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Who's the Boss?
Co -, Joint and Other Complicated Private and Public Sector Employment Relationships

New York State Bar Association
Labor & Employment Law Section Fall Meeting

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I. PUBLIC SECTOR LABOR RELATIONS

A. What is a Joint Employer?

Among other things, joint employment in the public sector implicates New York Civil Service Law § 207.1(b), which states that: "[T]he officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate." The term "joint employer" is generally applied to a situation in which two or more public employers share labor relations control over a group of what would otherwise be one of the employer's employees. The existence of a joint employer relationship depends on the control that one public employer exercises over the labor relations of another public employer. *Putnam County Sheriff's Office Managers Assoc. v. County of Putnam*, 33 PERB ¶ 3001 (2000).

B. The Joint Employer Test

A joint employer relationship rests on a finding of shared or divided control over the employees' terms and conditions of employment. *Niagara County Cmty. College Educ. Support Personnel Assoc. and Niagara Cmty. College and County of Niagara*, 23 PERB ¶ 4052 (1990), *aff'd*, 23 PERB ¶ 3000.45 (1990); *County of*

[1] We gratefully acknowledge the assistance of Rich's associate, Adam D. Michaelson, Esq., for his assistance in preparing these materials.

Ulster, 3 PERB ¶ 3032 (1970) (*citing Boire v. Greyhound Corp.*, 376 U.S. 473 (1964)).

C. Factors

Factors for determining whether an entity is a joint employer include, but are not limited to the employer's role in:

1. Hiring and firing;

2. Promoting and demoting;

3. Setting wages, work hours and other terms and conditions of employment;

4. Discipline; and

5. Actual day-to-day supervision and direction of employees on the job.

Other factors include the authority to tax and raise funds and approve budgets and grant financing. *See*, *e.g.*, *Niagara County Cmty. College*, 23 PERB ¶ 4052 (1990), *aff'd*, 23 PERB ¶ 3000.45 (1990).

D. Effects of Joint Employment

1. <u>Determine the Terms and Conditions of Employment</u>

   N.Y. Civil Service Law § 201.1(b) permits joint employers to determine the terms and conditions of employment.

2. <u>Duty to Bargain</u>

   Where a joint employer elected sheriff is present for or sends a designee to bargain on his behalf, his failure to execute an agreement may be considered to be in bad faith. *County of Cayuga and Sheriff of the County of Cayuga and Cayuga County Employees*, 18 PERB ¶ 4639 (1985). A PERB ALJ determined that an elected sheriff who participated in recent

negotiations and implicitly recognized the union was obligated to execute the agreement.

3. Representation Issues

Fragmentation of jointly employed employees from a larger bargaining unit is appropriate. *County of Clinton and Clinton County Sheriff*, 18 PERB ¶ 3070 (1985); *see also Jefferson County Cmty. College v. PERB*, 27 PERB ¶ 7010 (4th Dep't 1994) (affirming PERB's decision to fragment noninstructional employees); *County of Ulster and Ulster County Sheriff's Office*, 3 PERB ¶ 3032 (1970); N.Y. CIV. SERV. LAW § 207.1(b).

However, not all joint-employer relationships necessitate fragmentation on request. *Town of N. Castle*, 19 PERB ¶ 3025 (1988); *see also* PUBLIC SECTOR LABOR AND EMPLOYMENT LAW, 3d edition, § 6.64, p. 554.

4. Execution of CBA

In *County of Cayuga and Sheriff of the County of Cayuga and Cayuga County Employees*, 18 PERB ¶ 4639 (1985), a Sheriff's refusal to sign a collective bargaining agreement was found to be improper. The Sheriff's argument that he never ratified the agreement was misplaced since the parties did not, as part of the negotiations, reserve to the Sheriff the right to ratify. In addition, the Sheriff, who was not a party to the contract, authorized the County to negotiate on his behalf. He was, therefore, bound by the resulting agreement. As a result of the County's and union's agreement that the Sheriff sign the agreement, his failure to do so was a violation of the Taylor Law. *Id.*; *see also* N.Y. CIV. SERV. LAW § 204(3).

