Agenda

Mike Sheehan, DLA Piper
Introduction and Overview
Department of Labor

Terence Smith, Columbia College
National Labor
Relations Board

Allison Stein, Hospira, Inc.
Equal Employment
Opportunity Commission
**Joint employment** (also known as **co-employment**) occurs when separate business entities simultaneously share control and supervision of a worker.
What is Joint Employment?

The corporate veil that protects companies from liability for the acts of suppliers or franchisees is eroding.
A Department of Labor that is aggressively advocating novel theories of vicarious liability, combined with a motivated, class action-savvy plaintiffs' bar is stirring up a “perfect storm” that will test the limits of joint employment.
The more you dabble in the affairs of suppliers or franchisees, the greater the risk that you will be tagged as a joint employer and held jointly liable for *their sins*.
Recent pushes to expand the definition of who is an employer open employers at the “top of the pyramid” to exposure.
How is Joint Employment Being Expanded?

The historical test of **direct and actual control** is being altered.

The Department, NLRB, and the EEOC now proposed to find joint employment with any one of these factors:

- **indirect** control over working conditions;
- **unexercised potential** to control working conditions; or
- **industrial realities** suggest another entity essential to remedy
The U.S. Department of Labor
Department of Labor’s Wage and Hour Administrator

- Oversees the enforcement of the Fair Labor Standards Act, which sets rules for minimum wage, overtime pay and record-keeping standards.
- The division has broad powers to define what counts as work, set certain wages and punish companies that don't comply.
- Confirmed in May 2014.
Employment Fissuring

Enforcing Labour Standards in Fissured Workplaces: The US Experience
David Weil

Abstract
The employment relationship in a growing number of industries with large concentrations of low wage workers has become 'fissured', where the direct firms that collectively determine the product market conditions in which wages and conditions are set have become separated from the actual employment of the workers who provide goods or services. Instead, the direct employers of low wage workers operate in far more competitive markets that create conditions for non-compliance. We examine this evolution in employment and its implications for public policy in the US, discuss the factors driving fissured employment and detail its main features and outcomes. We then look at the traditional methods used for labour standards enforcement in the US and discuss why they are poorly suited to address fissured workplaces. Finally, we survey how public policies might better address the realities of the modern workplace, including efforts in this regard by the Obama administration.

JEL Codes: J31; J38; J61; J78; K31

Keywords
Geographic enforcement; fissure

1. Introduction
In recent decades, there has been a shift within the sector employers (USA): the direct, two-party and embedded in traditional employer–employee situation on the

A small works in a small and the property where the work is legally established is supervised on a daily basis and payroll is managed by

* Professor of Economics, Harvard

David Weil
Boston University

The Fissured Workplace
Why Work Became So Bad For So Many And What Can Be Done To Improve It

Fissured employment

David Weil, Boston University
2011 ISA Meetings, Pittsburgh, PA, May 31, 2011

Enforcement responses to a fissured workplace

Just Supply Chains Conference
MIT/ December 13, 2012

David Weil
Boston University

The fissured workplace: Implications for Closing the Gap

CSTE Occupational Health Surveillance Subcommittee Meeting
Washington, DC: April 18, 2013

David Weil
Boston University
Are there ways to allow the beneficial aspects of business models built on adherence to quality and consumer service standards to also assure that they meet their obligations under the law to employees?
Option one would be to treat the individual companies (and their workers) exactly as it would if they directly worked for the major employer . . . In so doing, the employer acts essentially as a joint employer . . . With that role comes liability . . .
“franchising arrangements . . . make the worker-employer tie tenuous and far less transparent.”

Weil, supra note 18, at 36-37.
The National Labor Relations Board
NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer

Office of Public Affairs
202-273-1991
publicinfo@nrlb.gov
http://www.nrlb.gov/

July 29, 2014

The National Labor Relations Board Office of the General Counsel has investigated charges alleging McDonald’s franchisees and their franchisor, McDonald’s, USA, LLC, violated the rights of employees as a result of activities surrounding employee protests. The Office of the General Counsel found merit in some of the charges and no merit in others. The Office of the General Counsel has authorized complaints on alleged violations of the National Labor Relations Act. If the parties cannot reach settlement in these cases, complaints will issue and McDonald’s, USA, LLC will be named as a joint employer respondent.

The National Labor Relations Board Office of the General Counsel has had 181 cases involving McDonald’s filed since November 2012. Of those cases, 68 were found to have no merit. 64 cases are currently pending investigation and 43 cases have been found to have merit. In the 43 cases where complaint has been authorized, McDonald’s franchisees and/or McDonald’s, USA, LLC will be named as a respondent if parties are unable to reach settlement.
The NLRB

The Board

Mark Gaston Pearce
Kent Hirozawa
Lauren McFerran
Harry I. Johnson III
Philip A. Miscimarra

The Office of the General Counsel

Richard F. Griffin, Jr.
The Process

1. A trial before a NLRB administrative law judge (ALJ) will be scheduled.

2. An NLRB lawyer will prosecute the case.

3. The ALJ will issue a decision.

4. The ALJ’s decision will be submitted to the NLRB for final NLRB decision.

5. Decisions of the NLRB may be appealed and/or enforced in a U.S. Court of Appeals.
"The Board should abandon its existing joint-employer standard because it undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining . . . The current standard also ignores Congress’s intent that the term “employer” be construed broadly in light of economic realities and the Act’s underlying goals, and has particularly inhibited meaningful bargaining with respect to the contingent workforce and other nontraditional employment arrangements."
An entity could be a joint employer if it exercised direct or indirect control over working conditions, had the unexercised potential to control working conditions, or where ‘industrial realities’ otherwise made it essential to meaningful bargaining.
The General Counsel urges the Board to adopt a new standard that takes account of the *totality* of the circumstances, including *how* the putative joint employers structured *their* commercial dealings *with* each other.”
Under this test, if one of the entities wields sufficient influence over the working conditions of the other entity’s employees such that meaningful bargaining could not occur in its absence, joint-employer status would be established.
The Equal Employment Opportunity Commission
Who is The Employer Under The ADA and Title VII?

