



INTEGRATED EMPLOYER/ENTERPRISE DOCTRINE IN LABOR & EMPLOYMENT CASES

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In labor and employment claims, one of the first issues that attorneys representing both plaintiffs and defendants must consider is whether the employee and employer are “covered” under one or more statutes that may be in play in any given factual setting. Coverage for claims arising under the principal federal employment discrimination statutes—Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act Amendments Act of 2008, and the Age Discrimination in Employment Act of 1967 (Title VII/ADAAA/ADEA)—and the Family Medical Leave Act (FMLA) depends on a minimum number of employees that must be employed by an employer for a specific duration of time. On the other hand, Fair Labor Standards Act (FLSA) claims require a showing that an employer grosses a certain level of revenue before statutory protections are cognizable. Moreover, minimum revenue levels are also required for some National Labor Relations Act/Labor Management Relations Act (NLRA/LMRA) purposes.

Often, a plaintiff’s direct employer simply does not have the requisite number of employees or revenue level for labor and employment law statutes to apply. This, however, is not the end of the story for litigants. Instead, the integrated employer/enterprise doctrine, the focus of this article, must be carefully considered by all parties to labor and employment litigation to ensure that potential liability is not overlooked.

Integrated employer/enterprise doctrine comprises either a three-factor (for FLSA claims) or four-factor (for all other claims) analytical test to determine whether two or more business entities are sufficiently related to aggregate revenue (for FLSA and some NLRA/LMRA purposes) or employees (for all other claims) for purposes of establishing the minimum coverage requirement sufficient for a plaintiff to assert liability against her direct employer. This doctrine arises from federal common law for Title VII/ADAAA/ADEA

claims, regulatory law for FMLA claims, and statutory law for NLRA and FLSA claims. While some courts have permitted plaintiffs to use the integrated employer doctrine in Title VII-type claims to establish “affiliate liability” (joint and several liability against all entities deemed integrated), the national trend—with some exceptions—has moved away from such an application.

The material for this article focuses on the birth of common law integrated employer doctrine in traditional labor cases in the 1945-1965 era and its subsequent evolution in statute-based employment claims along with the related integrated enterprise doctrine in FLSA cases.

Supreme Court Adopts Four-Factor ‘NLRB test’ to Determine Whether Integrated Employer Exists

The integrated employer doctrine evolved from traditional labor law contexts. The doctrine has been used in labor cases to aggregate

revenue to overcome exemptions from the National Labor Relations Board's (NLRB) jurisdictional coverage, to establish the proper "employer" for purposes of liability for injunctive or other relief, and as a predicate to ascertaining an appropriate bargaining unit.

The following factors are weighed in determining whether two or more entities constitute an integrated employer: (1) common management, (2) interrelation between operations, (3) centralized control of labor relations, and (4) common ownership.¹

The U.S. Supreme Court adopted this four-factor test from earlier appellate decisions, including one of its own precedents from a 1949 labor case that set the stage for the later development of the four-factor NLRB integrated employer test.² The case involved a petition to enforce an order of the NLRB requiring employers to cease and desist from an allegedly discriminatory and unfair labor practice pertaining to their refusal to allow a union organizer to use a company-owned meeting hall. The Supreme Court focused on two factors—common ownership and management—to determine that four sister entities constituted an integrated employer.

Fifteen years later, in 1964, an employer charged with unfair labor practices alleged that the NLRB erred in asserting jurisdiction.³ The Ninth Circuit held that the NLRB often treats separate corporations as one employer for jurisdictional purposes where it is found that the firms, despite their nominal separation, are highly integrated with respect to ownership and operation. The court then applied the four factors to sister corporations to uphold the lower tribunal's finding of integrated employer. The Ninth Circuit noted:

A discussion of the early development of this Board principle, and of the principal factors which the Board weighs in deciding whether there is the requisite integration to constitute two corporations a "single employer," is set out in the 21st Annual Report of the Board, pages 14-15, where this statement appears:

In applying the present jurisdictional standards, the Board early reaffirmed the long-established practice of treating separate concerns which are closely related as being a single employer for the purpose of determining whether to assert jurisdiction. The question in such cases is whether the enterprises are sufficiently integrated to consider the business of both together in applying the jurisdictional standards.

The principal factors which the Board weighs in deciding whether sufficient integration exists include the extent of:

1. Interrelation of operations;
2. Centralized control of labor relations;
3. Common management; and
4. Common ownership or financial control.

No one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show "operational integration," particularly centralized control of labor relations. The Board has declined in several cases to find integration merely upon the basis of common ownership or financial control.⁴

After the U.S. Supreme Court's formal adoption of this four-factor

integrated employer test in 1965, the Court reaffirmed its applicability over a decade later when it approvingly noted that a lower appellate circuit court utilized the correct and controlling NLRB criteria.⁵ Subsequent federal circuit courts followed suit.⁶

Courts Adopt NLRB Four-Factor Test for Title VII, ADA and ADEA Claims

The NLRB four-factor integrated employer test has been adopted by courts in Title VII/ADA/ADEA claims and used to aggregate employees to meet statutory coverage requirements and, in some instances, establish affiliate (joint and several) liability against all entities comprising the integrated employer. However, most courts only permit the theory to be utilized to establish coverage by aggregating employees of one or more business entities.

