



## MEMORANDUM

<b>To:</b>	
<b>From:</b>	Fisher Phillips LLP
<b>Date:</b>	March 30, 2020
<b>Subject:</b>	The Integrated Employer Test and How to Apply When Determining Employee Headcount Under the FFCRA

The Family First Coronavirus Response Act (FFCRA) provides for paid leave in the form of EFMLA (paid FMLA) and EPSLA (paid sick leave). EFMLA and EPSLA define a covered employer as an employer “who employs less than 500 employees.” The DOL has provided guidance on how to determine if a business is under the 500 employee threshold. FFCRA: Questions and Answers No.2. It explains that a corporation (including separate establishments or divisions) should be considered a single employer and all employees should be counted towards the 500 employee threshold. However, when a corporation has an ownership interest in another corporation, the two corporations are considered separate employers, unless they meet the “integrated employer test” under the FMLA. *Id.* The relevant regulation for the integrated employer test is 29 C.F. R. Section 825.104. According to this regulation, “Where this [integrated employer] test is met, the employees of all of the corporations or entities making up the integrated employer will be counted in determining employer coverage and employee eligibility.” It then lists the following factors which courts will use to determine whether an integrated entity exists,

1. Common management
2. Interrelation between operations
3. Centralized control of labor relations
4. Degree of common ownership/financial control

29 C.F.R. § 825.104(c)(2)(i)-(iv). The ultimate determination of whether different entities are an integrated employer is based on the totality of the relationship between the entities as opposed to any single factor. 29 C.F.R. § 825.104(c)(2). There does not need to be evidence supporting each factor. Some courts generally give the most weight to the first three criteria, with centralized control of labor relations being the most crucial, and others weigh the factors equally. We can provide more information on how the specific Circuit(s) in which your businesses are located, apply this test if requested.

### **Information Needed to Analyze the Factors**

Set forth below is the information various courts have considered under FMLA, ADA, Title VII, NLRA and the common law for evaluating whether related business entities' employee count should be aggregated to determine coverage under the FMLA/FLSA, which would therefore be applicable to the EFMLA/EPSLA. Accordingly, you should consider the questions listed below under each of the 4 factors in order to determine the likelihood that the business entities in question will be considered an integrated employer. As you will see, some of the same information is considered under more than one factor.

## 1. Common management

- a. Which entity will be making the decision to either grant or deny the EFMLA/EPSLA Leave?
- b. Do the entities have separate management? Separate day-to-day control of the different companies is a factor but is not alone determinative in avoiding single employer status.
- c. Does one entity have control of operational matters at a policy level over the other entity? The overall control of operational matters at a policy level is the key factor with separate management control between the different business entities.
- d. Regarding corporate structure – do the companies have:
  - i. Common directors?
  - ii. Common officers?
  - iii. Any officers of one company who also are employees of the other company?
  - iv. Does the officer of one company (e.g., the parent company) have the authority to fire officers of the other company (e.g., the subsidiary company)?
  - v. Is there common leadership/one executive team that has the final say on personnel/employment related decisions
- e. Does one entity rely on another entity's policies when making employment decisions?
- f. Does one entity set the rates for the provision of services (e.g. sale of goods, etc.) provided/sold by both entities?
- g. Does the management team at one entity have final authority over matters to include:
  - i. Purchases
  - ii. Borrowing/establishing lines of credit
  - iii. Job quotes
  - iv. Entering into contracts with customers
  - v. Entering into leases
  - vi. Entering into contracts with vendors/suppliers
- h. Do the entities
  - i. Operate at separate locations?
  - ii. File separate tax returns?
  - iii. File separate quarterly employee taxes?

- iv. Hold separate shareholder and board meetings?
- v. Enter into separate lease agreements?
- vi. Transfer or share employees among the entities?
- vii. Did the different companies' managers/supervisors come from the others'?
- viii. Are any managers/supervisors employed by both companies or transferred between the companies?
- ix. Are the day-to-day management operations of each entity separate?
- x. Do any of the managers of one entity have the authority to review/countermand orders of the other entity's managers?
- xi. Are separate supervisory meetings held for each entity?