1. **Integrated Employer Test**
   - Asks whether two superficially separate entities should be treated as one entity

2. **Joint Employer Test**
   - Assumes that the alleged employers are separate entities and assesses whether the degree of control is nonetheless sufficient to treat both as employers
The Joint Employer Test

The term "joint employer" refers to **two or more employers** that are unrelated or that are not sufficiently related to qualify as an integrated enterprise, but that **each exercise sufficient control of an individual to qualify as his/her employer**. The "joint employer" issue frequently arises in cases involving temporary staffing agencies. A charge must be filed against each employer to pursue a claim against that employer.

To determine whether a respondent is covered, count the number of individuals employed by the respondent alone and the employees jointly employed by the respondent and other entities. If an individual is jointly employed by two or more employers, then s/he is counted for coverage purposes for each employer with which s/he has an employment relationship.

If a charge is filed by a contract worker who is jointly employed by a private-sector employer and a federal agency, s/he should be notified that a claim against the federal agency must be filed with the agency's EEO office.
“The Court will apply the joint employer test, rather than the integrated enterprise test that Valero advocates…. [T]he integrated-enterprise test is not a good fit for a case involving one company with a service contract with the other, as opposed to affiliated or related companies such as a parent and subsidiary.”

* * *

“Because the Fifth Circuit has not formally defined the control factors to consider, this Court will follow the approach of at least two district courts in this Circuit and use the factors set forth by the Second Circuit. Those five factors are whether the alleged joint employer (1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process.” Citations Omitted.
“The Court therefore concludes that the undisputed facts demonstrate that Valero was not Bass’s employer. At oral argument on this motion, counsel for the Commission advanced a number of policy reasons why a company in Valero’s situation should have to comply with the ADA. But the independent contractor ‘hole’ in federal anti-discrimination law has long been criticized, and Congress has yet to enact a ‘fix.’ And Valero does not enjoy immunity under the ADA for its reading requirement; an individual with a reading disability who applies for a job with Valero at the refinery and is rejected may bring a claim. With respect to Bass’s situation, however, Valero is not a covered entity subject to suit.”
Adopting the joint employer theory in the Title VII context, the Sixth Circuit held, "entities are joint employers if they ‘share or co-determine those matters governing essential terms and conditions of employment.’ Carrier Corp. v. NLRB, 768 F.2d 778, 781 (6th Cir. 1985). To determine whether an entity is the plaintiff’s joint employer, we look to an entity’s ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance. Id. Here, Skanska supervised and controlled the operators’ day-to-day activities without any oversight from Neely. As a general matter, Skanska routinely exercised its ability to direct and supervise the operators’ performance. Skanska set the operators’ hours and daily assignments. Skanska assigned the operators’ supervisors. When the operators complained about the conditions on site, Skanska handled their complaints. When the operators had disagreements with their supervisors, Skanska arranged a meeting to discuss the situation."
What Does This Look Like in The Real World?

**Joint Employer**

- Setting employment policies
- Monitoring the number of hours worked
- Influencing discipline / promotions
- Setting pay rates and job classifications
- Dictating employment conditions
e.g., work schedules, breaks, timekeeping
- Dictating recruitment and hiring practices
- Running payroll and benefits
- Training / supervising their employees
- Hyper-managing their efficiency / profitability
- Keeping records on their employees
- Ensuring consistency of service
- Protecting branding and advertising
- Providing high-level shared services
- Consulting with them about start-up issues
- Requiring reports re normal business issues

**“Directly” or “Indirectly”**

**Traditional Relationship**
How Can Clients Minimize Joint Employment Risks With Counter Parties?

1. Stay out of their personnel decisions
2. Manage/supervise the counter party, not its employees
3. Avoid dictating their employment policies or practices
4. Don’t become their HR Dept. (for records, benefits, or payroll)
Example 1: Sex Harassment Investigation

One of your employees has accused a contracted, temporary employee (hired through a staffing agency) of sexual harassment.

- Who should handle the investigation?
- Should you ask the temp to leave your facility while the investigation is carried out?
What Does This Look Like in The Real World?

Example 2: Discipline/Discharge

The allegations of sexual harassment against the temporary employee prove to be true. What’s next?

- Should you discipline the temp?
- How do you go about firing a temp worker? Is there any “magic language” you use?
What Does This Look Like in The Real World?

Example 3: Company Policies

Your company is hiring 5 new contract, temporary employees (hired through a staffing agency). Your company is takes its anti-harassment and EEO policies very seriously and you want these workers to be aware of, and abide by, your policies.

• Should you give the temps a copy of your employee handbook that includes anti-harassment and EEO policies?

• Who should be in charge of making sure the temps receive your policies before they come onto your premises? Does it matter who physically hands the policy to the temps?