



# THE HOSPITALITY LAW CONFERENCE

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

2017 HOSPITALITY  
LAW CONFERENCE

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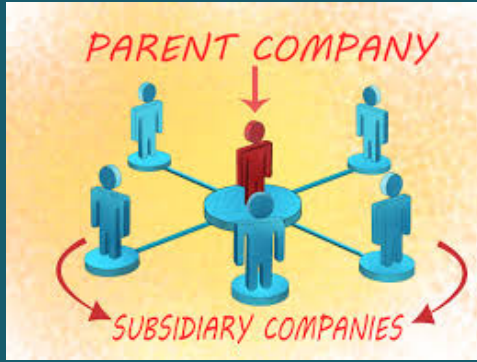
Vice-Chair, Office Managing Partner

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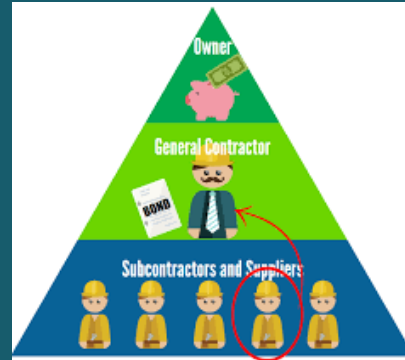
- Commercial litigator
- Emphasis in hospitality and transportation
- Huge fan of Stephen Barth and HospitalityLawyer.com



# Joint or co-employers: not just for franchisors anymore



Parent companies



General contractors



Staffing companies



3<sup>rd</sup> 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



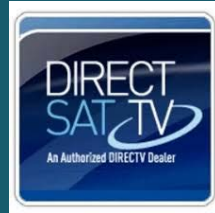
# Staffing agency case law

## Joint employer



# Subcontractor case law

## Joint employer



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# 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

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