The first federal appellate court to formally adopt the integrated employer doctrine and the four-factor NLRB test for a Title VII claim was the Eighth Circuit Court of Appeals in 1977.⁷ The Eighth Circuit reversed a trial court and held that broadcasting companies which shared management, ownership, and operations were sufficiently interrelated so that the companies could be consolidated as integrated "employers" for purposes of Title VII.

The two corporations examined in the case—Grand Island Broadcasting and Stuart Broadcasting—were "horizontally integrated" sister entities since there was no evidence presented that either company owned stock in the other as in a "vertically integrated" wholly owned subsidiary corporate structure. Rather, two individuals (namely, James and Helen Stuart) were the stockholders in both corporations. The Eighth Circuit stated that Title VII is to be accorded a liberal construction in order to carry out the purposes of Congress and such construction is also to be given to the definition of "employer." The court expressly indicated that the standard to be employed to determine whether consolidation of separate entities is proper for Title VII cases were the four-factors promulgated by the National Labor Relations Board: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control.

The court found that Grand Island Broadcasting and Stuart Broadcasting were owned by the same individuals and these individuals also served as members of the board of directors and officers of the two corporations. Richard Chapin was president of both corporations and had day-to-day control. Stuart Broadcasting provided management services for Grand Island Broadcasting, including check writing and completion of the necessary forms for broadcast license renewals. Stuart Broadcasting issued policy manuals that Grand Island Broadcasting followed.

Accordingly, the Eighth Circuit held:

Under the circumstances we find sufficient facts to hold as a matter of law that Stuart Broadcasting and Grand Island Broadcasting under controlling standards share management and ownership. In addition, we are of the opinion that the record evidences a sufficient interrelation of operations between the two companies. While evidence as to control of labor relations is less clearly developed in the record, we are of the opinion that the record supports a conclusion that Stuart Broadcasting and Grand Island Broadcasting should be consolidated for the purposes of 42 U.S.C. § 2000e(b). Cf., *National Labor Relations v. Welcome-American Fertilizer*

Co., 443 F.2d 19 (9th Cir. 1971) (holding that no one of the enumerated factors is controlling). Accordingly we remand this cause to the district court for further proceedings on the merits of plaintiff's complaint.

Some courts have found that the degree of interrelatedness needed to find that two or more entities should be integrated is driven by whether the factual setting is either private or public employment. The Eleventh Circuit, for example, has separate standards for determining the integrated employer issue.⁸

In the private sector in the Eleventh Circuit, the four-factor NLRB test is utilized and the degree of interrelatedness required to be shown is "highly integrated with respect to ownership and operations."⁹ The case, *McKenzie v. Davenport-Harris Funeral Home*,¹⁰ merits mention here as it is indicative of the approach that many courts around the nation take to this issue.

The *McKenzie* court stated that it was premature to rule on the integration issue at the summary judgment phase since there was a genuine issue of material fact based upon evidence of common ownership and "to some extent" common management.¹¹ The court held that the trial court went beyond the question of whether a genuine issue of material fact existed and improperly weighed the evidence. The panel stated that making credibility choices between competing views of the evidence is inappropriate in summary judgment proceedings and that the trial court failed to draw all inferences in favor of the plaintiff *McKenzie*.¹²

The evidence presented by *McKenzie* showed "common ownership" since all of the corporate stock of the plaintiff's direct employer (Davenport-Harris—a funeral home) and its affiliate (Protective—a funeral insurance provider) was commonly owned by a single family. Further, the evidence showed that two family stockholders, Virgil and Paul Harris, were also the president and vice president of both Davenport-Harris and Protective, which revealed the companies' joint management and interrelation of operations. Moreover, it was shown that Virgil Harris "in large part" controlled the personnel management of both companies. This was evidence supporting the integration factors known as "centralized control of labor relations" and/or "common management."¹³

As such, the Eleventh Circuit reversed the trial court's granting of summary judgment in favor of the employer and found that the plaintiff had raised a genuine issue of material fact for trial on the issue of whether an integrated employer existed.

The Eleventh Circuit, however, adopted a heightened standard of integration in public employment settings. In *Lyes v. City of Riviera Beach, Florida*,¹⁴ the en banc court reversed a panel decision¹⁵ which had, in turn, reversed a district court summary judgment granted in favor of an employer in a Title VII public employment setting. This case is illustrative of the fact-intensive and "totality of the circumstances" nature of integrated employer analysis.

