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Chapter 2

If We Do This, Will It Make Us a Single Employer? An Examination of Enterprise Liability and Protection

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Synopsis

§ 2.01. Introduction.

Incorporating to limit liability is a cornerstone of American business. "It is a general principle of corporate law 'deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries.' "[1] "The corporate form was created to allow shareholders to invest without incurring personal liability for the acts of the corporation. These principles are equally applicable when the shareholder is, in fact, another corporation, and hence, mere ownership of a subsidiary does not justify the imposition of liability on the parent."[2] Indeed, "[t]he insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception."[3]

Nonetheless, many laws, especially those affecting employees, permit courts and agencies to treat nominally separate, but highly integrated companies as a single employer. In such situations, protections otherwise available under general corporate law can be lost.

Courts and agencies use a variety of tests to determine single employer status; however, each test generally involves a fact-intensive consideration of at least four key factors: common ownership, common management, interrelated operations, and centralized control of labor relations. In this analysis, no one fact or factor determines the outcome and the decision typically turns on how each court or agency weighs the evidence.

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1 Blair v. Infineon Tech. AG, 720 F. Supp. 2d 462, 469 (D. Del. 2010) (quoting U.S. v. Bestfoods, 524 U.S. 51, 61 (1998)).

2 Pearson v. Component Tech. Corp., 247 F.3d 471, 484 (3d Cir. 2001).

3 NLRB v. Deena Artware, Inc., 361 U.S. 398, 403 (1960).

While certain strategies can be used to avoid becoming a single employer, they frequently conflict with efficiency goals. The simplest way to avoid single employer status is for each affiliated entity to operate on a separate, stand-alone basis; however, that approach typically adds costs and reduces efficiencies, especially with larger organizations. Therefore, the goal is to find an appropriate balance between efficiency and protection.

When trying to find the appropriate balance, a good analogy for the analysis is to treat each element of commonality as a stick, with the question being whether the pile of sticks is large enough that a court or agency would likely rule that the companies constitute a single employer, *i.e.*, how many sticks can be put on the pile without crossing the line and what logs should be keep away from the pile?

This chapter will examine the various tests that are used to determine whether nominally separate entities should be treated as a single employer with respect to employee-related matters, and will offer practical suggestions for trying to balance the tension between efficiency and protection.[4]

§ 2.02. Applicable Tests.

[1] — National Labor Relations Act — Single Employer Test.

The single employer test most frequently used to determine whether nominally separate companies can be treated as one was first developed for use under the National Labor Relations Act (NLRA),[5] which provides employees with a variety of rights and regulates the relationship between employers and unions.

The single employer test is used for a variety of purposes under the NLRA. For example, the test is used to determine whether companies are subject to the NLRA's jurisdiction,[6] whether they can be held jointly liable

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4 This chapter will not address when the corporate veil can be pierced under state law; however, many of the factors discussed in this chapter also would be considered as part of such an evaluation. Likewise, this chapter will not address the joint employer theory, in which two companies both actually exercise some degree of control over a group of employees, except in certain limited contexts where it is applied in lieu of a single employer test.

5 29 U.S.C. § 151 *et seq*.

6 Spurlino Materials, LLC, 357 N.L.R.B. No. 126, 21 (2011).