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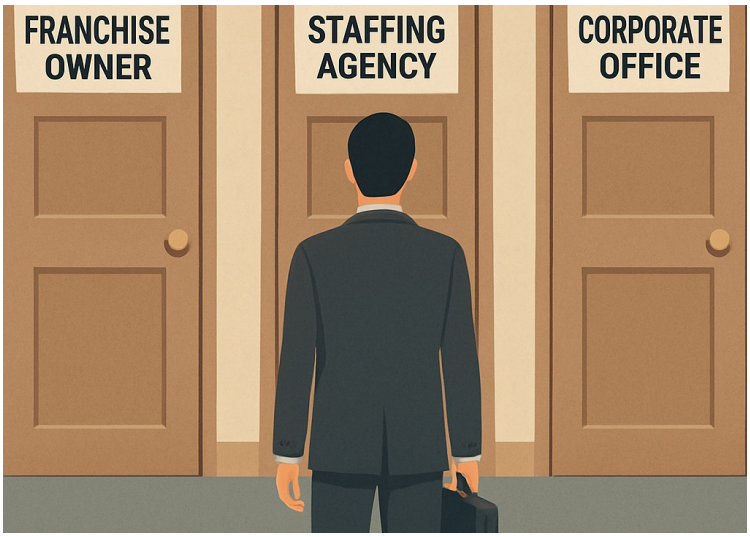

Everyone's employee but no one's responsibility

Steven J. Kaplan

In 2017, economist David Weil published "The Fissured Workplace," explaining that traditional employment patterns were being ruptured by the reallocation of responsibility for employment law compliance, such as through temporary staffing agencies, franchising and subcontracting.

This trend continues. Employers are using professional employer organizations to handle their HR responsibilities, and outside contractors to help them recruit and review job applicants.

This has led to more frequent joint employment litigation. Plaintiffs invoke the joint employer doctrine to impose liability on multiple independent business entities that influence some aspect of the same workforce, even if only one of them commits wrongdoing. Predictably, courts have developed tests to address joint employer challenges. Equally predictably, courts have sent mixed signals about the contours of the doctrine, often generating more confusion than clarity.

This article discusses three questions that persistently arise in joint employer jurisprudence: Can a co-employer's control be indirect? Is reserved but unexercised control enough to impose liability? Is joint employer liability vicarious?

The definition of "joint employer" varies between statutes. Under the Fair Employment and Housing Act (FEHA), courts apply the common law "right of control" test, a "totality of circumstances" approach that emphasizes control over employee job duties. (*Vernon v. State of California* (2004) 116 Cal.App.4th 114, 124.)

The California Labor Code primarily uses a disjunctive three-part test, based on the Industrial Wage Commission's (IWC) Wage Orders. To qualify as a joint employer, the business must (i) engage another to work; (ii) suffer or permit another to work; or (iii) directly or indirectly exercise control over the wages and working conditions of another person (*Martinez v. Combs* (2010) 49 Cal.4th 35, 57-58, 69-70). The "engage" and "exercise control" prongs together mirror the common law "control" test.

Indirect control: The most contested issue in joint employer law is whether indirect control, standing alone, can support a joint employer finding. Indirect control includes a strong influence, such as when a staffing agency requires its clients to comply with enumerated personnel protocols. Most courts have resisted generous application of the indirect control precept.

In *Patterson v. Domino's Pizza*, LLC (2014) 60 Cal.4th 474, a discrimination case, a franchise agreement imposed comprehensive operational restrictions on the franchisee but gave the franchisee control over personnel matters. The court held that the franchisor was not a joint employer even though it pressured the franchisee about both operational and personnel issues, going so far as to instruct it to fire one of its employees.

Patterson has received a mixed reception. In a trio of cases, Shell Oil engaged small businesses

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called MSOs to operate its gas stations. (*Curry v. Equilon Enterprises*, LLC (2018) 23 Cal.App. 5th 289; *Henderson v. Equilon Enterprises, LLC* (2019) 40 Cal. App.5th 1111; *Medina v. Equilon Enterprises, LLC* (2021) 68 Cal. App.5th 868.) The Shell contract required MSOs to abide by an enveloping set of operating standards, including integrating their banking operations and using 24-hour schedules (both of which raised labor costs). MSOs were contractually responsible for personnel matters, but Shell could demand that they terminate employees for "good cause."

Curry and Henderson held that this top-down pressure did not manifest joint employment. Medina, in sharp contrast, found the same business model warranted a joint employer finding because it undermined MSOs' discretion over scheduling and payroll.

Exercised or reserved control? A second question is whether a putative joint employer may be liable where it reserves but does not exercise control. Reserved control is often confused with indirect control, but they are distinct concepts. Indirect control usually involves nonpersonnel protocols that influence personnel decisions. In contrast, reserved control is implicated when a putative joint employer reserves the right to directly control personnel practices but refrains from exercising that authority.

California courts seem to recognize reserved control as indicative of joint employment. *Bradley v. California Department of Corrections and Rehabilitation* (2008) 158 Cal.4th 1612, 1624-1629 explained that liability can be based on "control retained" and "right to terminate the service at any time." *Jimenez v. U.S. Continental Marketing, Inc.* (USCM) (2019) 41 Cal.App.5th 189, 193 looked to the "extent of direction and control possessed and/or exercised … over the employee."

The reserved control issue was not actually presented in Bradley or Jimenez, and their observations are probably no more than dicta. The question has, however, been ferociously contested under federal law. (E.g., *Chamber of Commerce of United States v. NLRB* (E.D. Tex. 2024) 723 F.Supp.3d 498.) For this reason, the issue will likely arise in a future California case.

Does joint employer status lead to automatic/vicarious liability? Plaintiffs often argue that, if joint employment is established, both co-employers automatically share liability. This may be wishful thinking, as courts have sent mixed signals on this question.

Noe v. Superior Court (2015) 237 Cal.App.4th 316, 333-334, fn. 10 held that joint employer liability depends on the duties imposed by the particular statute. If a statute imposes a duty based on the business's status as an employer, as with meal breaks, then vicarious liability attaches. Otherwise, liability attaches only if the joint employer was aware of its co-employer's wrongdoing, had the ability to stop it and didn't. *Grande v. Eisenhower Medical Center* (2020) 44 Cal.App.5th 1147, 1160 took a contrary view, saying that "joint employers are not vicariously liable for each other's Labor Code violations, but liable for their own conduct." (Citation omitted.) And Medina, without citing either Noe or Grande, observed in dictum that Shell should be automatically liable for the MSO's labor law violations.

To the extent there is no vicarious liability, a joint employer finding is likely to be considered merely a gateway prerequisite to litigating liability questions.

In *Mobley v. Workday, Inc.* (N.D. Cal. 2024) 740 F.Supp.3d 796, plaintiffs pleaded that a business whose AI algorithm helped other businesses screen job applicants was itself an employer. Mobley signals that claimants will seek to impose joint employer liability on a greater variety of businesses involved in the fissured workplace. Employers will need to examine their business contracts and supervision plans to prepare for, or to avoid, these kinds of claims. And plaintiffs' counsel will need to devise creative discovery and litigation strategies to successfully maneuver in an increasingly complicated legal environment with a less-than-enthusiastic judiciary.

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