The *Lyes* (panel) opinion was reversed because the en banc court found that a significantly higher legal standard of integration was appropriate in public employment settings.¹⁶ *Lyes* (en banc) indicated that the standard for public employment cases is whether a fact finder could reasonably conclude that a plaintiff has "clearly" overcome a "presumption of separateness." When the *Lyes* (en banc) court applied this higher standard to the evidence, it found that the plaintiff had not clearly overcome the presumption of separateness in that particular public employment setting.¹⁷

In the *Lyes* (panel) opinion, the court articulated the four-factor NLRB standard as being appropriate where integration was at issue and found that "*Lyes* presented sufficient evidence to create a genuine issue of fact that [the two entities being examined] are a single Title VII 'employer.'" Specifically, there was evidence suggesting some interrelation between the operations of the two entities (a municipality and a redevelopment corporation). The defense countered with evidence that the entities maintained separate bank accounts, offices, and records. The *Lyes* panel viewed the defense's competing evidence and stated: "We agree that these facts are relevant, but they do not erase the fact question created by *Lyes*'s evidence of interrelation."

The panel also noted that the record showed competing facts regarding the "centralized control of labor relations" factor since the defense had argued that the executive director of one entity was solely responsible for hiring and supervising its own staff whereas evidence existed suggesting that this authority had only recently been delegated and that during the plaintiff's employment, the executive director had actually reported to the other entity's manager. Finally, the *Lyes* panel also noted that the same individuals set policy for both entities. The panel summed up its application of the legal standard (later heightened by the en banc opinion) to the facts and said: "The totality of the circumstances thus indicates that genuine issues of material fact remain as to whether or not [the two entities being examined] have sufficiently overlapping operations so as to be considered a single employer. Consequently, we must reverse the district court's summary judgment to the contrary."

However, in applying its newly crafted "presumption of separateness" theory, the Eleventh Circuit in *Lyes* (en banc) concluded that the city should not be aggregated with the redevelopment corporation based on a number of facts that led it to hold that there was not sufficient evidence of "interrelatedness with regard to control over employment" to clearly overcome the presumption of separateness. The Eleventh Circuit (en banc) noted that the redevelopment corporation retained control over the "fundamental aspects of employment" of its staff, including hiring, firing, and establishment of work schedules and assignments; the executive director was employed by the redevelopment corporation board and served at its pleasure; the employees of the corporation received their medical benefits, life insurance, and pension benefits from the corporation and not the city; and the disciplining, suspension, and termination of the plaintiff in that case were done by the corporation and not the city. Therefore, the en banc court held that the presumption of separateness had not been clearly overcome.

An ADEA claim in a private employment setting was the factual basis for integrated employer analysis in a New York federal district court in 1978.¹⁸ After a bench trial, the district court held that when all the relevant circumstances were viewed in light of the appropriate standard (the NLRB four-factor test), two nominally separate corporations constituted an integrated enterprise and were, therefore, a single "employer" for purposes of the ADEA.

The two corporations (Arlene and Swan) were horizontally integrated sister corporations that were commonly owned and had common officers and managers. The district court noted that the defendants contended that the ADEA was not applicable because the plaintiff's direct employer did not have enough employees to come within the scope of the act.

The court stated that the ADEA outlaws age discrimination by an "employer." An employer is defined as "a person engaged in an indus-

try affecting commerce who has twenty or more employees....”¹⁹ The definition of “person” includes “one or more ... corporations.”²⁰ It was undisputed that during the relevant period Arlene had fewer than 20 employees, Swan had over 100, and each company was engaged in an industry affecting commerce. The key question, therefore, was whether Arlene and Swan could be considered as a single employer for purposes of the ADEA.

The district court indicated that in light of the liberal construction to be accorded a remedial statute such as the ADEA, the appropriate standard for determining whether nominally separate corporations are to be considered a single employer is whether they comprise an integrated enterprise. Pursuant to the NLRB standard, the controlling criteria were again deemed to be (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control.

The court found that the first and fourth criteria were easily met because three people owned both Arlene and Swan and operated them as an integrated enterprise. The two companies complemented each other and their physical proximity facilitated their integration. The court stated, “The symbiotic relationship of Arlene and Swan is also apparent from the regular overlapping of work performed by several of their employees.” The court noted that the record did not support a finding of centralized control of labor relations. Nevertheless, “even a total lack of evidence of centralized control of labor relations did not bar a finding that Arlene and Swan formed an integrated enterprise, for no one of the relevant factors is controlling.”

The court concluded:

Viewing all the relevant circumstances in light of the appropriate standard, however, it is not difficult to find that Arlene and Swan constituted an integrated enterprise and should therefore be considered a single employer for purposes of the ADEA.... As Feitis’ employers, the three defendants are jointly and severally liable for the required payment to her.

