Co-Employment & Joint Employer Law

What Every Business Leader Needs to Know in 2026

Most commercial agreements involving contingent workers include a clause disclaiming any co-employment relationship. For most organizations, co-employment surfaces as boilerplate language in a contract. It deserves considerably more attention than that.

Co-employment is one of the most consequential and least understood concepts in workforce management. Structured properly, it enables flexible and compliant workforce strategies. Left unmanaged, a single enforcement action can expose an organization to liability in the millions.

This white paper is a plain-language guide for HR leaders, procurement executives, in-house counsel, and business owners who work with contingent workers, staffing agencies, or managed service programs. It covers what co-employment actually is, where the law stands today, what the courts have said when things go wrong and what well-structured arrangements look like.

1. What Co-Employment Actually Is

Employment is not a binary. It is a spectrum. Two or more entities can simultaneously share employer obligations and liability for the same worker. That is co-employment.

Courts have long recognized this reality. The foundational legal test, drawn from common law agency principles established in *Nationwide Mutual Insurance Co. v. Darden* (1992), asks a deceptively simple question: who controls the work?

> "Who controls the work?" is the foundational question. But as courts have developed the doctrine, control has three dimensions: direct, indirect, and economic.

Three questions cut to the heart of every co-employment analysis:

- Who directs the day-to-day work the how, when, and where?
- Who determines pay, benefits, and scheduling?
- Who has authority to hire, discipline, and terminate?

When the answer to any of those questions is "both of us" you have co-employment. The legal significance of that answer depends on which law you are analyzing and in which jurisdiction.

Want to learn more? We answered Common Contingent Workforce Questions HERE.

What Co-Employment Is Not

Before going further, it is worth clearing up three persistent misconceptions:

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It is not inherently illegal. Co-employment is built into the design of Employer of Record (EOR) and staffing arrangements. The goal is not to eliminate it, but rather to structure and manage it.

A "no co-employment" contract clause does not make it disappear. Courts analyze conduct, not just contracts. A disclaimer clause sets expectations and allocates risk between parties, but it is not a legal shield. Courts have repeatedly found co-employment where the parties' actual behavior told a different story than their contracts.

It is not the same thing as worker misclassification. Misclassification means calling an employee a contractor. One employer, wrong label. Co-employment means two legitimate entities simultaneously sharing employer obligations. Different legal theories, different plaintiffs, different remedies.

2. The Legal Framework: Multiple Tests, Multiple Statutes

One of the most important things to understand about co-employment law is that there is no single, unified standard. Different federal statutes use different tests. Different federal circuits apply those tests differently. And state laws particularly California, New Jersey, and Illinois impose standards broader than anything at the federal level.

The Common Law Control Test

For Title VII (discrimination), the ADA, and the ADEA, courts apply the common law control test from *Darden and Reid v. CCNV* (1989). The analysis examines twelve factors including supervision, source of tools and equipment, work location, duration of the relationship, method of payment, and how the work is integrated into the hiring party's regular business. No single factor controls; courts look at the totality.

The FLSA Economic Reality Test

The Fair Labor Standards Act uses a different lens: economic reality. The FLSA defines "employ" as "to suffer or permit to work" a deliberately expansive definition. Courts ask whether the worker is economically dependent on the alleged employer, not just whether that employer directly controls the work.

The circuit split here is significant. The Ninth Circuit (California, the Pacific Northwest) applies the four-factor *Bonnette* test. The Second Circuit (New York) uses the six-factor *Zheng* test and has explicitly held the *Bonnette* test is too narrow. The Fourth Circuit (Virginia, Carolinas, Maryland) established its own six-factor *Salinas* test in 2017, focused on the relationship between the two companies rather than just the company and the worker. The result: the same factual arrangement can produce different outcomes depending on where you are sued.

