Who's Your…Employer?

A Review of Employment Law and Benefits Compliance Issues to Consider

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LORI OLIPHANT, WINSTEAD, PC

MOLLY JONES, WICK PHILLIPS GOULD & MARTIN, LLP

Overview of Today's Discussion

Employment Law Considerations

- Whether a company is considered a worker's "employer" or "joint employer" determines its obligations and liabilities and varies by statute
  - FLSA, FMLA, Title VII, ADA, ADEA, NLRA, OSHA, and Workers' Comp.

Employee Benefits Considerations

- Whether a company is considered a worker's "employer" affects compliance obligations and liabilities under various laws
  - Internal Revenue Code of 1986 (Code), Employee Retirement Income Security Act of 1974 (ERISA), and Affordable Care Act (ACA)

Employment Law Considerations

Employment Law Considerations

- Two (or more) businesses can be an “employer” of one employee
- The test for determining who is an employer varies by statute
- Single Enterprise vs. Joint Employer
  - Single enterprise – multiple interrelated entities treated as one entity
  - Joint employer – distinct entities each acting as an employer to an employee

Employment Law Considerations – *Fair Labor Standards Act (FLSA)*

- Who is liable for minimum wage and overtime violations?
- Shifting DOL positions on Joint Employment
  - DOL Guidance, Jan. 20, 2016 – Joint Employment "should be defined expansively"
  - DOL Guidance withdrawn in June 2017
  - Labor Secretary Acosta favors the "direct and immediate" control standard

Employment Law Considerations – *Fair Labor Standards Act (FLSA)*

- 5th Circuit – Economic Realities Test
  - Did the alleged employer:
    1. Have the power to hire and fire?
    2. Supervise and control work schedules, employment conditions?
    3. Determine rate and method of pay?
    4. Maintain employment records?

Employment Law Considerations – *Family and Medical Leave Act (FMLA)*

- Multiple entities can be a single integrated entity or joint employers
- Joint Employer Coverage:
  - Two businesses exercise some control over the work/working conditions of an employee
  - Joint Employment issues arise where a staffing agency supplies a worker to its client, a second employer

Employment Law Considerations – *Family and Medical Leave Act (FMLA)*

- Primary and Secondary Employer
  - Primary – usually the staffing agency
    - Must provide notices, leave, maintain healthcare, and job restoration
    - Cannot interfere with attempt to exercise FMLA rights or retaliate based on FMLA rights
  - Secondary – usually the client company
    - Must accept employee after he/she returns from leave, but only upon request of the primary employer
    - Cannot interfere with attempt to exercise FMLA rights or retaliate based on FMLA rights

Employment Law Considerations – *Title VII and ADEA*

- Who is liable for discrimination, harassment, and retaliation?
  - Integrated enterprises and joint employers
- Both entities can be liable for joint employment decisions of the other employer if:
  - the entity participates in the decision or
  - knew or should have known about the discriminatory action and did not take corrective action

Employment Law Considerations – *Title VII and ADEA*

- Hybrid Economic Realities/ Common Law Control Test (5th Circuit)
  - Right to control employee's conduct
  - Hire/fire
  - Supervise and set work schedules
  - Pay employee's salary/taxes
  - Provide benefits
  - Set terms and conditions of employment

Employment Law Considerations – *Americans with Disabilities Act (ADA)*

- Liability for discrimination/harassment/ retaliation similar to Title VI
- Reasonable Accommodation
  - Application – usually staffing company
  - On the job – both employers
  - Companies should share cost of accommodation

Employment Law Considerations – *National Labor Relations Act (NLRA)*

- NLRB's 2015 Browning-Ferris Decision
  - Pre-Browning Standard – required direct and immediate control over employees
  - New Standard – permits indirect control or the right to control
  - Appeal to the D.C. Court of Appeals is pending

Employment Law Considerations – *Other Laws*

- Occupational Safety and Health Act (OSHA)
  - Temporary Worker Initiative
  - Multi-Employer Enforcement Policy
- Workers' Compensation
  - Responsibility for coverage
  - Protection by exclusive remedy doctrine