Therefore, in addition to using the NLRB four-factor “integrated employer” analysis to aggregate the employees of Arlene and Swan to establish coverage, this court held that liability under the ADEA would be imposed jointly and severally.

ADA (now ADAAA) claims are also subject to the integrated employer doctrine.²¹ In a 1996 case arising under the ADA in a Florida federal district court, a plaintiff brought a claim against three defendants, two of which are important for this discussion (a cruise ship operator and cruise ship service provider). The plaintiff sought to assert liability against those two entities and not to aggregate the employees of both entities. Moreover, the two entities were not in a parent/subsidiary relationship. Thus, this was a sister-type of relationship between the two defendants at issue.

The district court indicated that the four-factor NLRB “integrated employer” test was appropriate. The district court appeared to conflate “integrated employer” test with the somewhat related “joint employer” test (a common mistake), but in analyzing the facts, it zeroed in on the appropriate factors for establishing an “integrated employer.” The court indicated that:

1. The cruise ship service provider provided its services principally for the benefit of the cruise ship operator;
2. The two entities advertised together;

3. The two entities shared the same offices and accounting functions;
4. The two entities maintained records in the same office;
5. The cruise ship service provider recruited employees for itself and the cruise ship operator and approved of personnel discharges;
6. Employees could be transferred back and forth; and
7. One man was the owner of the cruise ship service provider, and president of both entities, and was on board of directors for both, and managed both entities.

As such, in light of the foregoing, the court found that the evidence supported a finding of a single integrated employer as a matter of law and granted the plaintiff’s motion for summary judgment on this issue.

Department of Labor Adopts Four-Factor NLRB Test

The Department of Labor (DOL), through a statutory delegation of rulemaking authority concomitant with the enactment of the FMLA, adopted the NLRB four-factor test for single integrated employer determinations under the FMLA.²² The DOL regulation states: “Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employee coverage and employee eligibility.”²³

Federal courts have used the four-factor NLRB test in the FMLA context to allow plaintiffs to try to aggregate employees to meet the statute’s 50-employee coverage minimum so as to permit the plaintiff to seek the imposition of liability against the direct employer.²⁴

The Eleventh Circuit, for example, has reviewed lower court decisions pertaining to integrated employer doctrine in the context of the FMLA. In one such case, the Eleventh Circuit applied the NLRB four-factor test and affirmed a lower court ruling in favor of an employer finding that the evidence showed only “common ownership” which, standing alone, was insufficient to establish an integrated employer between a direct employer and other businesses owned by the same person.²⁵

Other federal courts have also determined that because the NLRB test was specifically adopted by the DOL in the regulation cited above, it should be applied in the FMLA context for purposes of ascertaining whether two or more entities are an “integrated employer.” In one such district court case, the FMLA plaintiff sought to aggregate employees of horizontally aligned sister corporations.²⁶ The court noted that as to the centralized control over labor relations prong, there were management level employees serving dual roles within the two entities as well as identical boards of directors and nearly identical corporate officers and that, coupled with evidence supporting the other three factors, there was enough evidence to create a jury question as to whether the two companies were integrated employers for the purposes of FMLA.

In another case, an FMLA plaintiff sought to aggregate employees of horizontally aligned sister corporations.²⁷ The sister companies had the same owners, board of directors, and corporate officers. There was a common “administrator,” and an owner and officer who oversaw and endorsed all employment policies (*i.e.*, policies pertinent to labor relations). The sister corporations provided basically the same services and were located 72 miles apart. The district court stated: “Given the present state of the record, the court cannot say, as a matter of law, that the ‘integrated employer’ test does not apply and, therefore, that [the employer] is not covered by the FMLA.”²⁸

Illuminating the Four-Factor NLRB Test

Common Ownership

Entities can be owned horizontally (sisters) or vertically (parent/subsidiary); as such, it is not necessary to show that one entity owns another. Though aggregation under integrated employer theory commonly is alleged in the context of a parent-subsidiary relationship, “it is not necessary for the parent-subsidiary relationship to exist for this theory to apply.”²⁹

Common Management

“Common management” can be established where there are common directors and officers for the entities being examined.³⁰ The same people managing and supervising different entities is evidence of common management.³¹

Interrelation Between Operations

The type of evidence used to show “interrelation between operations” includes whether one company sets the operating budget and manages and administers benefit plans.³² Moreover, evidence of interrelatedness is found where there is commonality of headquarters, maintenance of corporate files, and employees transferring freely.³³

Centralized Control of Labor Relations

Centralized control over labor relations is generally viewed as the most important prong in the single integrated employer inquiry.³⁴ Factors often used to determine “centralized control of labor relations” include whether the entities maintain separate human resource departments, the extent to which the entities make their own separate hiring, firing, disciplinary, schedule setting, job review, and wage setting decisions or whether one entity retained such authority even if it was not exercised, whether the entities’ employees shift back and forth, and whether the companies use essentially the same employee handbook and/or have the same employee policies and procedures governing the terms and conditions of employment without substantive differences.³⁵