## **2. Interrelation between operations**

- a. Is the relationship between the entities reciprocal?
- b. Are the companies separate legal entities? Separate officers and separate directors? Do the related entities have common ownership?
- c. Are there common board members, common executives, common management?
- d. Does the parent wholly own the related entity? If not, who are the other owners?
- e. Do the entities operate at separate locations?
- f. Where are corporate records kept?
- g. Are employees interchanged between the entities? Separate seniority lists?
- h. Are sales, marketing, purchasing, advertising or other administrative services centralized? If some separation by entity due to the nature of the business, do the separate groups ultimately report to one department head (e.g. different companies have separate sales teams but ultimately report to one executive)?
- i. Is there centralized control of purchasing (no consequence in 4th Circuit)?
- j. Do the entities have separate bank accounts?
- k. Do the entities file separate tax returns? Different tax identification numbers?
- l. Does one entity pay the bills of another entity? Separate billing/ invoicing processes?
- m. Do the entities have separate corporate credit cards?
- n. Do the entities share internal accounting personnel?
- o. Do the entities have separate vendor accounts and separately procure supplies and services? If not, is there a chargeback from the parent entity for purchasing supplies for the subsidiaries?
- p. Do the entities advertise separately or together? Websites, print ads, etc.
- q. Is the IT separate or maintained by one entity?
  - i. Is the system integrated?
  - ii. If IT is consolidated in one entity, is there a charge to related entities for this service?

- iii. Is the cost of the supplies charged back to the related entities?
- r. Is there one entity that provides HR and legal advice?
  - i. If so, is there a charge to the related entity for those services?
  - ii. Is there a written shared services agreement? Many courts will reject integrated employer status if the interrelationship is based on shared administrative services alone.
  - iii. Do the related entities need HR or legal clearance to hire or terminate employees?
- s. Does any entity provide capital, loans or guarantees to the other entity?
- t. Does the related entity/parent corporation hire, fire, supervise employees in the related entities?
- u. Are employees transferred/shared among entities?
- v. Is there one workers' compensation policy for all the related entities? If so, is the cost of the policy premium distributed among the subsidiaries/related entities?
- w. Do the entities have separate benefit plans?
- x. Do the entities have separate insurance plans? If so, is the cost of the plan distributed among the subsidiaries/related entities?

### **3. Centralized control of labor relations**

- a. Does each entity have independent control over its own labor relations policies and dealing with its employees at both the policy making and day to day operational level?
- b. Do the entities share accounting or HR functions? If so, is there an administrative (or shared) services agreement?
- c. Is there one benefits plan for all employees? If so, can one company reject that plan and obtain its own?
- d. Do the companies have different personnel policies formulated by different managers? Does each company maintain its own separate handbook outlining separate and different policies?
- e. Does each company have its own company name on the handbook?
- f. Is there a website for employees of all the companies to go to find information?
- g. Is there a separate process for and decision makers at each company for wage increases? Are there separate wage scales?
- h. Are paychecks paid by one entity for the entire group of employees?
- i. Are benefits packages/election forms/policies on one entity's letterhead?
- j. Are hire/termination or employee performance issues handled across entities? Are there different processes at each company hiring, terminating and evaluating employees? Separate job posting system? Separate applications, interviewer and hiring decision maker for each company?
- k. Do the entities share personnel files?
- l. Are employees encouraged to report complaints of harassment or discriminatory conduct to leadership of another entity?

- m. Is there one workers compensation policy for all entities?
- n. Are contract negotiations and dealing with any union handled only by management of each company or is control exerted by management for another company?

If the parent or holding or management company ran a list of employees using its FEIN number would employees from the other entities show up on that list?

#### **4. Degree of common ownership/financial control**

- a. Is one business entity owned in its entirety by another? Must be some common ownership or financial control to find single employer status; however, common ownership alone is insufficient to find single employer status.
- b. Does one entity receive revenues from another's transactions.
- c. Do the business entities have their own working capital? Are any of them substantially dependent on financial resources of the other company.

#### **Application**

Again, no "bright line" factor or factors are determinative under the integrated employer test. All criteria are evaluated on a case by case basis (but common control of labor relations is considered by many courts to be the most important factor). Once you answer the above questions, we recommend a follow up discussion. If you create a document for our firm to review, you should mark it "Attorney Client Privileged and Confidential." Also, forward any organizational chart related to the business entities in question. After reviewing and considering this information, the senior management team will need to make a call as to whether the majority of answers point towards single employer status or not. If it is a close call, we can provide more guidance by reviewing the court's analysis in the specific Circuits.

#### **Communication**

If you determine that the employees of several business entities should be counted together, resulting in a headcount of 500 or more, it would not be appropriate for the "single employer" to provide EPSLA or EFMLA. If employees in the separate companies (or their unions) protest this interpretation of the statute, explain that the DOL has provided guidance requiring corporations with ownership interests in other corporations to apply a legal test (if communicating directly to employees) or the integrated employer test (if communicating to a union) to determine if the headcount of related companies (which you should list) should be combined. Then explain that your analysis of the factors provided by the guidance and the courts overwhelmingly indicates that the headcounts of your different business entities should be combined, and the headcount is well over 500. As a result, the company is not able to provide the leave as provided for by the FFCRA. If talking to the union, explain that the company cannot get the tax credit. If the union disagrees, reference the DOL guidance and invite the union to explain the basis for its position. Bear in mind that the union may make information requests that will require the company to respond.