5. Oral Modifications to CBA

The Second Department has held that an oral agreement between the County and union to modify the time limits set forth in the contractual grievance procedure was enforceable against the Sheriff. *Maggi v. County of Suffolk*, 751 N.Y.S.2d 592, 300 A.D.2d 489 (2d Dep't 2002). Even though the Sheriff was not a party to the contract, he was bound by the agreement between the County and the union and had no standing to pursue arbitration.

6. Necessary Joinder

A party is deemed to be necessary to the adjudication of a proceeding if it "ought to be [a party] if complete relief is to be accorded between the persons who are parties to the action or . . . might be inequitably affected by a judgment in the action." *United Federation of Police Officers v. Rockland County Dist. Attorney & New York State Pub. Employment Relations Bd.*, 34 PERB ¶ 7019 (N.Y. Sup. Ct. 2001) (*quoting* N.Y. C.P.L.R. § 1001). The failure to join a joint employer may result in incomplete relief.

E. Joint Employers Recognized by PERB

1. Elected County Sheriffs

PERB has consistently found that an elected sheriff and the county are joint employers where the elected sheriff controls significant non-economic terms and conditions of employment for sheriff's office or department employees an d the county controls the employees' economic terms and conditions of employment. *Putnam County Sheriff's Office Managers Assoc. v. County of Putnam*, 33 PERB ¶ 3001 (2000); *County of Erie and Civil Service Employees Assoc.*, 37 PERB ¶ 4004 (2004).

An appointed sheriff, however, is "no differently situated . . . than the many different officials of state and local government who carry out statutory mandates of various types, none of whom have been identified as independent public employers or have been made part of a joint employer relationship." *County of Putnam*, 33 PERB ¶ 3001 (2000).

2. Community Colleges

PERB has found that community colleges are joint employers with a sponsoring county. *Genesee Cmty. College and County of Genesee*, 24 PERB ¶ 3017, 3034-35 (1991). A PERB ALJ has considered the following factors in determining a joint employer relationship:

a) A joint employer relationship rests on a finding of shared or divided control over the employees' terms and conditions of employment.

b) The fact that the college hired and fired all college employees, determined work assignments and schedules, time off and overtime.

c) The control over the terms and conditions of employment in the community college, as compared to the control exerted by an elected sheriff who PERB has consistently found to be a joint employer with a county.

d) Even though the college was not involved in negotiations covering the at-issue employees, it had been an equal partner with the county in negotiating contracts with other organizations.

Niagara County Cmty. College Educ. Support Personnel Assoc. and Niagara Cmty. College and County of Niagara, 23 PERB ¶ 4052 (1990), *aff'd*, 23 PERB ¶ 3000.45 (1990).

F. Entities Not Considered to be Joint Employers by PERB

1. Superintendent of Highways

PERB has held that a superintendent of highways is not a joint employer for purposes of the Taylor Law. *Town of Ramapo*, 8 PERB ¶ 3057 (1975). There, the Board found "little difference between a town superintendent of highways who is elected and county superintendents of highways who under County Law § 400.4(a) are appointed." *Id.*

2. Appointed Sheriffs

PERB has determined that an appointed sheriff is not a joint employer for purposes of the Taylor Law. *County of Nassau and Nassau County Sheriff*, 25 PERB ¶ 3036 (1992). There, the Board determined that "there is no basis for finding a joint employer relationship . . . because the record shows that effective control over the employment relationship of deputies and co's resides solely with the county." *Id.* at 3075.

G. PERB Determines Whether a Joint Employer Relationship Exists

In *United Federation of Police Officers, Inc. and Town/City Poughkeepsie Water Treatment Facility*, PERB found that even though the City and Town had agreed

that the City was the employer of the Project's employees, the Board was not bound by the parties' agreement in determining the identity of the public employer and fashioning the most appropriate bargaining unit. 38 PERB ¶ 3017 (2005). PERB found that a joint employer relationship existed between the City, Town and the Project Board. *Id.*

H. The Taylor Law Does Not Apply to Most Public-Private Joint Employers

The Court of Appeals has declared that: "The Taylor Law applies only to employment which is unequivocally or substantially public." *New York Public Library v. PERB*, 37 N.Y.2d 752, 374 N.Y.S.2d 625, 337 N.E.2d 136 (1975).