Moreover, “relevant facts and circumstances include shared personnel files; parental control of subsidiaries’ personnel files; shared or parental control over the hiring, promotion, assignments and firing of employees; shared personnel departments; intercorporation; mobility or interchange of personnel; uniform personnel policies and standards; single payroll account; common benefits; single insurance policy; and a combined income tax filed.”³⁶

This centralized control inquiry considers whether the companies being examined have separate human resources departments and whether an entity separately establishes its own policies and/or makes its own decisions as to the hiring, discipline, and termination of its employees.³⁷ Evidence of centralized labor and employment decisions includes unified control of hiring, firing, promoting, paying, transferring, or supervising employees of the affiliate.³⁸

Because most courts have agreed that primacy is afforded to that of the “centralized control of labor relations” prong of the four-factor NLRB test, below is an examination of an appeal in a NLRB context that provides a “laundry list” of sub-factors that inform the issue of whether two or more entities do have “centralized control of labor relations” for purposes of ascertaining whether entities are an integrated employer.³⁹

In a consolidated appeal before the Seventh Circuit, the NLRB was seeking to enforce two of its orders directing chain-store com-

panies to cease and desist from refusing to bargain collectively with unions which had been certified as exclusive bargaining representatives. The Seventh Circuit framed the legal issue for both cases as follows: Whether the NLRB abused its discretion in certifying a single retail store as an appropriate unit for collective bargaining where such store constitutes only one of a chain of stores owned and operated by companies in the Chicago metro area. This question, in turn, required an analysis of whether the two companies being examined were “integrated” to such a significant degree with their respective chain-stores throughout the region that the chain-stores should be aggregated for purposes of establishing a larger bargaining unit encompassing all of the stores.

In examining the “centralized control of labor relations” issue, the court looked to the evidence and found that there was:

- (1) Centrally administered personnel and labor relations policies as evidenced by:
 - (a) Personnel files, payroll records, and other records were maintained at company headquarters;
 - (b) Employee job classifications were uniform throughout all stores;
 - (c) Employees of the same job classification, experience, and seniority received the same wages throughout all stores;
 - (d) Employee benefits were uniform throughout all stores; and
 - (e) Employees enjoyed companywide seniority.
- (2) Highly centralized operations and routine employee interchange between various stores as evidenced by:
 - (a) A vertical management structure wherein district managers were responsible for ensuring that all stores were being operated in full compliance with the policies and procedures formulated at headquarters;
 - (b) The company maintaining regular contact with all stores including in person visits, telephone calls, and written memoranda;
 - (c) Individual store managers have little or no authority over non-labor business activities and are required to implement the company’s centrally developed policies and procedures;
 - (d) Individual store managers in labor relations and personnel matters are severely limited in that they have no authority to do any of the following:
 - (1) Hire new employees;
 - (2) Grant promotions, wage increases, or changes to job classifications;
 - (3) Fire or suspend employees for disciplinary reasons;
 - (4) Lay off employees;
 - (5) Handle employee grievances;
 - (6) Grant requests for vacation or other leaves of absence;
 - (7) Permanently or temporarily transfer employees between the stores; and
 - (8) Post weekly work schedules for employees without prior approval from centrally controlled district manager.

- (e) Job application process, hiring, and training is handled “upstream” by headquarters;
- (f) Employee manuals are common to all stores’ employees;
- (g) Temporary and permanent transfers of employees among the locations occurred routinely and 25 percent of the workforce including managers and line employees transferred permanently in a 13-month period; and
- (h) Individual store managers in general did not operate “without significant interference” by the central office.

The foregoing list of factors are excellent sources for requests for admission, other written discovery, and deposition questions when attempting to ascertain the scope of integration during litigation.

Arguing For or Against Integration Depends on the Circumstances

Interestingly, employers and employees may end up on the opposite side of the “integrated employer” issue depending on the legal setting. In other words, employers often argue strenuously *for* integration for purposes of aggregating their multilocation operations so as to establish a larger single bargaining unit so that they will not have to bear the cost and administrative difficulty of negotiating with numerous different bargaining representatives (*i.e.*, unions). However, in other circumstances, employers will argue strenuously *against* integration for purposes of aggregating employees to establish minimum coverage requirements under labor and employment law statutes so that they will avoid the cost of defending against potential liabilities for their actions/omissions. As such, depending on the particular legal situation (*i.e.*, NLRA context versus Title VII/ADAAA/ADEA or FMLA context), it may be advantageous for the employer to argue different sides of the same basic issue.

