

BLOGS

Investigations & Training; Labor & Unions; Workplace Policies

Joint Employment: Whose Employees Are You Liable For?

Much has been written in recent months about the National Labor Relations Board (NLRB) standard for joint employment liability between separate businesses, especially with respect to franchisor McDonalds Corporation, which is facing dozens of cases in which it has been named as a respondent along with its franchisees. The NLRB's General Counsel has been advocating for a change to the joint employer test currently used by the NLRB. An arm of the U.S. Chamber of Commerce recently published a 40-page [report](#) on how the NLRB's proposed new joint employer test threatens small businesses.

Even without a change to the legal standard, though, businesses and nonprofits have often been caught off-guard by the types of arrangements that can give rise to claims of joint employer liability against an entity that doesn't serve as the employer on paper or issue workers paychecks or Form W-2s. Besides the franchise relationships at issue in the McDonalds cases, arrangements with heightened joint employer risks include independent contractor relationships, the full range of temporary or contingent worker service models, and workforce supply arrangements. The latter sometimes come in the form of employee leasing or Professional Employer Organizations (PEOs). Also, joint employment issues can arise when two companies are affiliated by some measure of common ownership or control.

Business organizations would be wise in this current legal climate to take a proactive approach to minimizing joint employment risks. Worthwhile steps to consider taking now include:

- Reviewing employee handbooks and manuals for possible joint employer issues
- Auditing workplace practices and procedures
- Training directors, officers, and management on key joint employment risks
- Reviewing affiliations with other entities, as well as service contracts, to assess and take steps to minimize joint controls and joint employer risks
- Conducting insurance coverage audits and considering insurance against joint employment risks

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Unfortunately, joint employer liability is not an area of the law that is well-defined and uniform. The standards for determining joint employment can vary depending on the legal context and jurisdiction, and there are not many bright-line rules. Businesses can, however, enhance their chances of avoiding joint-employer surprises by being proactive and seeking legal counsel to navigate through these challenging issues.