Where an employment relationship involves joint public and private employers, PERB has declined jurisdiction on the premise that it has no jurisdiction unless each of the joint employers is itself a public employer. Examples include:

1. A private contractor that exercised substantial control over terms and conditions of employment. *See Niagara Frontier Transp. Auth.*, 13 PERB ¶ 3003 (1980).

2. A SUNY medical professor's clinical practice. *United University Professions (Egan)*, 35 PERB ¶ 3019 (2002).

3. A museum on county property where the county exercised little control over the museum's day-to-day operations and fiscal management. *Suffolk County Vanderbilt Museum*, 24 PERB ¶ 3042 (1991), *remanded to* 27 PERB ¶ 4082 (1994).
4. A public school's private treatment facility. *Berkshire Farm Union Free School Dist.*, 23 PERB ¶ 4035 (1990).

5. Private school nurses. *Mamaroneck Union Free School Dist.*, 38 PERB ¶ 4016 (2005).

I. Public/Private Charter Schools are Subject to PERB's Jurisdiction

Notwithstanding PERB's precedent regarding joint public/private employers, PERB recently held that New York charter schools with public/private partnerships between the charter school and for-profit corporations are subject to the Taylor Law and PERB's jurisdiction due to express statutory language found in New York Education Law § 2854.3(a).

In *Brooklyn Excelsior Charter School and Buffalo United Charter School Education*, PERB determined that the New York Charter Schools Act (Education Law, Article 56) extends collective bargaining rights to employees of charter schools and that those employees fall squarely within the purview of the Taylor Law and PERB's jurisdiction. 44 PERB ¶ 3001 (2011), *aff'd*, 45 PERB ¶ 7005 (Sup. Ct. 2012).

J. Where PERB Lacks Jurisdiction Pursuant to the Taylor Law, the State Employment Relations Act ("SERA") May Apply

A union seeking to represent employees at the primary direction of a private entity, however, could petition PERB to invoke its jurisdiction pursuant to the SERA, which would apply if the Public Employees Fair Employment Act and the National Labor Relations Act ("NLRA") were not to apply. SERA is New York's private sector collective bargaining statute, which covers private sector employers and employees who are not subject to the NLRA or Federal Railway Labor Act. Effective July 22, 2010, PERB became responsible for administering the adjudicatory and conciliation provisions of the State Employment Relations Act ("SERA"), New York Labor Law §§ 700-718.

II. PRIVATE SECTOR LABOR RELATIONS

A. Overview

The NLRA protects union-related activity of employees. Pursuant to the NLRA, employees have the right to form, join, or assist labor organizations, to collectively bargain through representatives of their choice and to engage in other concerted activities for the purpose of collective bargaining or group protection. The Act applies to all employers and employees whose activities affect interstate commerce, as defined by the Act.

1. Joint Employment is common in the private sector.

2. The protections and liabilities of the NLRA extend to Joint Employers.

B. Factors For Determining Joint Employment

Whether an employer "possessed sufficient control over the work of the employees to qualify as a 'joint employer' with [the actual employer]." *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982) (*quoting Boire v. Greyhound Corp.*, 376 U.S. 473, 481, 84 S.Ct. 894, 898-899 (1964)).

In order to establish a joint employer relationship, current NLRB precedent requires two or more employers to share or codetermine matters governing essential terms and conditions of employment. *Id.* at 1123.

C. Joint Employer Liability Factors

The NLRB has found joint liability among joint employers where:

1. The non-acting employer knew or should have known that the other employer acted against an employee in violation of the Act; and

2. The non-acting employer acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist the unlawful action.

Capitol EMI Music, 311 NLRB 997, 1000 (1994). Joint employers may be vicariously liable for unfair labor practices committed by other joint employers within the scope of the relationship.

