Joint Employment and *Equal Pay*: A Broader (And More Aggressive) Approach

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Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

Federal Gov't Focus on Joint Employment

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Businesses On Notice After DOL Joint Employer Guidance

By **Aaron Vehling**

Law360, New York (January 20, 2016, 9:57 PM ET) -- The U.S. Department of Labor turned up the heat on employers Wednesday with guidance that spells out which business relationships could lead to joint liability for federal wage-and-hour law violations, a move that serves as a warning to employers that they should take a close look at their business relationships.

Joint Employment Generally

- Joint employment can be found where multiple entities control different aspects of the employment relationship with a particular individual, such that each entity alone could be considered an "employer."
- Where joint employment exists, all joint employers are jointly and severally liable for compliance with relevant statutes governing working conditions.
- Joint employment standard different depending on the claim (e.g., Title VII, FEHA, FLSA, Labor Code, Common Law) *and* the allegations.

Joint Employment under California Law

- In 2010, the California Supreme Court in *Martinez v. Coombs*, 49 Cal. 4th 35 (2010) discussed the standard under the California Labor Code for finding the existence of an employment relationship, specifically focusing on the definition of employment as to "suffer or permit" a person to work.
- Although not finding joint employment in the particular case, the Court set a lower bar for finding that joint employment exists between multiple businesses.

Joint Employment under California Law (Cont.)

- Effective January 1, 2015, AB 1897 added California Labor Code Section 2810.3, making businesses liable to workers supplied by labor contractors when those labor contractors fail to correctly and completely *pay wages* to the worker, or provide *workers' compensation insurance coverage*.
  - It prohibits shifting liability for Cal-OSHA compliance to labor contractor for workers supplied by the labor contractor.
- Businesses using workers from labor contractors are liable to such workers for unpaid wages, even if they have already fully paid the labor contractor.

DOL Issues Administrative Guidance

- On January 20, 2016, the Wage and Hour Division of the U.S. Department of Labor ("DOL") released administrative guidance regarding a new framework to be used when determining whether an entity is considered a joint employer under the Fair Labor Standards Act ("FLSA").
  - It is consistent with the aggressive joint employer positions taken by the NLRB and other branches of the DOL, including OSHA.
- The federal government's issuance of this bulletin likely indicates that it will be looking for – and will more easily find – joint employment relationships.
- Sends a strong warning that joint employment enforcement is going to get a lot tougher for many unsuspecting companies across all industries and will target well-established business practices.

DOL Issues Administrative Guidance (Cont.)

- The DOL's Administrator's Interpretation confirmed that the FLSA broadly defines the employment relationship, including "to suffer or permit to work."
- The Interpretation does not articulate a new legal test; rather it announces a new analytical framework for evaluating joint employment.
- The Interpretation divides joint employment arrangements into "horizontal" and "vertical" joint employment and lists various non-exhaustive factors that the DOL considers relevant to each situation.

“Horizontal” Joint Employment

- Company A and Company B are in some way related and share an employee, but are distinct economic units.
  - Example: a restaurant manager works at two different restaurants, one owned by Company A and the other owned by Company B.
- If the worker cumulatively works more than 40 hours/week, are Company A and Company B each liable for the entire overtime pay because the entities are so related that the manger’s employment is considered a single employment?

“Horizontal” Joint Employment (Cont.)

- Do the potential joint employers (Company A and Company B) have common owners?
- Do the potential joint employers have any overlapping officers, directors, executives, or managers?
- Do the potential joint employers share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs)?
- Are the potential joint employers’ operations inter-mingled (e.g., centralized employee scheduling, accounting, and other administrative functions)?
- Does one potential joint employer supervise the work of the other?
- Do the potential joint employers share supervisory authority for the employee?
- Do the potential joint employers treat shared employees as a pool of employees available to both of them?
- Do the potential joint employers share clients or customers?
- Are there any agreements between the potential joint employers?

“Vertical” Joint Employment

- Company A and Company B are not related and do not both hire the same employee, but agree that Company B’s employee will perform services benefitting Company A.
- Based on the “economic realities” of the arrangement between Company A and Company B, the employee of Company B is considered “economically dependent” on Company A and, therefore, jointly employed by Company A.
  - Example: Company B assigns its employees to perform housekeeping services at Company A’s hotel: is Company A the joint employer of the housekeeping staff?

