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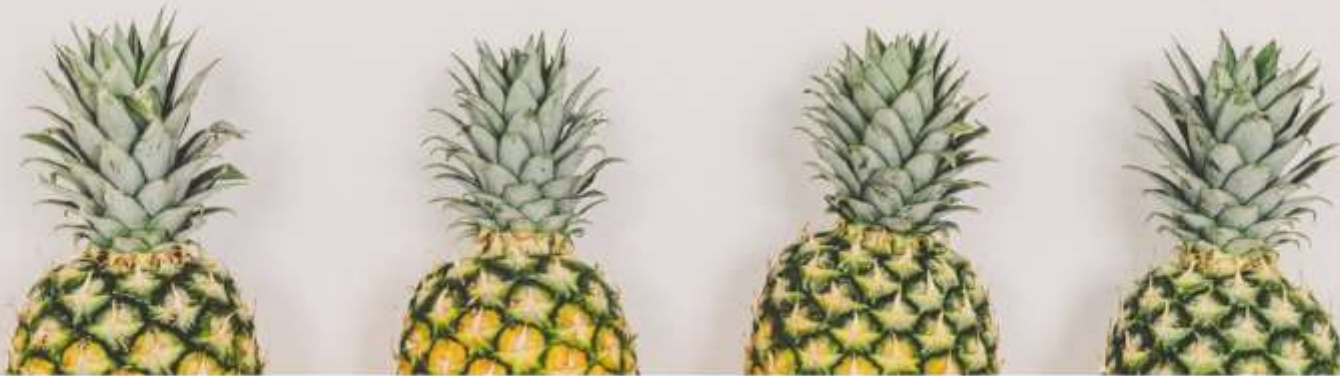
THE HOSPITALITY LAW CONFERENCE

April 24 - 26, 2017 • Houston, Texas

Undercover boss: How you can be a joint employer and not even know it

2017 HOSPITALITY
LAW CONFERENCE

APRIL 24 - 26



Kendall Kelly Hayden

Cozen O'Connor, PC

Vice-Chair, Office Managing Partner

- Commercial litigator
- Emphasis in hospitality and transportation
- Huge fan of Stephen Barth and HospitalityLawyer.com



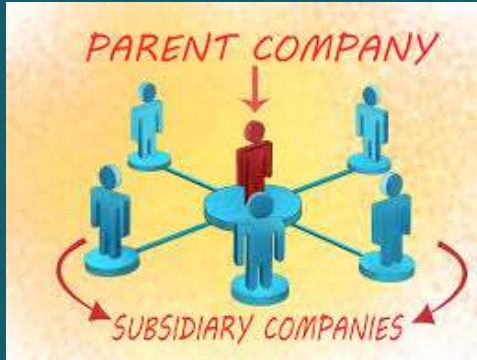
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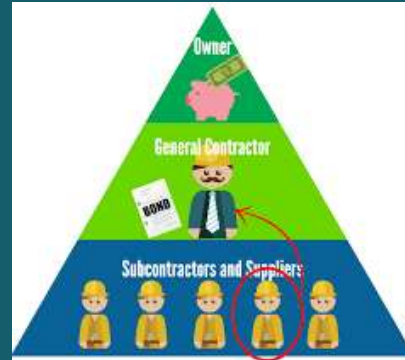
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Joint or co-employers: not just for franchisors anymore



Parent companies



General contractors



Staffing companies



3rd party vendors

Joint employer definitions

- Two separate legal entities share right-to-control
- One employer provides labor to another employer



WHD Factors

Horizontal

Employee has two or more employers where the employers themselves have relationships with each other. This is common in scenarios where two companies are owned by the same entity and the employee is employed by both companies.

Vertical

Intermediary employer (i.e. staffing agency, third party management company, contracting agency, or independent contractor) is controlled by the ultimate employer (i.e. client company) to provide work for the benefit of the ultimate employer.



Right-to-control v. vertical

Right-to-control

- Alleged employer supervises/directs employee
- Employee working on employer's premises at time of injury
- Alleged employer controls employment conditions
- Alleged employer can fix regularity of hours
- Alleged employer fixes time spent on particular aspect of work
- Alleged employer provides tools to perform work
- Alleged employer instructs on physical manner of accomplishing end result
- Alleged employer provides raw materials

Vertical

- Alleged employer supervises/directs employee
- Employee working on employer's premises at time of injury
- Alleged employer controls employment conditions
- Relationship w/ alleged employer permanent w/o specific end
- Work is repetitive
- Work integral to alleged to employer's business
- Employee performs administrative functions commonly performed by alleged employer



Potential liability

Discrimination

Wage and hour violations

FMLA

Immigration

Termination

Personal injury

Worksite employment obligations

Government investigations

Tax withholdings

Benefits

Subcontractors and sub-sub contractors

Parent companies/subsidiaries



Franchisor/franchisee case law

Joint employer



No joint employer



Staffing agency case law

Joint employer



Subcontractor case law

Joint employer



Parent company/subsidiary case law

Joint employer



No joint employer (yet)



