. Transp. Mgmt., Inc.*, DC Circuit, July 18, 2023)

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# California & Joint Employment

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# Martinez v. Combs

- California Supreme Court - 2010
- Plaintiff strawberry pickers sued their employer, strawberry harvester Isidoro Munoz (who was later discharged in bankruptcy), and the companies that sold Munoz's strawberries (brokers), for unpaid minimum wages.
- the court determined the brokers were not employers because:
  - (1) the brokers did not "**suffer or permit**" plaintiffs to work as the brokers did not have the right to hire or fire, set wages and hours, or tell the workers when and where to report to work;
  - (2) the brokers did not "**exercise control over**" the plaintiffs' wage and hours as Munoz alone decided which fields to harvest, trained and supervised the workers, determined their rate and manner of pay, set hours and working conditions, and decided what type of fruit to harvest at what time; and
  - (3) the plaintiffs knew they owed their obedience to Munoz and not the broker's field representatives.

# Key Factors to Being a Joint Employer

- Exercises control over wages, or working conditions
- “Suffers and permits” the employee to work e.g. knowledge of ad failure to prevent the work from occurring
- Employee is “engaged” by entity e.g. creation common law employment relationship.

# Presumptive Employer

- **Gov. Code section 12928** – Employer includes any person or entity identified as the employer on the employee's Form W-2

# Panel Discussion