D. Employees of Staffing Agencies Need Employer Consent to Unionize

The NLRB standard for whether a joint employer relationship exists has vacillated over the last 22 years. The NLRB does not currently permit bargaining units combining employees solely employed by a temporary staffing agency to be included in a bargaining unit with regular employees of the employer without the consent of the staffing agency and the regular employer. *H.S. Care L.L.C., d/b/a Oakwood Care Center and N&W Agency, Inc.*, 343 NLRB 659 (2004). This decision overruled the Board decision of *M.B. Sturgis*, 331 NLRB 1298 (2000) (permitting staffing agencies' temps to organize with permanent workers on the job site if the two groups could show a "community of interest" without a staffing agency's consent), which had overruled the longstanding precedent of *Lee Hospital*, 300 NLRB 947 (1990) (finding joint employer units to be impermissible absent consent).

III. PROFESSIONAL EMPLOYER ORGANIZATION ("PEO")

A. What is a PEO?

A PEO is an entity hired by a company used to "outsource the management of human resources, employee benefits, payroll and[/or] workers' compensation.[2]

A PEO includes an organization whose business is entering into a professional employer agreement ("PEA") with a client "to co-employ all or a majority of the employees providing services for the client." N.Y. LAB. LAW §§ 916(3) and (4).

PEOs are not "public employers" pursuant to the Taylor Law. N.Y. CIV. SERV. LAW § 201.6.

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[2] National Association of Professional Employer Organizations, http://www.napeo.org/peoindustry/index.cfm (last visited August 17, 2012).

B. Applicable law

The New York Professional Employer Act is codified at New York Labor Law Article 31 (§§ 915-924).

C. Labor Law Considerations

1. General Rule: Employees subject to the direction and control of a PEO are not covered by the Taylor Law. *Niagara Frontier Transportation Authority*, 13 PERB ¶ 3003 (1980) (PERB lacks jurisdiction over joint public-private employers); s*ee also Service Employees' Int'l Union, Local 200-D, AFL-CIO, CLC*, 23 PERB ¶ 4035 (1990); *United University Professions (Egan)*, 35 PERB ¶ 3019 (2002) (clinical practice plan associated with SUNY Buffalo Medical School not a public employer).

2. Exception: PERB retains jurisdiction where a private entity is nothing more than a conduit for the public employer.

   A public entity that exercises primary control over employees may not use the contractor relationship "as a device to preclude itself from an employer's obligations" and thus PERB will exercise jurisdiction over the public employer. *Auburn Industrial Development Authority*, 15 PERB ¶ 4048 (1982), *aff'd*, 15 PERB ¶ 3107; *see also Mamaroneck Teachers' Association*, 38 PERB ¶ 4016 (2005).

3. NLRB May Assert Jurisdiction Over a PEO

   In *Management Training Corporation*, 317 NLRB 1355 (1995), the NLRB announced that it would assert jurisdiction over a private employer subject to control by an exempt governmental entity if the private employer met the definition of employer pursuant to the NLRA and satisfied the applicable monetary jurisdictional standards.

   The case could support the proposition that PEO employees also working for the federal government may be able to form unions pursuant to the NLRA.

4. PEO Employees May Be Able to Form Unions in New York

Although there are not any reported cases on this subject in New York, a union could be certified as the representative of a unit composed of employees primarily under the control of a PEO. If the PEO does not engage in interstate commerce, the union may petition PERB to invoke its jurisdiction pursuant to SERA, which would apply if the NLRA does not.

However, PERB cautions on its website "that applicable substantive and procedural rules under SERA are not necessarily consistent with analogous rules under the NLRA or the Taylor Law."[3]

5. Interference with Organizational Rights

An improper practice charge could be filed with PERB by a union alleging a violation of Civil Service Law § 209-a.1(a), (b) and/or (c) on the theory that the placement of employees under the primary control of a PEO is a sham designed to undermine and defeat employee organizational rights.

6. Contracting Out Work to a PEO

A public sector collective bargaining unit may also challenge the contracting out of unit work when a PEO assumes primary control. This could be a violation of New York Civil Service Law § 209-a(1)(d).

The public entity could argue that there is no external entity to which any work was "contracted out" as the entity and a PEO would be joint employers. If a different group of employees, *i.e.*, those not in the existing bargaining unit, are placed under a PEO's control and direction and assigned what has traditionally been exclusive unit work, however, an improper practice charge alleging an unlawful contracting out of unit work would have merit.

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[3] *See* http://www.perb.state.ny.us/PRIVDECINDEX.asp.

THIS OUTLINE IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. EMPLOYERS OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.