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Briefly

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Rosalia Fiorello

"The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer."

RIOT GAMES TO PAY $10 MILLION TO SETTLE GENDER DISCRIMINATION LAWSUIT

Riot Games, developer of the popular online battle game, "League of Legends," has agreed to pay out at least $10 million to women who worked at the company in the last five years as part of a settlement in a class action lawsuit over alleged gender discrimination.

In the Plaintiff's Notice of Motion and Motion for Preliminary Approval of Settlement, the two female employees who led the class-action lawsuit will receive $10,000 each and will be paid in addition to any payment they may otherwise receive as members of the proposed class. The settlement filing also lays out a number of commitments Riot has made to improve its company culture, including beefing up internal programs for reporting sexual harassment and discrimination.

Pursuant to the Settlement Agreement, each Settlement Employee Subclass member shall receive a minimum payment of at least $5,000 for employees hired prior to September 1, 2018, and $2,500 for employees hired after September 1, 2018. Each Settlement Temporary Agency Contractor Subclass will receive a minimum payment of $1,000 for contractors performing work prior to September 1, 2018, and $500 if engaged after September 1, 2018.

The lawsuit against Riot Games began in November 2018 when two employees, one current and one former, sued the company for "endemic gender-based discrimination and fostering a 'men-first' environment." The class-action lawsuit accused Riot Games of violating California's Equal Pay Act.

The California Equal Pay Act prohibits an employer from paying its employees less than employees of the opposite sex for equal work. In 2015, Governor Brown signed the California Fair Pay Act, which strengthened the Equal Pay Act where, amongst a slew of other changes, notably required employers to furnish employees equal pay for employees who perform "substantially similar work," when viewed as a composite of skill, effort, and responsibility.

In January 2017, Governor Brown signed a bill that added race and ethnicity as protected categories. In January 2018, the Equal Pay Act was amended to encompass public employers. Labor Code section 432.3 was enacted (also effective January 2018) prohibiting employers, with one exception, from seeking applicants' salary history information and requiring employers to supply pay scales upon the request of an applicant.

The Riot Games suit came after an investigation from a Kotaku report on the alleged culture of sexism at Riot Games. One former female employee described the working environment at Riot Games in the following manner:

> … her direct manager would ask her if it was hard working at Riot being so cute. Sometimes, she said, he'd imply that her position was a direct result of her appearance. Every few months, she said, a male boss of hers would comment in public meetings about how her kids and husband must really miss her while she was at work.

The same employee also described an experiment she conducted when it came to present new ideas during company meetings:

After an idea she really believed in fell flat during a meeting, she asked a male colleague to present the same idea to the same group of people days later. He was skeptical, but she insisted that he give it a shot. "Lo and

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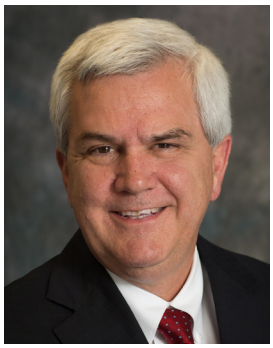
DOL WEIGHS IN ON JOINT EMPLOYER TEST



Howard B. Jackson

"Significantly, the guidance provides: 'Operating as a franchisor … does not make joint employer status more likely under the Act.'"

The U.S. Department of Labor ("DOL") recently issued interpretive guidance regarding how it would analyze joint employer status under the Fair Labor Standards Act ("Act"). The guidance is not a formal regulation but does provide insight into how the DOL will analyze this subject.

The guidance recognizes two joint employer scenarios. The first is the one more commonly considered, where one employer employs the employee to work and another employer simultaneously benefits from that work. The stereotypical example is a person employed by a temporary employment service who is assigned to work for a client company of the employment service.

The guidance sets out four factors that will be analyzed when determining whether the other person or employer will be considered a joint employer (hereafter the term "other employer" will refer to the employer being analyzed to determine whether or not it is a joint employer). The first factor is whether the other employer hires or fires the employee. That is an obvious form of control over conditions of employment.

The second factor is whether the other employer supervises and controls the schedule or conditions of employment "to a substantial degree". An employer who determines when an employee will arrive and depart, and precisely what the employee will do during the day, certainly exercises a significant degree of control over the employee's conditions of employment.

The third factor is whether the other employer determines the employee's pay and method of payment. Generally, the other employer will not do this directly. Presumably an arrangement whereby the other employer pays an amount to the primary employer, and the primary employer determines the wage will not be found to favor joint employer status. But that is not entirely clear from the text of the guidance.

The fourth factor is whether the other employer maintains the employee's employment records. Such records include payroll records, work schedules and other records that relate to the hiring, firing supervision and control of the employee.

Perhaps just as importantly, the guidance provides examples of matters that will not make joint employer status more or less likely. With respect to records, maintaining records of information which shows compliance with legal obligations or health and safety standards, or quality control standards required by contract, do not make joint employer status more or less likely.

The potential ability to exercise control over terms and conditions of employment is not sufficient. The other employer "must actually exercise – directly or indirectly" one or more of the four factors to be found a joint employer. In this regard, indirect control is demonstrated when the other employer provides mandatory direction that directly controls the employee. An employer's decision to accept a suggestion or recommendation does not satisfy this standard. Nor do actions with only incidental impact on employees indicate joint employer status.