“Vertical” Joint Employment (Cont.)

- In analyzing if a vertical joint employment relationship exists, the first question the DOL will ask is whether Company B itself is an employee of the potential joint employer (Company A).
  - If yes, then all employees of Company B are considered employees of Company A too and there is no need for further analysis.
- But when Company B, the intermediary employer, cannot be classified as Company A’s employee based on the DOL’s criteria, then the vertical joint employment analysis examines the “economic realities” of the working relationship between Company B’s employees and the potential joint employer (Company A) by considering seven relevant factors…

“Vertical” Joint Employment (Cont.)

- Does the putative joint employer (Company A) direct, control or supervise the employees’ work beyond reasonable oversight for Company B’s performance of its contract with Company A?
- Does Company A indirectly influence Company B’s employment decisions (a lot like the NLRB test)?
- How long have Company B’s employees been performing services important to Company A’s business?
- Is the nature of Company B’s employees’ work rote, repetitive and unskilled?
- Is the work of Company B’s employees integral to Company A’s business?
- Do Company B’s employees work on premises that Company A owns or leases?
- Does Company A provide equipment, tools, or materials to Company B that its employees need to perform the contracted work?

Practical Issues – Can Joint Employment Be Avoided?

- Assume that joint employment exists, and plan from there…
- Carefully select new labor contractors and reevaluate existing contractor relationships, focusing on the contractor's compliance with relevant labor laws, especially with respect to payment of wages and workers' compensation certificates.
- Ensure that labor contractors' service agreements provide for indemnification for liability – i.e., the labor contractor's violations of laws; and legal fees and costs incurred in defending against such claims. Indemnity only valuable if labor contractor can fulfill its indemnity obligation – and consider the contractor's financial *ability* to defend claims.

Practical Issues (Cont.)

- Monitor labor contractors to ensure compliance with relevant labor laws. Periodic audits of time records, pay stubs, and workers' compensation insurance certificates to encourage compliance.
- Ensure that workers from labor contractors are provided with appropriate anti-harassment timekeeping and breaks policies and trainings. Be mindful of *unique pay issues* (e.g., piece rate, premium rates, etc.).

The Push for Equal Pay

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EEOC To Seek Equal Pay Data From Large Employers

By **Vin Gurrieri**

Law360, New York (January 29, 2016, 12:50 PM ET) -- The U.S. Equal Employment Opportunity Commission and the Obama administration on Friday unveiled changes to so-called employer information reports that would require federal contractors and other employers with more than 100 workers to provide more pay data, which the agency says will help uncover potential pay discrimination.

EEO-1 Reporting – Pay Data?!?

1. What companies are required to file the EEO-1 report?

- A. All companies that meet the following criteria are required to file the EEO-1 report annually:
  - … with **100 or more employees**; or
  - … with fewer than 100 employees if the company is owned by or corporately affiliated with another company and the entire enterprise employs a total of 100 or more employees; or
  - Federal government prime contractors or first-tier subcontractors …. with **50 or more employees and** a prime contract or first-tier subcontract amounting to $50,000 or more.

2. Do I need to file if my company has fewer than 50 employees but does have a federal government contract worth $50,000 or more?

- A. No, your company must meet **both** requirements of 50 employees **and** the government contract worth $50,000 or more.

The Big Push - Federal

- Obama Initiatives
  - 2010 National Equal Pay Task Force
  - https://www.whitehouse.gov/issues/equal-pay
- EEOC – Strategic Enforcement Plan:
  - Priority #4 = Enforcing equal pay laws
  - Litigation efforts, including amicus briefing = pushing the boundaries
- OFCCP
  - Directive 307
  - Data requests in scheduling letters and compliance audits
  - EO 13665 pay transparency

Salary Convergence: The EEOC's Theory

- *Cooper v. United Airlines*: pending in the Ninth Circuit
  - Federal Equal Pay Act Case; EEOC joined as amicus
- EEOC Argument…
  - Even if starting salaries are based on bona fide factors other than sex, *the failure of male and female comparator salaries to converge over time constitutes a violation of the EPA.*

California Equal Pay Act

- **Former Law**: No employer shall pay a wage rate less than the rate paid to employees of opposite sex:
  - In the **same establishment**
  - For **equal work**
  - Which requires **equal skill, effort and responsibility**
  - And is performed under **similar working conditions**

  UNLESS

  A seniority system

  A merit system

  A system which measures earnings by quantity or quality of production or

  A differential based on any **bona fide factor other than sex**

California Equal Pay Act – (Cont.)