> Important: There is currently no operative federal DOL regulation on FLSA joint employer status. The Trump administration's 2020 rule was partially vacated by a federal court and then fully rescinded by the Biden DOL in 2021. The Biden administration proposed no replacement. Courts are back to their pre-regulation circuit-specific tests.

The NLRA Joint Employer Standard: The Political Pendulum

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Nowhere has the legal volatility been more visible than under the National Labor Relations Act. The NLRB joint employer standard has swung dramatically with each administration, creating a planning environment where what is safe today may not be safe a few years from now.

Year / Action	Standard	Key Implication
Pre-2015 (common law)	Direct and immediate control, actually exercised	Narrower; typical staffing structures largely protected
2015: Browning-Ferris (NLRB)	Indirect control and reserved authority sufficient	Massive expansion; contractual rights became risk factors
2017: Hy-Brand (NLRB)	Reverted to direct/immediate control	Vacated 2018 on ethics grounds; BFI standard restored
2020: Trump NLRB rule	"Substantial direct and immediate control" actually exercised; codified at 29 C.F.R. § 103.40	Employer-friendly; cost-plus contracts explicitly protected
2023: Biden NLRB rule	Reserved and indirect control sufficient; seven essential-term categories	Returned to BFI-era expansion
March 2024: Federal court vacatur	2023 rule vacated (Chamber of Commerce v. NLRB, E.D. Tex.)	2020 rule restored
February 2026: NLRB formal action	2023 rule formally withdrawn; 2020 rule reinstated at 29 C.F.R. § 103.40	Current operative federal NLRA standard

> The current operative NLRA standard (as of early 2026): An entity is a joint employer only if it possesses AND actually exercises substantial direct and immediate control over one or more essential terms of employment. Reserved authority and indirect control are relevant but alone insufficient. This standard will likely change again with future administrations.

One important caveat: in February 2026, the NLRB reaffirmed its original 2015 joint employer finding in the *Browning-Ferris* case itself, expressly noting the finding applied solely as "law of the case" with "no application" beyond the 2020 rule's effective date. The underlying *Browning-Ferris* analysis remains influential in academic and advocacy circles, and the SEIU has a pending D.C. Circuit challenge to the 2020 rule itself.

3. State Law: The Picture Is Getting Broader

While the federal pendulum swings, state legislatures and courts have been moving consistently in one direction: more liability, more coverage, more worker protections. Businesses operating in multiple states cannot rely on federal employer-friendly standards to insulate them from state-level exposure.

California: The Broadest Approach

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California's joint employer standard under *Martinez v. Combs* (2010) defines "employ" three independent ways. An entity employs someone if it: (1) exercises control over wages, hours, or working conditions directly or indirectly; (2) suffers or permits the person to work; or (3) engages the person in a common-law employment relationship. Meeting any one of the three is sufficient.

AB 1897 (now Labor Code § 2810.3), in effect since 2015, goes further. It creates automatic shared civil liability between client employers and staffing agencies for unpaid wages and workers' compensation regardless of whether the client knew the staffing agency was violating the law. Contractual waivers are void, though indemnification clauses are still permitted.

In *Medina v. Equilon Enterprises* (2021), the California Court of Appeal held that indirect control through an intermediary is sufficient reversing a grant of summary judgment for Shell Oil, whose extensive operational requirements over a gas station operator created triable joint employer issues even without direct control over individual workers.

New Jersey: Joint and Several Liability for Temporary Workers

New Jersey's Temporary Workers' Bill of Rights (effective August 2023) mandates equal pay and benefits for temporary workers in designated classifications, imposes joint and several liability on both the staffing agency and the client, and requires a minimum four-hour pay guarantee per shift. The Third Circuit upheld its constitutionality in July 2024. A companion statute enacted in 2020 (A5840) makes employers and staffing agencies jointly and severally liable for state wage and tax law violations, with individual liability extending to owners, directors, and managers.

