



Coffee Club

Joint Employer Liability...Is Your Company Ready?



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Introduction

Welcome to the AALRR monthly "Coffee Club" Webinar Series. Our series will focus on labor and employment law issues facing California employers and will provide you with a unique understanding and perspective on a variety of interesting and timely topics.



Join us the first Tuesday of every month @ 10:00 am for a new and exciting topic.

Today, we will be discussing *Joint Employer Liability...Is Your Company Ready?*

Next Month, **October 3** - *Essential Aspects to Understand about Defamation Claims*



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Disclaimer | Housekeeping

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Who is a Joint Employer?

And why does it matter?

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What is the Joint Employer Standard?

- When two or more businesses co-determine or share control over a worker's terms of employment
- Both businesses may be considered to be employers of that worker, or "joint employers."
- Usually both entities co-determine and share control over the terms and conditions of employment, both businesses may be found to be joint employers.
- Joint employers are responsible, both individually and jointly, to employees for compliance with worker protection laws.

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Why it Matters

It Matters!

- Joint and several liability
 - DOL wage and hour ("to suffer")
 - DOL stepping away from prior guidance on joint employer status
 - Sounds good *but...*
 - What about NLRB
 - OSHA
 - State Law
 - NLRA unfair labor practice charges
- Bargaining Obligation under NLRA

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Browning-Ferris Decision
362 NLRB No 186 (August 27, 2015)

- BFI, recycling company, engaged Leadpoint, which provided subcontracted sorting and cleaning services
- Union filed a petition seeking to organize a unit comprised of employees of both BFI and Leadpoint
- Sole issue at representation hearing – whether BFI and Leadpoint were joint employers

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Regional Director's Decision

- BFI and Leadpoint were not joint employers
 - *Browning-Ferris* did not share or co-determine those matters governing essential terms and conditions
 - Leadpoint set pay scale and was sole provider of benefits
 - Leadpoint had sole authority to control recruitment hiring, counseling discipline and termination (on site HR department)
 - Leadpoint controlled daily work (Leadpoint "supervised" employees -BFI's control of work was "routine in nature")
 - Leadpoint controlled scheduling of shifts, overtime and vacation

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The Board's Decision



- NLRB Board (3-2 decision):
 - Adopted new standard (although similar/identical to standard applied in the 1980s)
 - Possessing *authority* to control terms and conditions of employment is sufficient to show that the entity is a joint employer; *exercise* of control is not required.
 - Direct and immediate exercise of control is not required, *indirect control* over terms and conditions of employment is sufficient.

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Direct and Indirect Control by Leadpoint

- **Hiring**
 - No role in actual hiring but contract set basic qualification
 - Drug screening required
 - Disqualified workers that were ineligible for rehire by BFI
 - Limited employment term to six months
- **Discipline and Evaluation**
 - No direct role but contract reserved BFI's right to reject employees for any reason

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Direct and Indirect Control by Leadpoint

- **Wages**
 - Although agency determined rate of pay and paid all benefits, BFI's contract placed limits
- **Training**
 - Agency responsible, but BFI contract required compliance with safety policies, procedures and training requirements.

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Miller & Anderson Decision
364 NLRB No. 39 (2016)



- Whether consent of multiple employers is relevant to organization of multiple employers
- Board has flip flopped on this issue
- Lee Hospital & Greenhoot: consent is required
- MB Sturgis: consent is irrelevant
- Oakwood Care Center: consent is required
- Miller & Anderson: consent is not required due to issues in the current contingent workforce

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Miller & Anderson



- Dissenting opinion by Member Miscimarra
- Member Miscimarra is now Chairman Miscimarra (leaving late 2017)
- Expect continued battles over whether consent is relevant
- Expect this rule to flip-flop some more
- Questions to be considered as business relationships change, when employers disagree on positions to be taken, etc.

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Impact in 2017



- Subcontracting
- Supplier employer
- Franchisee/Franchisor
- Impact on bargaining?

| What You Should Watch for... |
|--|
| Further DOL Guidance |
| NLRB Appointments & Rulings |
| Legislation |
| Expect higher standards in California regardless of whether federal standards loosen |

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Thank You

For questions or comments, please contact:

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