


STAFF ISSUES

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Beware of joint employer rules

Ownership of multiple practices has become more and more common, but it can complicate legal obligations. Before making a decision, you must consider these regulations to avoid unpleasant surprises.

TODAY'S DENTAL INDUSTRY has seen big changes from years past. The new business model of a single person or entity owning and operating multiple practices has created great opportunities for the entrepreneurial spirits out there, as well as changed the landscape of dental practices.

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The "small" dental practice has grown. A small practice with 5–15 employees is rarer each year as more businesspeople buy more practices. Now, it's not unusual for the practice to have or exceed upwards of 50 or more employees. What a change!

With those changes come greater responsibilities. Federal, state, and local laws set an employee threshold when applying their laws and regulations. As a result, the more employees one has, the more laws that are in play.

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What happens if you're one of these business entrepreneurs who has two or more practices under your belt? Do all employees count from all practices? When do those laws at higher employee thresholds become applicable? What if you share those employees at the different practices? Do you have to pay them overtime when they work more than 40 hours in a week (or greater than any applicable daily overtime requirements) if they split their time between different practices? These and other questions generally boil down to whether or not a joint employer relationship exists or not.

Joint employment exists when an employee is employed by two (or more) employers such that the employers are responsible for compliance with various laws, such as the Family and Medical Leave Act (FMLA).

FMLA applies to employers with 50 or more employees within a 75-mile radius. According to the Department of Labor (DOL), "Employees who are jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility under the FMLA, regardless of whether the employee is maintained on one or both of the employers' payrolls."[1]

Similarly, joint employer relationships have implications with the Fair Labor Standards Act (FLSA), which governs minimum wage and overtime rules. In its "Small entity compliance guide," the DOL states: "Under the FLSA, an employee may have—in addition to his or her employer—one or more joint employers. A joint employer can be an individual, partnership, association, corporation, business trust, legal representative, public agency, or any organized group of persons, excluding any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such a labor organization. For each workweek that a person or entity is a joint employer of an employee, *that joint employer is jointly and severally liable* with the employer and any other joint employers for compliance with all of the applicable provisions of the FLSA, including the minimum wage and overtime pay provisions, for all of the hours worked by the employee in that workweek."[2] Determining joint employer status will depend on all the facts in a particular case. In their latest rules, the DOL has provided a plethora of information for understanding whether or not a joint employer relationship exists. In one part they discuss their *four factor balancing test*, which "examines whether the potential joint employer:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- determines the employee's rate and method of

payment; and
- maintains the employee's employment records."[2]

In another case, they discuss situations in which "employers are acting independently of one another and are disassociated with respect to the employment of the employee" and are, therefore, not joint employers. It goes on to say, "Employers will generally be sufficiently associated when:

- there is an arrangement between them to share the employee's services;
- one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or
- they share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer."[2]

Here's the main takeaway: if your business model is buying practices, you must take joint employment relationships into consideration and, when applicable, follow the laws accordingly. To avoid unpleasant surprises down the road, take joint employment ramifications into account *before* you make those deals and sign on the dotted line. You cannot go forward thinking that each practice is its own separate entity because it may not be. Serious financial liability can result if you fail to make these considerations.

We encourage you to visit the DOL website for more information. DE

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REFERENCES

1. US Department of Labor Wage and Hour Division. Fact sheet #28N: Joint employment and primary and secondary employer responsibilities under the Family and Medical Leave Act (FMLA). Revised January 2020. https://www.dol.gov/agencies/whd/fact-sheets/28n-fmla-joint-employment
2. US Department of Labor Wage and Hour Division. Small entity compliance guide. https://www.dol.gov/sites/dolgov/files/WHD/publications/SmallBusinessGuideJE.pdf