Illinois: Assignment Duration and Equal Pay

Illinois's Day and Temporary Labor Services Act (amended August 2023) requires that after 720 hours of service for the same client in a 12-month period, temporary workers must receive equal pay and equivalent benefits to the lowest-paid directly hired comparable employee. Both the agency and the client share compliance responsibility, with penalties up to $18,000 per violation. An equal-benefits provision was briefly enjoined on ERISA preemption grounds in 2024 but was allowed to proceed following statutory amendment.

Massachusetts: Treble Damages

Massachusetts applies the FLSA four-factor economic reality test for joint employer analysis (per *Jinks v. Credico*, 2021), but the consequences of a finding are uniquely severe. Massachusetts law mandates treble damages for wage violations triple unpaid wages plus attorneys' fees, with no good-faith defense available. A co-employment finding in Massachusetts creates among the highest dollar exposure of any state.

4. Where It Went Wrong: Real Cases, Real Costs

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Understanding the risk in the abstract is one thing. Seeing what it looks like in practice is another. The following cases illustrate how co-employment liability materializes in practice, what triggered it, and what it cost.

Vizcaino v. Microsoft Corporation

9th Circuit (1997) | Settlement: $97 Million

Microsoft supplemented its workforce with thousands of workers classified as independent contractors or placed through staffing agencies. These "permatemps" sat alongside regular employees, used Microsoft equipment, reported to Microsoft managers, and worked on-site for years. When Microsoft's employee stock purchase plan paid out, those workers sued for inclusion in the plan. The Ninth Circuit found they were common-law employees of Microsoft regardless of their formal classification. Microsoft settled for approximately $97 million.

Interposing a staffing agency does not neutralize co-employment risk when the client retains functional control. Duration of the assignment, integration into operations, and use of client facilities and supervision all pointed toward employment not independent contracting.

Lucas v. Vee-Pak / Personnel Staffing Group / Alternative Staffing

N.D. Illinois | Settlement: $11.1 Million (Final Approval April 2024)

Over 12 years of litigation, this case established that a client company's direction to staffing agencies to discriminate against Black applicants creates joint liability under Title VII even though the client never directly hired anyone. Vee-Pak directed the staffing agencies to provide racially homogenous workers. The staffing agencies carried out those instructions. Both were named as joint employers and both bore liability.

Clients cannot insulate themselves from discrimination claims by outsourcing hiring decisions to a staffing agency while directing the discriminatory outcome. Joint employer = joint defendant.

EEOC v. Global Horizons, Inc.

9th Circuit (2019) | Total Recovery: $16.7 Million (multiple judgments and settlements)

Global Horizons recruited Thai farmworkers under H-2A visas and supplied them to agricultural clients in Hawaii and Washington State. Workers were subjected to trafficking-like conditions: passport confiscation, substandard housing, and wage theft. Farm clients were found jointly liable under Title VII because H-2A regulations imposed employer obligations as a matter of law, the clients had contractual authority to enforce standards, and they knew or had reason to know about the conditions.

When you use a labor contractor for a legally regulated workforce category, regulatory employer obligations do not disappear just because you use an intermediary. Knowledge (or willful ignorance) of the conditions on your site creates exposure.

EEOC Administrative Case: Federal Agency Joint Employer Finding (2023)

EEOC Appeal No. 2021004320 (Feb. 2023) | Significant administrative finding

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A government contractor's employee had been assigned to the same federal agency through five different staffing firms over 17 years. She worked on-site at the agency, used agency equipment, received assignments from agency employees, and had her performance monitored by agency supervisors. The EEOC found the federal agency was a joint employer.

Extreme duration, full operational integration, and direct supervisory control create co-employment status even across multiple successive staffing arrangements. The 17-year tenure was not incidental, it was central to the finding.

5. Where It Went Right: What Protection Actually Looks Like

The cases above make the stakes clear. But courts have also affirmed that well-structured arrangements can succeed. The following illustrate what protection looks like in practice.