Majority v. minority view

Majority

Consider joint control over the conditions of employment or labor relations of the relevant group of employees as determinative of joint employment

Minority

Apply the 4 part integration test:

- 1) common ownership
- 2) common management
- 3) integration of business operations
- 4) control over labor relations



Best practices to avoid joint employment: GC's

Do

- Ban workers
- Ensure safety under OSHA
- Review agreements w/ subs to ensure legally enforceable defense/indemnity provisions
- Require subs comply with FLSA and monitor
- Identify and define your role in relation to the individuals working on the project
- Supervise and manage the contractual chain of command

Do not

- Discipline sub's employees
- Control day-to-day management
- Participate in hiring/firing of sub's employees
- Set hours during which sub's employees can work
- Coordinate schedules for sub's employees
- Mandate what sub pays employees
- Play a roll in presentation of payroll or payment of wages
- Have direct communication with subs' nonmanagerial employees
- Exert excessive amount of control over the subcontractors' employees except in emergency situations



Best practices to avoid joint employment: staffing agencies

Do

- Keep off your payroll
- Review insurance policies for coverage and ambiguities
- Require agency to hire, fire, demote, promote

Do not

- Share authority with agency in determining conditions of employment
- Retain ultimate control in hiring, firing, demotions, promotions
- Supervise day-to-day activity
- Provide HR support



Best practices to avoid joint employment: franchisors

Do

- Make clear franchisor is not employer
- Ensure employment application establishes that franchisor has no role in the hiring process
- Give franchisees complete control over the application process

Ensure franchisees make clear to employees throughout their training that the franchisee and not franchisor is the employer

Do not

- Employ springing rights that allow franchisors to step in if contingencies occur
- Provide manual/handbook as a requirement
- Carelessly use franchisor's name and marking on checks, handbooks
- Allow frequent communication between franchise employees and franchisor



Best practices to avoid joint employment: parent companies

Do

- Review all contracts
- Recognize back office functions
- Understand view of employees
- Ensure employees know who they work for
- Realize joint employment may be beneficial

Do not

- Rely on contractual disclaimers
- Rely on government regulations
- Rely on legal entity status
- Allow home office to control subsidiary
- Ignore who provides supplies to subsidiary



Thank you

For more information:

Kendall Kelly Hayden

O: 214-462-3072

C: 214-629-1997

khayden@cozen.com



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When Patrons Attack:
Employment Law Risk
and the Disruptive
Customer



Andrea M. Kirshenbaum

Principal, Hospitality & Retail Practice Group
Post & Schell, P.C.

- Chair of Firm's Wage and Hour Practice Group
- Defends employers nationally in federal and state court litigation involving all major employment statutes
- Provides proactive counseling and guidance regarding the full range of employee relations challenges that employers confront



Darren M. Creasy

Principal, Hospitality & Retail Practice Group
Post & Schell, P.C.

- Principal in Firm's Employment & Employee Relations Practice Group
- Employment litigation defense practice focused on civil actions arising under all major employment statutes
- Helps clients formulate litigation avoidance and defense strategies



When Patrons Attack:
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Did you know?

- **Third-parties (including guests, customers, and occasionally foul-mouthed parrots) can harass your employees?**
- **You could be held responsible for third party harassment if you take no corrective action?**



EEOC Regulations



Employers are responsible for third party harassment where the employer (or its agents or supervisory employees) either knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

Lessons from Red Olive

- Thompson v. Panos X. Foods, Inc. d/b/a/ Red Olive (E.D. Mich. April 22, 2016)
- Server harassed repeatedly by the same guest (an older male) at two different restaurants. Conduct was lewd and suggestive but not outlandish.



Lessons from Red Olive

- Prior supervisor at a different restaurant told the guest his behavior was inappropriate, and that if repeated he would be asked to leave
- Red Olive supervisor allegedly laughed and took no remedial action
- Court distinguished the supervisors and denied Red Olive's summary judgment motion on HWE claim

Mitigating Risk

- **Ensure that your anti-harassment and discrimination policies cover third-party harassment**
- **Confirm that third-party harassment is covered by your EPL insurance**
- **Take complaints seriously, investigate, and don't retaliate**
- **Document employee reports/complaints and management's response**

Mitigating Risk

- **Take prompt remedial action!**
 - Reassign staff,
 - remove the offending person (or parrot)
 - Bar repeat offenders from the property
- **Report to security/police as appropriate**