Employee Benefits Considerations

Employee Benefit Considerations – *Treatment as a Single Employer*

- Benefit programs are governed by applicable laws to ensure fairness to employees and to support tax subsidies
  - Under the Code, multiple entities are generally treated as a "single employer" based on ownership and/or relationship
  - Under ERISA, similar concepts apply with some modifications
  - Under the ACA, similar concepts apply with some modifications

Employee Benefit Considerations – *Why is determination important?*

- Qualification requirements under the Code
  - Minimum coverage and participation requirements
  - Nondiscrimination rules
  - Compensation dollar limit
  - Vesting requirements
  - Annual benefits
  - Top-heavy rules
  - Distribution restrictions for 401(k) plans
  - SEPs and SIMPLEs

Employee Benefit Considerations – *Why is determination important?*

- Obligations under ERISA
  - Funding for pension plans subject to Title IV
  - Status as multiple employer welfare arrangement
- Determining employer mandate penalty under Affordable Care Act

Employee Benefit Considerations - *Different Types of Controlled Groups*

- Controlled group of corporations
- Commonly controlled trades or businesses
- Affiliated service groups

Employee Benefit Considerations - *Parent-subsidiary controlled group*

- Exists when:
  - one or more chains of entities are connected through ownership with a common parent; and
  - 80% ownership of each entity (except the common parent) is owned by one or more entities in the group; and
  - Parent entity owns at least 80% of at least one entity
- Determining 80% ownership threshold
  - For corporations, look to value or voting power of entity
  - For partnerships, look to value of capital or profits interests (not voting!)

Employee Benefit Considerations - *Example 1*

- Holding Company owns 100% of the value of the stock of Subsidiary A, 80% of the voting stock of Subsidiary B, and 79% of the value of the stock of Subsidiary C.
- Holding Company, Subsidiary A and Subsidiary B are treated as a single parent-subsidiary controlled group.
- Subsidiary C is not a member of the controlled group.

Entity	Number of Employees	Number of HCEs	Number of NHCEs
Holding Company	0	N/A	N/A
Subsidiary A	40	10	30
Subsidiary B	560	20	540

Employee Benefit Considerations - *Example 1 cont'd*

- A 401(k) plan is maintained for employees of Subsidiary A, but not for employees of Subsidiary B. All employees of Subsidiary A are eligible to participate in the plan.
- Taking into account only employees at Subsidiary A, the plan passes minimum coverage test requirements.
- However, when combined with Subsidiary B, the plan fails minimum coverage test requirements.
  - *NHCE ratio percentage = 30/570 = 5.3%*
  - *HCE ratio percentage = 10/30 = 33.3%*
  - *Ratio percentage test = 5.3%/33.3% = 15.9% (Failed)*

Employee Benefit Considerations - *Example 2*

- Same facts as Example 1, except assume coverage test requirements are satisfied for Subsidiary A plan.
- Assume Employee X transfers employment from Subsidiary B to Subsidiary A during the plan year.
- Employee X's service with Subsidiary B must be taken into account for the following purposes:
  - Participation requirements
  - Benefit accrual conditions
  - Vesting conditions

Employee Benefit Considerations - *Example 2 cont'd*

- Employee X's compensation with both entities must be combined for purposes of determining maximum annual benefit under Subsidiary A's plan.
- If Subsidiary B had a retirement plan, you would aggregate deferrals and other employer contributions made under that plan for benefit limitation purposes.

Employee Benefit Considerations - *Brother-sister controlled groups*

- Exists when:
  - 5 or fewer common persons (individual, trust or an estate) have a controlling interest, and
  - The same group of persons has effective control of two or more entities
    - Each person must have an interest in all entities being tested
- Based on two-step test
  - Controlling interest - 80% threshold
  - Effective control - More than 50% identical interests (i.e. based on lowest interest) held by owners among all entities
    - Same ownership rules apply to effective control test, with different threshold

Employee Benefit Considerations - *Example 3*

- Corporation A and Corporation B are owned by 6 shareholders as follows:

Shareholders	Corporation A	Corporation B
L	55%	25%
M	10%	45%
N	17%	17%
O	10%	5%
P	3%	3%
Q	5%	5%
TOTALS	100%	100%

Employee Benefit Considerations - *Example 3 cont'd*

- L, M, and N have a controlling interest in each of the entities

Shareholders	Corporation A	Corporation B
L	55%	25%
M	10%	45%
N	17%	17%
Controlling interest	82%	87%

- L, M, and N have effective control of both entities.