Felder v. United States Tennis Association

2nd Circuit (2022) | Joint employer claim dismissed

A security guard hired by AJ Security and assigned to work the U.S. Open sued the USTA as a joint employer under Title VII. The Second Circuit applying the joint employer standard to Title VII for the first time in a published opinion affirmed dismissal. The complaint was "devoid of any allegations" that the USTA controlled hiring, firing, training, promotion, discipline, supervision, or handled the guard's records, insurance, or payroll. The USTA issued access credentials and directed where to stand. That was the full extent of its control.

What protected the USTA: The security company alone hired, paid, and supervised. USTA's role was purely operational direction within a defined scope the "what" (patrol this perimeter) without the "how" (discipline, schedule, evaluate).

Chamber of Commerce v. NLRB (2024): The Regulatory Road Map

E.D. Texas (2024) | 2023 NLRB rule vacated

While primarily a regulatory challenge, the court's reasoning provides a road map for what does not create joint employer status under the NLRA. The court credited: standard contractor relationships; franchise parameters; routine commercial contract terms; cost-plus contracts (even with maximum reimbursable wage rates); operational standards that indirectly affect employment; and reserved contractual rights that are never exercised.

What the court found insufficient: Mere contractual authority to control, without actual exercise; indirect influence on working conditions through commercial pricing; and brand or quality standards common to any franchisor or service contract.

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What Compliant Arrangements Have in Common

Across the cases where joint employer claims failed or were successfully managed in favor of the client, the facts on the ground shared a consistent pattern. These are not aspirational best practices; they are the specific operational features that courts credited when dismissing or limiting co-employment liability:

- The staffing agency or EOR made all personnel decisions independently: hiring, firing, discipline, and compensation.
- The client directed work at the project or task level (what to accomplish) and not the employment relationship as a whole.
- Contracts clearly allocated responsibilities, and actual operations matched what the contracts said.
- Benefit plans explicitly defined and excluded contingent workers, preventing the *Vizcaino* pattern.
- Workers were not integrated into the client's brand identity. They wore the agency's badge, not the client's.
- Assignment durations were monitored and managed, reducing the "functional permanence" argument.

The inverse is also true: where these features were absent or eroded over time, that is where liability materialized.

6. EOR and MSP Arrangements: Same Risk, Different Structure

The legal frameworks above apply to all contingent workforce arrangements, but EOR and MSP structures present the risk differently.

Employer of Record (EOR)

In an EOR arrangement, co-employment is the design, not the risk. The EOR is the statutory employer: it pays wages, withholds taxes, provides workers' compensation coverage, and handles the employment infrastructure. The client directs the day-to-day work and supervision. Both parties know they share employment responsibilities, and a well-drafted EOR agreement allocates those responsibilities clearly.

The risk in EOR is not the existence of shared employment; it is the failure to maintain appropriate boundaries. Clients who begin making independent compensation decisions for specific workers, conducting direct performance evaluations without EOR involvement, or making termination decisions unilaterally are eroding the structural separation that the arrangement depends on.

GET THE FULL EOR GUIDE HERE

Managed Service Provider (MSP)

In an MSP arrangement, the program manager is not designed to be the employer- the staffing suppliers in the program are. The MSP's role is program management: vendor governance, compliance oversight,

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invoicing consolidation, and reporting. The employment relationship runs between the supplier and the worker.

- The risk in MSP is what practitioners call "control creep," the gradual accumulation of behaviors that, individually, seem harmless but collectively add up to a joint employer relationship. The following are the most common warning signs:

- Client managers begin providing direct task-level instructions beyond project objectives.
- Workers are integrated into client systems: HRIS, SSO, email, badges, all-hands meetings.
- Client conducts performance reviews of contingent workers without supplier involvement.
- Client managers make or effectively dictate termination decisions for contingent workers.
- Workers consistently identify themselves as "working for" the client rather than the supplier.
- Assignment durations extend without reassessment of the "permatemp" pattern from *Vizcaino*.