Thus, the “integrated employer” analysis in both the NLRA and Title VII/ADAAA/ADEA or FMLA contexts has both common and disparate characteristics. In the NLRA context, avoiding liability is a concern of the employer where a union files a petition on behalf of employees for one of several operations and/or the NLRB has issued an order that requires different parts of an enterprise’s operations to negotiate with different bargaining units. Only then will a company typically raise an argument that its enterprise should be seen as integrated. The NLRA statute protects employees’ rights to organize and seek, select, and obtain certification/recognition of their elected representative to bargain with management on their behalf. If a company is found to be “integrated,” then smaller groups of workers at different locations are required to pool together (*i.e.*, aggregate themselves) and agree upon one single bargaining unit to represent them all. This, in turn, may make it more difficult for workers of an enterprise’s different locations to come together, unite, and engage in the kind of organizing necessary to select a single larger bargaining unit. As such, a finding of “integration” theoretically may hamper employees’ ability to unionize by making it more administratively and perhaps financially difficult to unite for a common cause.

In the Title VII/ADA/ADEA or FMLA context, of course, the employer has no benefit from arguing in favor of integration. Instead, the employer will simply argue the other side of the “integrated employer” coin (*i.e.*, that its enterprise—whether structured as parent/sub or sister entities—is too disparate to justify the aggrega-

tion of employees for purposes of meeting minimum statutory coverage requirements or, in some courts, establishing joint and several liability).

FLSA Three-Factor ‘Integrated Enterprise’ Test

Finally, under the FLSA, a covered “enterprise” need not be a single stand-alone business or corporation. The definition of “enterprise” includes “the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments.”⁴⁰ FLSA integrated enterprise coverage depends on a three-factor test as articulated by the U.S. Supreme Court: A fact finder must determine whether the businesses being examined (1) engage in related activities, (2) are subject to common control or unified operations, and (3) are linked by a common business purpose.⁴¹

This test has been used to aggregate revenue to meet the FLSA coverage minimum in order to sue the direct employer only and is specifically not used to impose affiliate or joint and several liability.⁴²

Discussion of the Three Factors for FLSA Integrated Enterprise Purposes

“Related activities,” for purposes of the first prong of the FLSA integrated enterprise test, means activities that are “the same or similar” or when they are “auxiliary and service activities.”⁴³ Auxiliary or service activities involve “operational interdependence in fact” such as warehousing, bookkeeping, and any other activity performed for a common business purpose.⁴⁴ Essentially, whether activities are related depends upon “whether [they] serve a business purpose common to all activities of the enterprise, or whether they serve a separate and unrelated business purpose.”⁴⁵

The second prong, common control, exists “where the performance of the described activities is controlled by one person or by a number of persons, corporations, or other organizational units acting together.”⁴⁶ The right to control that is inherent in ownership is determinative of the “common control” prong regardless of the extent to which the right is exercised.⁴⁷ Importantly, courts must “look beyond formalistic corporate separation to the actual pragmatic operation and control.”⁴⁸

A common business purpose, the third factor, encompasses activities that are directed to the same business objective or to similar objectives in which the group has an interest.⁴⁹ As with other elements, whether a common business purpose exists depends upon the particular circumstances of the relationship at issue.⁵⁰

Conclusion

Integrated employer/enterprise doctrine and the three- or four-factor tests articulated in this article should be considered every time employee or employer “coverage” is at issue. Plaintiffs should not immediately concede defeat if presented with evidence that a direct employer either does not have the requisite number of employees to establish coverage under Title VII type statutes or the requisite revenue to establish coverage under the FLSA. The doctrine and factors discussed herein may provide guidance to a plaintiff whether he or she is drafting a pleading or engaging in discovery to ascertain whether there are other entities that are associated enough with his or her direct employer to justify employee or revenue aggregation. By the same token, defendants should be wary and prepared to

address the integrated employer/enterprise doctrine in cases where minimum employee or revenue numbers appears favorable. Avoiding coverage and liability might not be as simple as it looks on its face. ☉



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Endnotes

¹*Radio & Television Broad. Techs. Local 1264 v. Broadcast Serv. of Mobile Inc.*, 380 U.S. 255 (1965).

²*NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949).

³*Sakrete of N. Cal. Inc. v. NLRB*, 332 F.2d 902 (9th Cir. 1964).

⁴*Id.* at n. 4.

⁵*South Prairie Const. Co. v. Local No. 627, Intern. Union of Operating Eng'rs, AFL-CIO*, 425 U.S. 800 (1976).

⁶*See, e.g., Mastell Trailer Corp. v. NLRB*, 682 F.2d 753 (8th Cir. 1982) (employer petitioned for review of NLRB order finding that it had committed unfair labor practices; the Eighth Circuit held that substantial evidence supported the NLRB's determination that the employer and an affiliated entity constituted an integrated employer when applying the four-factors); *NLRB v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986) (NLRB applied for enforcement of its order requiring three cable television systems and their management firm to bargain collectively with their employees' union having found that the employer committed an unfair labor practice by refusing to bargain collectively in violation of NLRA; Ninth Circuit noted "it has long been settled that the Board may treat two or more distinct business entities as a 'single employer' within the meaning of § 2(2) of the NLRA, 29 U.S.C. § 152(2)" by applying the four-factor test; court upheld the finding of an integrated employer).

