The Jaffe Update
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GUIDE TO 500-EMPLOYEE ANALYSIS
Family First Coronavirus Response Act

Do I have less than 500 employees?

Question:
As an employer, how do I know if my business is under the 500-employee threshold and, therefore, must provide paid sick leave or expanded family and medical leave?

Answer:
You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees

- on leave;
- temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and
- day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship).

(Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.)

Typically, a corporation (including its separate establishments or divisions) is considered a single employer and its employees must each be counted towards the 500-employee threshold unless the company satisfies the joint employer test or the integrated employer test.

- *Paid Emergency Sick Leave Act* – For purposes of determining whether you have 500 employees under the Paid Emergency Sick Leave Act, you may satisfy the 500-employee threshold only under the joint employer test.
- *Emergency FMLA Expansion Act* – For purposes of determining whether you have 500 employees under the Emergency FMLA Expansion Act, you may satisfy the 500-employee threshold using the joint employer test *or* the integrated employer test.

Joint Employer Test
(Emergency Paid Sick Leave Act and Emergency FMLA Expansion Act)

If two entities are joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under either the Emergency Paid Sick Leave Act or the Emergency FMLA Expansion Act. Under the joint employer test, separate companies may each exercise sufficient control over the employee that they are considered joint employers. There are two potential scenarios where an employee may have one or more joint employers.

SCENARIO #1

The employee has an employer who suffers, permits, or otherwise employs the employee to work, but another individual or entity simultaneously benefits from that work. In this scenario, you must use a four-factor balancing test to determine whether the entity that benefits from the work (the potential employer) is directly or indirectly controlling the employee by assessing whether that the potential employer:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records ("employment records" means records, like payroll records, that reflect, relate to, or otherwise record information pertaining to the hiring or firing, supervision and control of the work schedules or conditions of employment, or determining the rate and method of payment of the employee).

Even though the potential employer's ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, such ability, power, or right alone does not demonstrate joint employer status without some actual exercise of control.

SCENARIO #2

Employer A employs an employee for one set of hours in a workweek, and Employer B employs the same employee for a separate set of hours in the same workweek. The employee is employed by both employers and works separate jobs and hours for each employer. This scenario typically occurs if the employers are sufficiently associated with respect to the employment of the employee. The employers will generally be sufficiently associated if the following exists:

- there is an arrangement between the employers to share the employee's services,
- the employer is acting directly or indirectly in the interest of the other employer in relation to the employee, or
- they share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Integrated Employer Test
(Emergency FMLA Expansion Act)

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer are counted in determining employer coverage for purposes of the Emergency FMLA Expansion Act.

When examining the integrated employer test, one factor is not determinative. The entire relationship must be viewed in its totality. Factors to be considered in determining if separate entities are an integrated employer include:

- common management, common directors, and boards;
- interrelation between operations (such as common offices, common record keeping, shared bank accounts, and equipment);
- centralized control of labor relations and personnel; and
- degree of common ownership or financial control.

In other words, do the two entities work "hand in glove," so to speak? Do they share the same leadership? Ownership? The more intertwined, the more likely they are "integrated employers."

Example #1: Two companies owned by the same person were integrated employers:

- Common management was met where the owner made high-level management decisions for both companies and directed management of each company, who implemented his instructions.
- There was significant interrelation between operations because the two companies shared office space and some personnel; used the same bookkeeper and IT support person; the same project manager oversaw construction projects for both companies; and there was a common payroll process.
- The employees of one company reported to the other company's premises to be dispatched to specific work locations. Employees also moved between companies to meet overall labor needs.
- The owner owned 100 percent of one company and was the primary shareholder of the other company.

Example #2: Two companies owned by the same person were NOT integrated employer:

- Even though the same person owned both companies, and could hire or fire employees at either company, each company had separate managers who did not have authority in the other company. While the owner had authority to hire and fire, he refrained from interfering with the direct manager's decision to terminate employees.
- Each company had separate offices, equipment, and records.
- Even though the owner had an office at each company's location, and some employees periodically performed work or services for the other company, this was insufficient to establish interrelated operations.

Our Recommendation

Talk with your team. Start with this guide to analyze the various factors that might establish joint employment or integrated employment. Consider the following during your discussions:

(1) What is the corporate structure and ownership interests?
(2) What authority do owners and managers have to make employment decisions of employees (hiring, pay, duties, discipline, promotion, termination, etc.) at other entities?
(3) What decisions are actually being made? What level of control is being exercised?
(4) Do the entities share labor services?
(5) Do the entities share office space, equipment, resources, payroll/accounting/benefit administration services, etc.?
(6) Are employees easily transferrable between the entities or locations?
(7) How and where are employment documents maintained?

Contact Nicole Foley at nfoley@jaffelaw.com or Patrice Arend at parend@jaffelaw.com to help guide your discussions or assist in applying your particular facts to the joint and integrated employer tests.

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Information for this update can be found at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions; Department of Labor "Fact Sheet: Final Rule on Joint Employer Status under the Fair Labor Standards Act;" 29 CFR 791.2; 29 CFR 825.10(c); https://www.jdsupra.com/legalnews/what-am-i-doing-wrong-common-fmla-55839/.