

Human Resources

By Stephanie Ramsey



HR REALITY CHECK: OVERTIME

When Separate Businesses Share the Same Employees

SCENARIO: Maykin Muny Funeral Homes is a privately held funeral business with several owners who operate multiple funeral homes, cemeteries and a crematory. Each location is a separate corporation. However, all the corporations have substantially the same owners as MMFH, and they all actively work in the businesses.

The various locations share many of the same employees. In fact, when payday rolls around the employees receive a paycheck from each of the corporations in which they worked for the pay period. Most pay periods, an employee will have three different paychecks.

All employees work less than 40 hours in a work week in any one business, but several frequently work more than 40 hours between all the locations. These employees are not

paid overtime by any location. Recently, one of the employees approached an owner and asked about overtime as they had worked 60 hours between two of the locations. The owner explained that they had not earned overtime because they did not work more than 40 hours for any specific location and they got paid separately by each business for the specific work performed. Should the employee be paid overtime?

What are the rules? Under 29 C.F.R. Vol. 3 Subtitle B §791.2, joint employment relationships are discussed as part of the Fair Labor Standards Labor Act. This subsection provides an explanation of the U.S. Department of Labor's perception of joint employment. It can be used as a guideline to determine whether an employee is to be considered a joint employee or a separate and distinct employee when situations arise involving an employee that works for more than one entity.

There is no standard in federal employment law that prohibits an individual from being employed by more than one employer. In summary, this subsection establishes that if two or more employers are acting entirely independently of each other and are completely disassociated with respect to the

employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining their own responsibilities under the act. In other words, the time the employee worked for the other employers would have no bearing on overtime calculations for the time the employee worked for them.

Conversely, if the facts illustrate that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the

applicable provisions of the act, including the overtime provisions.

Did the employer make any mistakes? Possibly. Based on the scenario presented above and the guidelines stated in 29 C.F.R. Vol. 3 Subtitle B §791.2, it is possible that the Department of Labor would perceive that the employees shared between all the MMFH businesses are in fact joint employees. If that is the case, any time spent working for one of the other locations must be considered in overtime calculations for payroll.

In the scenario of the employee who worked 60 hours in the work week, it may be that they are due 20 hours of overtime pay as all hours worked between the two locations must be considered jointly. Which of the businesses pays for the overtime is a management decision.

Resolution of the issue: One of the best ways to deal with this issue is to manage your employees' schedules so that between all the

locations they are not working more than 40 hours a week. If they do work more than 40 hours a week, then pay them overtime to play it safe with the Department of Labor. It is far less money in the end to pay overtime than to have to provide back pay to the employees and pay a fine for each occurrence that overtime was not paid properly.

Preventive measures: Work closely with legal counsel familiar with your state labor laws to help determine whether or not employees of multiple businesses would be considered joint employees. Each state may have its own definition of joint employment. Legal counsel can assist you in how to structure various businesses and how the employees function within those businesses to avoid triggering the joint employment issues. If you are uncertain whether you may have a joint employment situation, feel free to reach out to The Foresight Companies for assistance. •

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