- California Fair Pay Act – SB 358 - New Law (eff. January 1, 2016)
- No employer shall pay an employee at wage rates less than employees of the opposite sex:
  - For **substantially similar work**
  - When viewed as a **composite of skill, effort and responsibility**
  - And performed under **similar working conditions**

UNLESS…

- A seniority system;
- A merit system;
- A system which measures earnings by quantity or quality of production; *or*
- A bona fide factor other than sex such as education, training or experience.

California Equal Pay Act – (Cont.)

- If employer can prove a "bona fide factor other than sex" defense…
- The employee can still prevail by showing that an alternative business practice exists that:
  - would serve the *same business purpose*
  - without resulting in a differential
- Unclear whether this is a burden of production or proof.

California Equal Pay Act – (Cont.)

- Compensation Transparency…
- Entirely new subdivision (j) broadly prohibits discrimination and retaliation against employees who invoke or assist in the enforcement of the statute and provides a cause of action.
- Also forbids blanket rules prohibiting employees from discussing their wages with other employees.
  - Note: Labor Code section 232 has similar prohibition of pay secrecy rules.

California Equal Pay Act – (Cont.)

- Significant expansion of prior law…
- Higher burden for employer to prove *any* affirmative defense, but especially the "bona fide factor other than sex" defense
- "Substantially similar work" replaces narrower term "equal work"
  - Change allows employees to bring a claim even where the comparator job is not exactly the same.
- "Same establishment" requirement eliminated
  - But legislative history indicates geography/cost of living differences may be taken into account.

California Equal Pay Act – (Cont.)

- Some Open Issues….
- What evidence will be used to determine if jobs are "substantially similar?"
- How will the statute apply to unions and collective bargaining agreements?
- Has the death knell been rung for reliance on starting salaries as a bona fide factor other than sex?
- How do market factors come into play?

Comparison Old/New CA Law and Federal Law

	Federal Law	Old CA Law	New CA Law
Comparison for work?	Equal Work	Equal Work	Substantially similar work
Same Establishment?	Yes	Yes	No
Establishing affirmative defense?	No explicit requirement that factor explain entire difference	No explicit requirement that factor explain entire difference	Factors used must explain entire wage differential
Factor other than sex?	Circuits split whether an employer need only identify a factor or must show a business justification	No explicit requirement that factors be consistent with business necessity	Must be job related and consistent with business necessity
Compensation Transparency	No explicit requirement	While not specifically provided for, other provisions of the Labor Code provide that employees can disclose/discuss their wages	Specific prohibition of retaliation for discussing wages
Statute of Limitations	2 (3 for willful violations)	2 (3 for willful violations)	2 (3 for willful violations)
Damages	Unpaid wages, plus liquidated damages	Unpaid wages, plus liquidated damages	Unpaid wages, plus liquidated damages
Enforcing Agency	EEOC	DLSE	DLSE

Practical Issues – **Pay Practices**

- Consider demographics of each job position
- Review rationale behind pay decisions, and whether they are based on objective factors (e.g., education and experience)
- Review compensation awarded by various decisionmakers to ensure consistency
- How do individuals who started on different pay scales compare after those qualifications, over time, become less important than performance

Practical Issues

- Are external hires paid more than similarly situated current employees? Can candidates negotiate starting salary? Can prior salary be used as a basis for starting salary?
- Ascertain whether an objective formula is reasonable for determining bonuses, and determine whether salary raises are lockstep depending on seniority.
- Update job descriptions to ensure that two different jobs will not be compared for purposes of compensation. Include details concerning necessary education/experience and skill requirements.

Conducting Analyses – A Warning!

- Undertake an analysis, but ***only if prepared to implement***
- Take steps to ensure privilege!
- Compensation policies
  - How frequently reviewed
  - When and how adjusted
- HR and HRIS systems and policies
  - How jobs grouped and categorized
  - What information captured by HRIS

Questions?

Thank you for attending today's presentation. Any questions?

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