- None of these behaviors is automatically dispositive. But courts look at the totality of the relationship. A cluster of these behaviors, especially over a long period, is precisely the fact pattern that has produced the largest co-employment findings in the case law.

What a Well-Structured MSP Does About It

- A well-run MSP program does not simply pass these risks to the client and move on. Proactive MSP management includes built-in mechanisms to detect and interrupt control creep before it accumulates into legal exposure. In practice, this means establishing clear escalation protocols so client managers know how to raise performance concerns through the supplier rather than directly; conducting periodic compliance audits that compare actual manager behavior against contractual role boundaries; monitoring assignment tenure and flagging workers approaching thresholds that courts have associated with functional permanence; and maintaining supplier scorecards that include compliance metrics, not just cost and fill rate.

7 SIGNS IT'S TIME TO REPLACE YOUR WORKFORCE PARTNER

- The goal is not to make the client a passive observer of its own workforce. It is to preserve the structural separation that keeps the arrangement defensible, while still giving the client the operational visibility and quality control it needs.

[For a detailed overview of MSP program practices and compliance frameworks, READ HERE.]

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7. The Pay Rate Question: What Courts Actually Say

One of the most common questions in contingent workforce management is whether a client's involvement in setting pay rates creates co-employment exposure. The legal answer is nuanced and depends on which statute is at issue but a practical risk hierarchy is clear.

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What the Reinstated NLRB Rule Says

The current NLRB rule (2020, reinstated February 2026) provides the most specific guidance. Under its factor analysis, an entity must actually determine wage rates for individual employees or job classifications to trigger the compensation-control factor. The rule explicitly states: "Cost-plus contracts, even those with a maximum reimbursable wage rate, do not establish direct control sufficient to establish joint employer status."

This is a meaningful safe harbor: a client who negotiates a commercial bill rate with the EOR or staffing agency, even one that implicitly caps worker pay, is not automatically a joint employer on that basis alone.

Client Action	Risk Level	Why
Negotiates a bill rate with the agency (lump sum for services)	Low	Standard arm's-length commercial pricing; explicitly protected by 2020 NLRB rule
Sets a maximum reimbursable wage rate in a cost-plus contract	Low-Moderate	Explicitly protected under 2020 rule, but courts may weigh alongside other factors
Approves pay bands or ranges for job classifications	Moderate	Approaches "determining rates for job classifications" grey area requiring careful structuring
Directs specific pay rates for specific individual workers	High	Strong joint employer indicator under all tests, NLRA and FLSA

Under the FLSA economic reality test, pay rate control is one factor among many and is rarely determinative on its own. Courts look at the totality: supervision, permanence, integration, and economic dependence all factor in. But the combination of pay control and other indicia of control adds up quickly.

The vacated 2023 NLRB rule would have treated indirect compensation control such as a client setting bill rates that effectively capped worker pay as sufficient for joint employer status. That rule is no longer operative, but it illustrates where a future administration could take the standard.

8. What Good Looks Like: Structuring for Protection

No contractual structure eliminates co-employment risk entirely courts apply substance-over-form analysis, and operational conduct ultimately determines the outcome. But the following practices have been validated by courts, regulatory guidance, and enforcement history as meaningful risk mitigation.

In Your Contracts

- Delineate authority clearly: specify in writing who makes payroll decisions, who has hiring and termination authority, who handles discipline, and who is responsible for compliance under each applicable law.

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- Expressly preserve EOR/staffing agency authority over individual pay determination. The client negotiates the bill rate; the agency independently sets the worker's wage.
- Exclude contingent workers from client benefit plans explicitly. Post-Vizcaino, plan documents must define and exclude contingent workers by name or category.
- Include indemnification provisions allocating risk for specific compliance failures to the responsible party. California Labor Code § 2810.3 expressly permits these provisions even under its joint-liability scheme.
- Ensure settlement and release agreements in related litigation name all joint employer entities as released parties. Failure to do so can result in successive exposure (see *Grande v. Eisenhower Medical Center*, Cal. Supreme Court).