An employee's economic dependence on the other employer is not a relevant factor. This statement is significant because some authorities had used this factor in their analysis and it can often be used to argue in favor of joint employment status.

Significantly, the guidance provides: "Operating as a franchisor or entering into a brand and supply agreement, or using a similar business model does not make joint employer status more likely under the Act." This is a clear signal that the DOL does not intend to make the argument attempted by the General Counsel of the National Labor Relations Board ("NLRB") in several cases brought against McDonald's and franchisors.

Allowing the other employer to work on-site (such as "store within a store" arrangements for example), allowing participation in association health plans or association retirement plans, or jointly participating in an apprenticeship or similar practices does not make joint employer status more or less likely under the Act.

The guidance describes the second joint employer circumstance as where one employer employs an employee for a number of hours in a workweek, and a second employer employs the same employee to work other hours in the same workweek. In this scenario if the employers "are acting independently of each other and are disassociated with respect to the employment of the employee" then neither employer is required to consider hours worked for the other when determining compliance under the Act. On the other hand, if the two employers are "sufficiently associated with respect to the employment of the employee" they are joint employers. As such, they "must aggregate the hours worked for each for purposes of determining compliance with the Act."

This begs the question of how one knows if the two employers are "sufficiently associated"? The guidance

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provides some examples. Typically there is sufficient association where: (1) there is an arrangement between the two employers to share the employee's services; (2) one of the employers acts directly or indirectly in the interest of the other; or (3) they share control of the employee because one employer controls, or is under common control with, the other.

Why all the fuss over joint employer status? A recent settlement in an NLRB case provides a hint. On January 10, 2020, the NLRB announced settlement of a case brought against CNN. The NLRB brought a case alleging that CNN was a successor to and joint employer with Team Video Services, and that CNN had unlawfully canceled a contract with Team Video Services. (Successorship is another article for another day.)

The case proceeded to the Court of Appeals for the D.C. Circuit, which affirmed part of the decision and remanded other aspects. Issued to be addressed on remand included the Board's finding on joint employer status and issues of back pay.

The Board did not have to issue a new decision after remand. Instead the parties settled via CNN's agreement to pay *$76 million in back pay* which is expected to benefit over 300 persons.

A wise employer can go a long way toward avoiding the risk and expense of such scenarios by addressing liability issues in contracts with other businesses, and engaging in a proper analysis of the issue when structuring arrangements with its business partners and constituents.

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Congratulations to Fred Bissinger for being named 2020 "Lawyer of the Year" by Best Lawyers for Litigation/Labor & Employment (Nashville).

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A WORD TO THE WISE

Many claims employers face *are insured*. These can include workers' compensation, employment practices, or a variety of commercial or general liability disputes. If you are interested in making sure that your insurer permits you to work with your Wimberly Lawson attorney when claims come up, there are various steps you can take. ***When a claim is filed***, ask for us. We are on many panels. ***When you renew your coverage***, specify in the policy that you can use our Firm. Many insurers are open to this. ***When you are considering new coverage***, ask your broker or the insurer in advance whether we are on the panel. We love working with you, and sure hope you will want to work with us when needs arise. So we wanted to offer some tips for how you can make sure that happens.

behold, the week after that, [he] went in, presented exactly as I did and the whole room was like, 'Oh my gosh, this is amazing.' [His] face turned beet red and he had tears in his eyes," said Lacy. "They just didn't respect women."

To read the full article, *Inside the Culture of Sexism at Riot Games*, See https://kotaku.com/inside-the-culture-of-sexism-at-riot-games-1828165483.

The Riot Games lawsuit set forth allegations that the company cultivated a "men-first" and "bro culture." The suit alleged harassment and inappropriate behavior such as but not limited to "crotch-grabbing, phantom humping, and sending unsolicited and unwelcome pictures of male genitalia." The lawsuit also alleged managers circulated a "hot girl list," ranking female employees by attractiveness, which apparently went unchecked.

Court documentation in the Riot Games suit revealed that outspoken female employees repeatedly faced retaliation including denied promotions, refusals to provide increased compensation or equal pay, demotions, reassignment with significantly different responsibilities, losses of benefits, suspensions, terminations, and other adverse employment actions.

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer. *See*, https://www.eeoc.gov/laws/types/sex.cfm for more information on sex-based discrimination.

In Tennessee, Tenn. Code Ann. §50-2-202 states in relevant part:

> No employer shall discriminate between employees in the same establishment on the basis of sex by paying any employee salary or wage rates less than the rates the employer pays to any employee of the opposite sex for comparable work on jobs the performance of which require comparable skill, effort and responsibility, and that are performed under similar working conditions; however, nothing in this part shall prohibit wage differentials based on a seniority system, a merit system, a system that measures earnings by quality or quantity of production, or any other reasonable differential that is based on a factor other than sex.

Employers who want to maintain an optimal and respectful working environment and who want to minimize liability exposure should focus on preventative measures such as developing appropriate policies, regularly training managers and supervisors, conducting timely and appropriate investigations into reports of misconduct, and taking necessary action to address discriminatory and harassing behavior. Employers should timely consult with legal counsel in order to develop strategic plans for safeguarding against and correcting discrimination and harassment in the workplace. These actions not only promote a positive workplace but may also keep your organization from becoming the next 10 million dollar lawsuit.