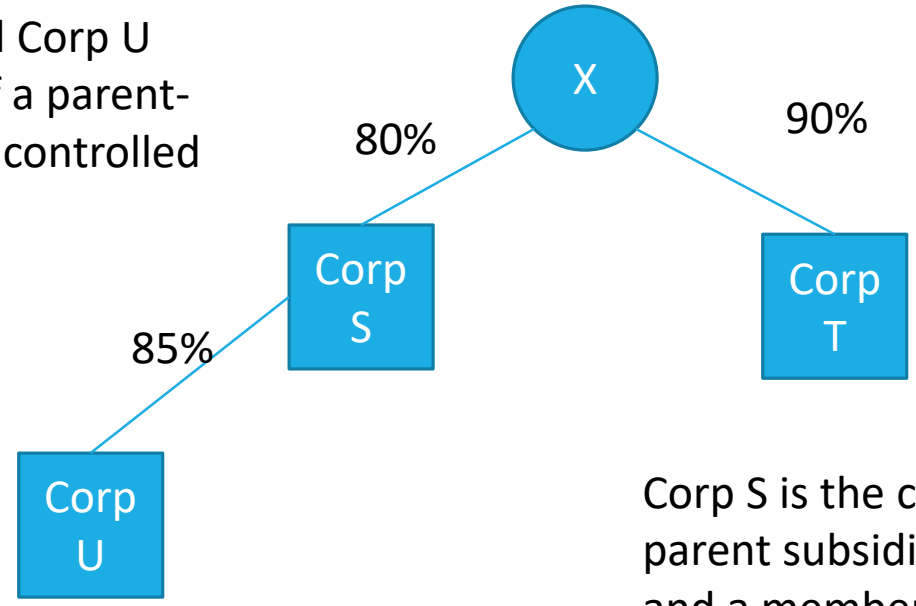
Shareholders	Effective Control
L	25%
M	10%
N	17%
Effective Control	52%

Employee Benefit Considerations - *Combined controlled groups*

- Exists if 3 or more organizations are organized as follows:
  - Each organization is a member of either a parent-subsidiary group or brother-sister group
  - At least one organization is the common parent of a parent-subsidiary group and is also a member of a brother-sister group

Employee Benefit Considerations - *Example 4*

Corp S and Corp U are part of a parent-subsidiary controlled group



Corp S and Corp T are part of a brother-sister controlled group

Corp S is the common parent of a parent subsidiary controlled group and a member of a brother sister group

Employee Benefit Considerations – *Rules for Determining Ownership*

- Ownership attribution rules apply
  - Persons may be treated as owning an interest that is not actually owned by them
    - From unexercised options
    - From partnerships to 5% partners
    - From estates and trusts to 5% beneficiaries and grantors
    - From corporations to 5% shareholders
    - From spouse
    - From children, grandchildren, parents and grandparents
      - There is no reattribution of family attribution; however, family interests can be attributed to more than one family member
  - Some attribution rules apply only to a brother-sister controlled group

Employee Benefit Considerations – *Rules for Determining Ownership*

- Some interests are disregarded
  - Treasury stock and nonvoting preferred stock
  - Interest held by deferred compensation plan or tax-exempt trust
  - Interests held by principal owners and officers
  - Restricted interests held by employees
  - Interest held by exempt organization

Employee Benefit Considerations - *Affiliated Service Groups*

- Exists when two or more organizations have a service relationship and, in some cases, an ownership relationship
  - Organization includes sole proprietorship, partnership, corporation or any other type of entity
  - *But does not include bona fide expense sharing arrangement where parties are not working for common business purposes*

Employee Benefit Considerations - *Affiliated Service Groups*

- Three types:
  - A-Org – consists of an organization designated as a First Service Organization and at least one A Organization
  - B-Org – consists of a First Service Organization and at least one B Organization
  - Management group – consists of an organization whose principal purpose is to provide management services on a regular, continuing basis for an organization (and related entities)
- First Service Organization
  - Must be a service organization
  - Can be a corporation, partnership or other organization

