Accidental Joint-Employment Relationships:
Getting More Than You Bargained For

Karina B. Sterman, Esq.
ksterman@ggfirm.com

Whatever your business—design, production, talent management—you likely focus on your actual core strengths and subcontract labor through outside vendors for work like security, janitorial maintenance, website design. While one of the key advantages of such outside vendors is keeping your own employment workforce lean and manageable, an unfortunate and unexpected side effect of such vendor relationships is that you may actually be a joint employer of your vendors' employees.

Why does that matter? As a joint employer, you may be held jointly liable when the vendor is not in compliance with applicable federal and state employment laws, such as paying at least minimum wage and overtime, providing rest and meal breaks, and issuing itemized wage statements that comply with the California Labor Code. Finding out that you are a joint employer for the first time when you get served with a lawsuit by one of your vendor's employees can be very confusing. Trying to extricate yourself from that lawsuit, thinking it must be a mistake, can be very frustrating and near futile. Trying to defend yourself when you have no access to underlying employment records for someone claiming to be your "joint" employee is downright scary. The best defense, as always, is anticipating the issue and preparing to deal with it.

Step 1: Determine the Likelihood of Joint Employment

The main premise of joint employment is that an employee may be employed by more than one employer (generally and specially) at the same time. Accept that reality. Enforcement agencies and courts routinely interpret the term "employer" broadly in favor of employees, and federal and state-specific tests to determine the existence of a joint-employment relationship vary slightly. Most commonly, the tests focus on the economic realities of the relationship and the degree of control retained by the entity claimed to be a joint employer.

A joint-employment relationship likely exists when one entity (the general employer) hires, provides, and pays a worker, while another entity (the special employer) actually directs and supervises the work itself. The analysis is quite fact specific and applies in both parent-subsidiary business relationships as well as true third-party vendor relationships.

Step 2: Review Vendor Contracts

If there is ever a slight chance of a joint-employment relationship, even a temporary one, it is essential to have a written contract with the outside vendor. In addition to other key provisions, this contract should expressly address what happens if a joint-employment relationship is found and who will provide defense in case of a lawsuit by the vendor's employee. If you only use an invoicing system with vendors and do not have contracts, you may want to reconsider after discussing with your counsel. If you have contracts with your vendors but they do not protect you, consider negotiating key revisions to your vendor contracts or find vendors that will work with you on these issues. They should be willing to stand by their own employment practices.

Step 3: Practice What You Preach

In addition to having a vendor contract that specifically assigns responsibilities and liabilities, it is equally important to train your own staff to minimize the chance of becoming a joint employer. In some cases, the level of interaction may be so high that joint employment is inevitable. However, in many cases, it is the micromanagement and over-involvement of the special employer that converts the relationship into one of joint employment. Although no one factor standing alone will be determinative, the more control you have over the wages, hours or working conditions, the more certain that a joint-employment relationship will be found.

Karina B. Sterman is a partner in the Litigation and Employment Law Departments of Greenberg Glusker. A creative and ardent advocate for her clients, Ms. Sterman defends businesses in class action lawsuits as well as in discrimination, harassment, wrongful termination, and other lawsuits. She also defends companies in administrative proceedings in front of the EEOC, Department of Labor, California Labor Commissioner, and other jurisdictions.