⁷*Baker v. Stuart Broad. Co.*, 560 F.2d 389, 391-392 (8th Cir. 1977).

⁸*McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933-34 (11th Cir. 1987) (integrated employer doctrine in private employment setting); and *Lyes v. City of Riviera Beach, Florida*, 166 F.3d 1332 (11th Cir. 1999) (en banc) (integrated employer doctrine in public employment setting).

⁹*McKenzie*, 834 F.2d at 933.

¹⁰*Id.* at 930, 933-34.

¹¹*Id.*

¹²*Id.* at 934.

¹³*Id.* at 931.

¹⁴*Lyes*, 166 F.3d 1332 (11th Cir. 1996) (en banc).

¹⁵*Lyes v. City of Riviera Beach, Florida*, 126 F.3d 1380 (11th Cir. 1997) (panel).

¹⁶The Eleventh Circuit wrote: "The most obvious way in which the NLRB 'single employer' test is incompatible with cases involving governmental entities involves the test's fourth factor—'common ownership or financial control.' Governmental subdivisions such as counties or towns, or smaller subdivisions such as local agencies, may share sources of ultimate political control or funding, yet be

wholly distinct with respect to their day-to-day operations or their control over relationships with employees. Thus, the 'common ownership or financial control' factor of the NLRB test has no application to the usual case involving governmental subdivisions." (internal citation omitted).

¹⁷*Lyes* (en banc), 166 F.3d at 1346-47.

¹⁸*Marshall v. Arlene Knitwear Inc.*, 454 F.Supp. 715 (E.D.N.Y. 1978), *aff'd in part, rev'd in part and remanded without opinion*, 608 F.2d 1369 (2d Cir. 1979).

¹⁹29 U.S.C. § 630(b).

²⁰29 U.S.C. § 630(a).

²¹*EEOC v. Dolphin Cruise Line Inc.*, 945 F. Supp. 1550, 1553-1554 (S.D. Fla. 1996).

²²29 C.F.R. § 825.104(c)(2).

²³*Id.*

²⁴*See, e.g., Knidel v. T.N.Z. Inc.*, 2016 WL 5387625 at *8-9 (D. Mass. 2016).

²⁵*Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1257 (11th Cir. 2004).

²⁶*McConnell v. Swiftly Transp. Inc.*, 2005 WL 1865386 (S.D. Ohio 2005).

²⁷*Nott v. Woodstock Care Ctr. Inc.*, 2000 WL 982560 (S.D. Ohio 2000).

²⁸*See Herron v. Baptist Mem'l Hosp. Corp.*, 2007 WL 2579972 *1-2 (N.D. Miss. 2007) for a similar result.

²⁹*Landon v. Agatha Harden Inc.*, 6 F. Supp. 2d 1333, 1338 (M.D. Ala. 1998), citing *Stockett v. Tolin*, 791 F. Supp. 1536, 1551 (S.D. Fla. 1992); *see also Baker v. Stuart Broad. Co.*, 560 F.2d 389 (8th Cir. 1977) (sister radio stations).

³⁰*McCulley v. Allstates Tech. Servs.*, 2005 WL 1475314 at *25, 28 (S.D. Ala. 2005); *Schubert v. Bethesda Health Group Inc.*, 319 F. Supp. 2d 963, 967 (E.D. Mo. 2004); *Perry v. Manocherian*, 675 F. Supp. 1417, 1425 (S.D.N.Y. 1987) (integrated employer status found where two entities had common management and, in reality, most employees of one entity also worked for the other).

³¹*Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992); *Story v. Vae Nortrak Inc.*, 214 F. Supp. 2d 1209 (N.D. Ala. 2001) (in employment discrimination action brought under 42 U.S.C. § 1981a, trial court applied four-factor test and held that defendant and its horizontally aligned sister Wyoming and Canadian affiliates together constituted "single employer" whose employees could be aggregated in fixing statutory cap on compensatory and punitive damages since there was a common stockholder, officers, complementary business interests, and the president maintained control over the prices at which services were performed by the sisters for one another); *Scheidecker v. Arvig Enters. Inc.*, 122 F. Supp. 2d 1031 (D. Minn. 2000) (liberal construction given to definition of "employer" coupled with evidence of common ownership and management created factual question for jury to resolve regarding whether horizontally aligned sister corporations would constitute a single entity for Title VII purposes); *Jarvis v. Chimes Inc.*, 2008 WL 623402 at *6-7 (D. Md. 2008) (genuine issues of material fact for trial on issue of whether the two defendants were "integrated employers" under Title VII and ADA where entities were commonly owned and managed with common employment policies).