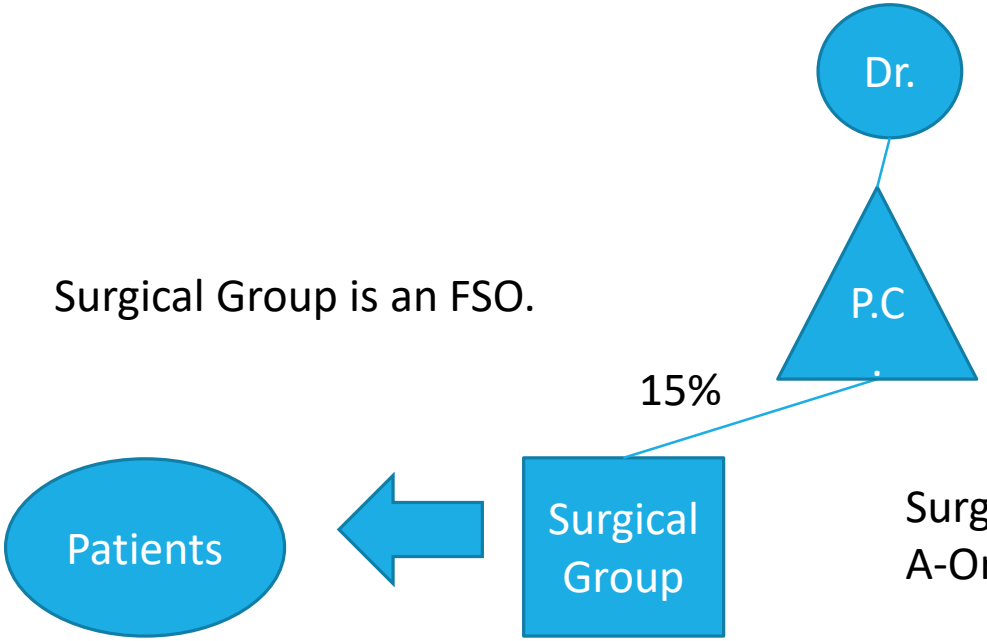
Employee Benefit Considerations – *A-Org Groups*

- Exists when:
  - An organization is a partner or shareholder in the FSO (regardless of the percentage interest it owns in the FSO, and includes constructively owned interests);
  - The organization "regularly performs services for the FSO", or is "regularly associated with the FSO" in performing services for third parties; and
  - Both organizations are service organizations
- FSO can be any type of entity
  - However, if involved in certain field (e.g. accountants, lawyers, actuaries, doctors, etc.), must be a professional service corporation

Employee Benefit Considerations – *A-Org Groups*

- Service organization - principal business is performance of services (i.e. capital is not a material income-producing factor)
  - Look to facts and circumstances
    - Capital is not a material income-producing factor for business principally based on receipt of fees, commissions or other compensation for personal services
    - Capital is a material income-producing factor if there is a substantial investment in inventories, plant, machinery or other equipment, and for banks and similar institutions.
  - Organizations in certain fields are deemed service organizations: health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting and insurance

Employee Benefit Considerations - *Example 5*



Surgical Group is an FSO.

P.C. is an A-Org because it is an owner of Surgical Group and is regularly associated with it in providing services to patients.

Surgical Group and P.C. are part of an A-Org Affiliated Service Group.