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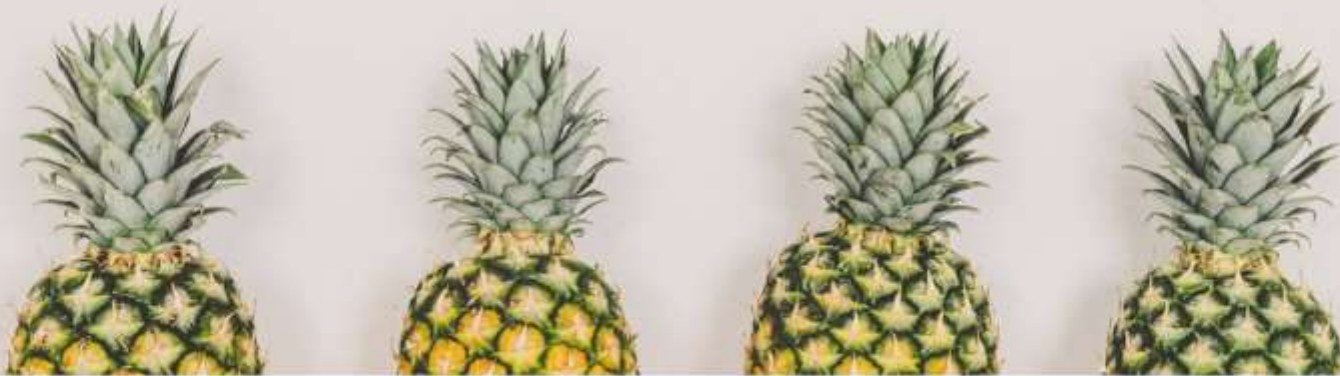
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Food and Beverage Management Agreements

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Grace Yang

Shareholder, GrayRobinson, P.A.

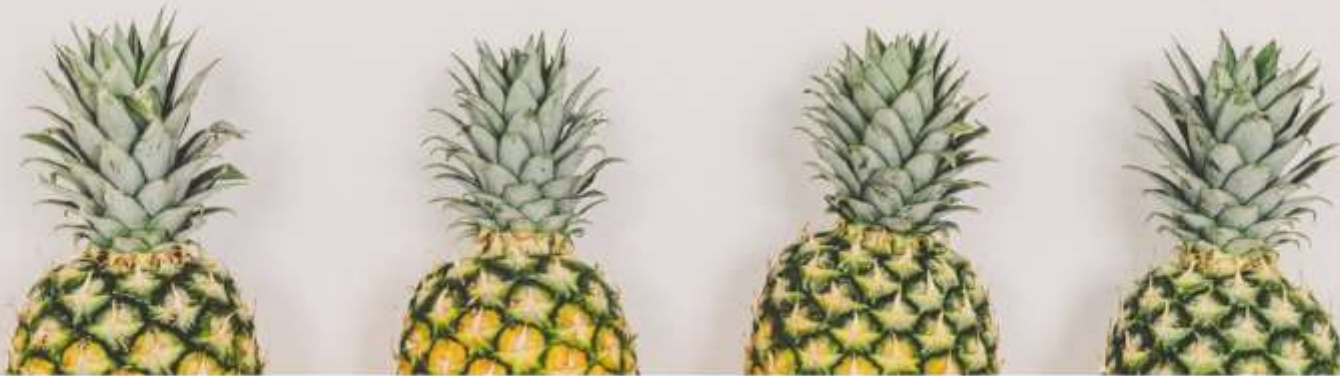
- Tampa, FL based member of the hospitality industry, alcohol, food, and land use teams
- Clients include owners or operators of hotels, restaurants, grocery stores, convenience stores, private clubs, theme parks, and sporting venues.
- B.A. from Yale and J.D. from Cornell Law School



Food and Beverage Management Agreements

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Management Agreements



A management agreement is an agreement between a business owner and a manager (usually a management company, not individual) who agrees to operate the business for the owner.

Why Hire a Management Company?

- Brand strength
- Expertise and Experience
- Marketing Resources
- Staffing and Access to Well-Trained Employees
- The type of owner (corporation, partnership, investment group)
- Owner is not geographically close
- Owner is not interested in day-to-day responsibilities



F&B Management Agreements

F&B management agreements are used when business owners want to hire management companies to operate food and beverage services at their businesses



Food & Beverage Management Agreements Are Common In a Variety of Businesses:

- Hotels
- Hospitals
- Corporate Cafeterias
- Dining Facilities at Schools and Universities
- Stadiums
- Museums
- Senior Living Facilities
- Aquariums and Zoos



Special Case: Interim Food And Beverage Agreements

An interim food and beverage management agreement is sometimes used because the incoming company to a business needs additional time to obtain its food and/or alcohol license.



Key Considerations

- Term of the agreement– how much time are the parties agreeing to operate under the agreement? Clearly define the interim period.
- Financial arrangements– how will the parties be compensated and costs paid in the interim period?
- Labor and employment – managers and employees.
- Indemnification concerns



Also Key-- Are Interim Food And Beverage Agreements Allowed?

Determined based on state and/or local laws.

For example, Florida currently does not allow interim alcohol beverage agreements but Texas does.



Special Reasons That May Require Interim F&B Agreements

- Foreclosure of a business
- Bankruptcy of a business
- Failure of a franchisee
- Zoning approval delays



Questions?

Grace Yang

Phone: 813-273-5043

grace.yang@gray-robinson.com

www.gray-robinson.com