In Your Operations

- **Route personnel concerns through the agency and keep the agency informed when direct involvement is operationally necessary.** The cleaner the channel, where the client raises the concern with the agency and the agency addresses it with the worker, the cleaner the legal picture. In practice, client managers will sometimes interact directly with contingent workers about performance or conduct. That is the reality of how projects run. When it happens, the agency should be made aware promptly and given the opportunity to manage the outcome. What courts have found most problematic is not that clients provided feedback; it is that clients made or dictated the final personnel decision without agency involvement at all.
- Train client-side managers. The gap between what the contract says and what a manager does in the field is where liability is created. Supervisors need to understand the difference between directing the project outcome and supervising employment.
- Audit regularly. Conduct periodic reviews comparing operational conduct to contractual terms. If managers are behaving as supervisors in ways the contract reserves to the agency, correct it.
- Monitor assignment duration. Long-tenure assignments create the "functional permanence" argument that courts have credited. Build in rotation or reassessment processes for assignments exceeding 12-18 months.
- Avoid brand integration of contingent workers: separate badge systems, separate email domains where practical, clear identification of agency vs. client employees in internal directories.

A Note on the Critical Caveat

> Contracts matter, but conduct matters more. The employers who have fared best in co-employment litigation are the ones whose operational discipline matched their contractual structure. The employers who have fared worst are the ones who had good contracts and ignored them.

9. What to Watch: The Unsettled Questions

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The legal landscape is not static. Several developments in 2025-2026 create near-term uncertainty that employers and their partners should monitor.

Read about Upcoming Employment Law Changes in 2026

The NLRB Standard Will Change Again

Every administration since 2015 has changed the NLRB joint employer standard. The 2020 rule currently in force is employer-friendly, but future administrations can and based on history, will change it. Compliance programs built only for the current federal standard will need adjustment.

No Operative FLSA Regulation Exists

The absence of a federal FLSA joint employer regulation means courts continue to apply varying circuit-specific tests. Companies operating in multiple circuits face different risk profiles in different jurisdictions. The Trump administration's regulatory agenda includes proposed FLSA joint employer rulemaking, but nothing has been published.

State Expansion Is the Dominant Trend

Regardless of the federal direction, California, New Jersey, Illinois, Massachusetts, and New York are moving toward broader liability. For multi-state employers, the floor of risk is not determined by the current federal standard it is determined by the most expansive state law applicable to your workforce.

Loper Bright and Agency Deference

The Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo* overturned *Chevron* deference. Going forward, courts owe no special deference to DOL or NLRB interpretations of their own statutes. This increases the relative weight of judicial precedent and potentially opens space for courts to apply their own judgment about what joint employer standards should be independent of whatever regulation is currently in effect.

Closing Thoughts

Co-employment is not a problem to be solved. It is a reality to be managed. The employers who get into serious trouble are not, as a rule, the ones who understood the co-employment relationship and structured it carefully. They are the ones who ignored it or who had good contracts and allowed the actual working relationship to drift away from those terms.

The legal environment is genuinely unsettled at the federal level and actively expanding at the state level. A compliance posture built only for the current moment will not be adequate for the next administration's rule, the next circuit court decision, or the next state expansion.

What provides durable protection is not any particular contractual clause or regulatory safe harbor. It is the operational discipline to ensure that what happens on the ground matches what the contract says, understood by the managers who are closest to the workers every day.

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> When the arrangement looks like employment (same tools, same supervisors, same space, same duration, same integration) courts tend to find employment. When it looks like a genuine service relationship (separate authority, separate decisions, separate identity) courts tend to respect that too. The documents follow the conduct. They do not lead it.

DISCLAIMER

This white paper is for general informational purposes only and does not constitute legal advice. The law governing co-employment and joint employer status changes frequently and varies by jurisdiction. Employers should consult qualified legal counsel for advice specific to their circumstances.

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