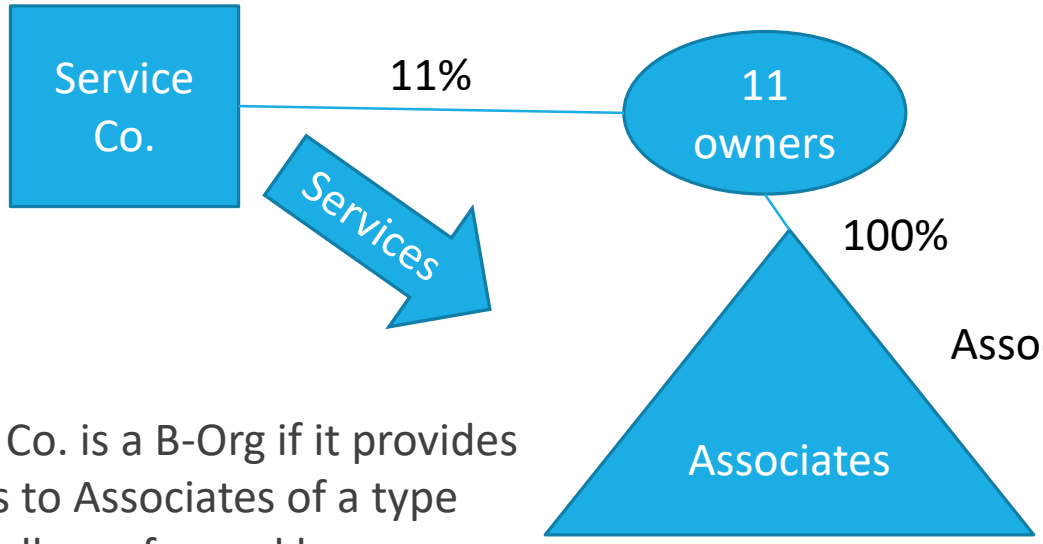
Employee Benefit Considerations – *B-Org Groups*

- Exists when:
  - A significant portion of organization's business is the performance of services for a FSO, for one or more A-Org's determined with respect to the FSO, or for both;
  - The services are of a type historically performed by employees in the service field of the FSO or the A-Org; and
  - Ten percent or more of the interests in the organization are held, in the aggregate, by persons who are highly compensated employees of the FSO or A-Org.

Employee Benefit Considerations – *B-Org Groups*

- Significant portion based on one of two tests:
  - Service receipts safe harbor test – "service receipts percentage" must be at least 5%
  - Total receipts threshold test – "total receipts percentage" must be at least 10%
- The B-Org need not be a service organization.

Employee Benefit Considerations - *Example 6*



Service Co. is a B-Org if it provides services to Associates of a type historically performed by employees in Associate's industry and such services are a significant portion of the business of Service Co.

Service Co. and Associates are part of a B-Org Affiliated Service Group.

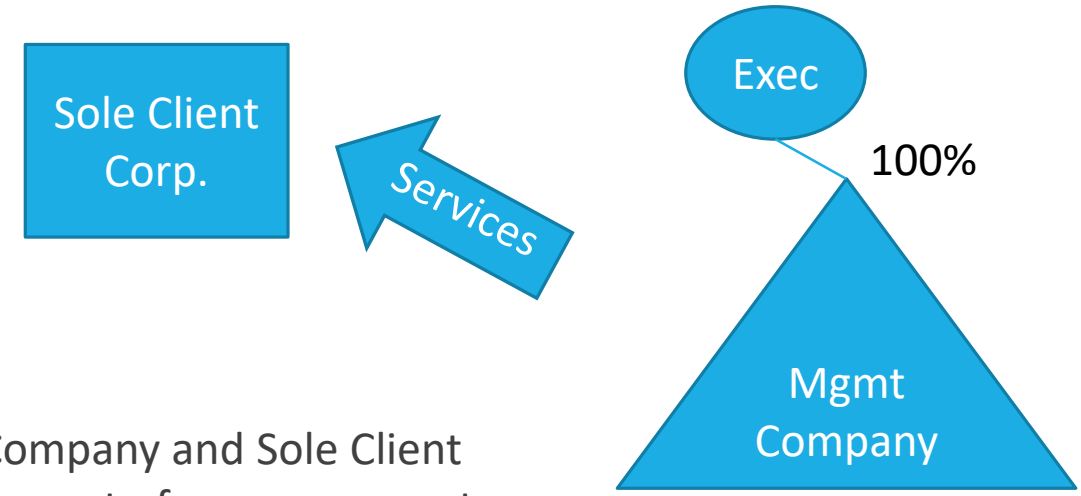
Employee Benefit Considerations - *Multiple Affiliated Service Groups*

- Two or more affiliated service groups will not be aggregated merely because an organization is an A-Org or a B-Org with respect to each affiliated service group.
- However, if an organization is an FSO with respect to two or more A-Org's or two or more B-Org's, or both, all of the organizations are considered to constitute a single affiliated service group.