³²*Thornton v. Mercantile Stores Co.*, 13 F. Supp. 2d 1282, 1291-92 (M.D. Ala. 1998); *Armbruster v. Quinn*, 711 F.2d 1332, 1338 (6th Cir. 1983).

³³*Frank v. U.S. West Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993); *Schubert v. Bethesda Health Group Inc.*, 319 F. Supp. 2d 963, 967 (E.D. Mo. 2004) (finding interrelationship of operations where employees can transfer between companies and where one company handles the personnel function for the other); *Baker v. Stuart Broad. Co.*, 560 F.2d 389 (8th Cir. 1977) (horizontally aligned sister entities' operations were sufficiently interrelated so that they were properly consolidated as "employers" under liberal construction of that term); *Sedlacek v. Hach*, 752 F.2d 333 (8th Cir. 1985) (same); *Marshall v. Arlene Knitwear Inc.*, 454 F. Supp. 715 (E.D.N.Y. 1978) (when all relevant circumstances were viewed in light of liberal construction standard, two nominally separate but horizontally aligned sister corporations constituted an integrated enterprise and were, therefore, an "employer" for purposes of the ADEA since they were commonly owned, had common officers and managers, had close physical proximity, and their businesses complemented one another which, in sum, constituted a "symbiotic relationship"), *aff'd in part, rev'd in part, and remanded without opinion*, 608 F.2d 1369 (2d Cir. 1979).

³⁴*Llampallas v. Mini-Circuits Inc.*, 163 F.3d 1236, 1244 (11th Cir. 1998).

³⁵*McCulley v. Allstates Tech. Servs.*, 2005 WL 1475314 at *25, 27 (S.D. Ala. 2005); *Torres-Negron v. Merck & Co.*, 488 F.3d 34, 43 (1st Cir. 2007).

³⁶*Watson v. MCI Communs. Corp.*, 1995 U.S. Dist. LEXIS 3557 (N.D. Ill. 1995); *Bruce v. S & H Riggers & Erectors Inc.*, 732 F. Supp. 1172, 1175 (N.D. Ga. 1990) (genuine issue of material fact as to single employer status remains where one person controlled the hiring and firing of employees); *Harriel v. Dialtone Inc.*, 179 F. Supp. 2d 1309, 1311 (M.D. Ala. 2001) ("That special weight is accorded to the question of the control of labor operations is significant for present purposes given the evidence concerning the role played by Lane in both entities. Lane had dual roles he played with regard to the two entities which raises a genuine issue of material fact with regard to the question of centralized labor operations"); *Hiltibrand v. Lynn's Hallmark Card Shop*, 2005 U.S. Dist. LEXIS 22405 (M.D. Ga. 2005) (sufficient evidence from which a jury could conclude that Mayo Management exercised centralized control of labor relations and personnel. Mayo Management

employees hired and supervised manager of Lynn's Hallmark Card Shop and Lynn's Too, and approved employment decisions she made on behalf of the stores).

³⁷*Laurin v. Pokoik*, 2004 U.S. Dist. LEXIS 4066 (S.D.N.Y. 2004) (rejecting summary judgment where two individuals owned rental properties and centralized their control of employees).

³⁸*Rowland v. Franklin Career Servs., LLC*, 272 F. Supp. 2d 1188, 1202 (D. Kan. 2003) (genuine issue of fact whether owner of truck driving schools was a single employer where it approved pay increases, payroll advances, and promotions at a school that did not employ a chief executive officer and its director did not have authority to enter a written employment agreement with any employee).

³⁹*NLRB v. Chicago Health & Tennis Clubs Inc. and NLRB v. Saxon Paint & Home Care Centers*, 567 F.2d 331, 339 (7th Cir. 1977) (consolidated cases).

⁴⁰29 U.S.C. § 203(r).

⁴¹*Brennan v. Arnheim & Nelly Inc.*, 410 U.S. 512 (1973).

⁴²*Patel v. Wargo*, 803 F.2d 632 (11th Cir. 1986) (court adopted the FLSA three-factor test to determine enterprise coverage ... in contrast, it noted, case law treats the questions of enterprise coverage and liability separately and liability hinges on an employment relationship ... simply put, enterprise analysis is different from the analysis of who is liable under the FLSA).

⁴³*Wilson v. GoWaiter Franchise Holdings LLC*, 2014 WL 1092307 at *4 (N.D. Ga. 2014).

⁴⁴29 C.F.R. § 779.206(a).

⁴⁵29 C.F.R. § 779.206(b).

⁴⁶*Brock v. Hamad*, 867 F.2d 804 (4th Cir. 1989) (finding that the employer's operations constituted "single enterprise" subject to FLSA).

⁴⁷29 C.F.R. § 779.221-.222.

⁴⁸*Donovan v. Grim Hotel Co.*, 747 F.2d 966, 970 (5th Cir. 1984).

⁴⁹29 C.F.R. § 779.212-.213.

⁵⁰*Id.*



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