Employee Benefit Considerations - *Management Affiliated Service Groups*

- Exists when:
  - An organization's principal business is to perform management functions on a regular and continuing basis for a recipient organization (and its affiliates, based on different relationship rules)
  - No common ownership is required!
  - Management functions likely include decisions regarding daily business operations, hiring/firing personnel, business planning, and supervisory roles.
- Principal business test likely requires that a majority of the business of the management organization be the performance of management functions for the recipient organization(s)

Employee Benefit Considerations - *Example 7*



Mgmt Company and Sole Client Corp. are part of a management affiliated service group if Mgmt Company performs management functions for Sole Client Corp.

Employee Benefit Considerations – *MEWAs*

- Exists when two or more unrelated employers (and/or self-employed individuals) participate in a welfare arrangement
  - Exceptions for collectively bargained groups and certain cooperatives
  - Relationship determined based on same controlled group rules, except:
    - Does not take into account affiliated service group status
    - DOL is authorized to disregard interests of less than 25%
  - Arrangement can be insured or self-insured
  - Will be subject to state law requirements under insurance code (e.g. filing, license, reserve funding, etc.)

Employee Benefit Considerations – *Employer Mandate (ACA)*

- An “applicable large employer” is subject to penalty tax for failing to offer minimum essential coverage to full-time employees, or providing coverage that does not satisfy minimum value and affordability requirements.
  - ALE is an employer who employed an average of at least 50 full-time employees (including equivalents) during preceding calendar year
  - Determination is made on a controlled group basis
    - Same rules as apply to qualified plans
    - Except no exclusion of “qualified separate line of business”

Employee Benefit Considerations - *Example 8*

- Same facts as Example 1, except all employees of Subsidiary A and Subsidiary B are full-time employees under the ACA.
- Assume no health plan is provided to employees of Subsidiary A.

Entity	Full-time employees
Subsidiary A	40
Subsidiary B	560

- Taking into account only employees at Subsidiary A, the entity is not an applicable large employer. However, when combined with Subsidiary B, both entities are members of an "applicable large employer."

Alternative Employer Arrangements

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- Professional Employer Organization (PEO)
- Employee Leasing
- Joint Ventures
- Secondments

Alternative Employer Arrangements – *PEOs*

- Co-employment of a Company's employees
  - Different than using an administrative service organization
  - Governed by Ch. 91 of the Texas Labor Code
- PEOs typically handle certain HR functions
  - Payroll, taxes, benefits, workers' compensation and unemployment insurance
- Watch out for MEWAs and multiple employer 401(k) plans!

Alternative Employer Arrangements – *Employee Leasing*

- Leasing company hires employees and provides them to client companies, as needed
- Agreements typically define the employees as employed by the leasing company and not of the client company
- Watch out for qualification issues for retirement plans!

Alternative Employer Arrangements – *Employee Leasing*

- However, leased employees will be treated as employees of the recipient organization for qualified plan purposes under the Code if:
  - Recipient organization pays fee for services;
  - Services provided on a substantially full-time basis for at least one year;
  - Recipient organization has primary direction and control; and
  - Leasing organization is common law employer
- Contributions by leasing organization to plan may be attributed to recipient organization for testing purposes

Alternative Employer Arrangements – *Employee Leasing*

- Leased employees are not employees of recipient organization if satisfy safe harbor:
  - Leasing organization sponsors money purchase pension plan with immediate participation and provides minimum 10% contribution on behalf of leased employees, that is immediately 100% vested
  - Leased employees do not comprise more than 20% of the recipient organizations NHCE workforce
- Issues arise when employment is transferred to/from the leasing organization

Alternative Employer Arrangements – *Joint Ventures*

- Two or more entities contribute capital for a new entity
- Agreements should define responsibility for decisions regarding employment
- Watch out for MEWAs and multiple employer 401(k) plans!

Alternative Employer Arrangements – *Secondments*

- Short-term “loaning” of an employee of one company to another company
- Usually the original employer maintains the employment relationship and continues to provide compensation, benefits, etc.

Questions?