JOINT EMPLOYMENT: AVOIDING CONTRACTUAL MISSTEPS IN A WORLD OF WINE AND WORKERS

A Legal Resource Provided by Davis Wright Tremaine

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2019

Davis Wright Tremaine LLP is a full service law firm providing services to the wine industry in the areas of mergers and acquisitions and other business transactions, land use and real estate, alcohol regulatory and licensing, intellectual property, employment, and litigation.

AVOIDING CONTRACTUAL MISSTEPS: WINE AND WORKERS IN A JOINT EMPLOYMENT WORLD

"Joint employment"—that situation where two or more companies "employ" a worker for the same job at the same time—rocketed to the top of hot employment issues in 2016 with expansive new rules. More recently, some of those broad interpretations were withdrawn under the Trump administration, reverting to "the old standards." But joint employment remains alive and well under those old standards, and is a critical issue in the wine industry. Agricultural workplaces like vineyards, and situations where laborers handle equipment on someone's premises, are particularly expected to draw increased scrutiny from government agencies.

Jointly employed workers come through a variety of staffing models, including farm labor contractors, staffing agencies, vineyard management companies, and leased worker and temporary worker providers. In other cases, joint employees are borrowed from a neighboring vineyard or work for two separate but related business entities during the same workweek. The question: Who is the employer? The answer: sometimes, both companies.

Three big takeaways for vineyards and wineries using contracted labor: (1) a government agency, court, or plaintiff's attorney may believe you are a "joint employer" even if you do not agree; (2) whether you are legally considered a joint employer depends on many factors, including conduct in the field and the parties' overall relationship; and (3) taking steps to contractually limit exposure to liability is crucial given the increasing likelihood of a joint employment finding.

1. KNOW THE RISKS.

Being an employer carries responsibilities. Laws governing wage and hour law, disability accommodations, harassment, retaliation, and other employment issues fall squarely on employers' shoulders. If "temp workers" are deemed the client company's employees, that company's size may swell large enough to become potentially subject to medical-leave laws (e.g., FMLA, OFLA), to trigger overtime pay obligations by both companies, and to other legal requirements.

> *Example: Winery A and Winery B are separate legal entities but share the same owners and overlap many functions and employees. Worker who is not exempt from overtime works 25 hours at Winery A and his manager then schedules him to work 20 hours at Winery B in the same workweek.*
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> *Risk: The entities may be deemed joint employers and jointly liable for unpaid overtime wages based on 45 hours worked in a week.*
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> *Example: Vineyard employs five individuals, but also brings on seasonal labor through a labor supplier.*
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> *Risk: Vineyard may need to provide reasonable accommodations for disabilities if deemed a joint employer with the labor supplier and therefore an employer of six or more persons under Oregon law.*

An owner or business caught unaware of the likelihood that it is actually a joint employer may realize too late that the labor supplier did not timely pay wages, did not properly address harassment allegations, or inappropriately handled other issues that have now become the client company's liability.

2. REDUCE THE RISKS.

Different laws look at different "tests" to decide if joint employment exists. But all tests depend on the specific facts of the workplace and the arrangement between companies and workers. The factual realities include questions like who directs and controls the work; who has hiring, supervising, and firing authority; the details of the relationships involved; and multiple other factors. A contract stating "*Grower is not a joint employer*" is not sufficient to avoid a legal determination of joint employment

if the facts show otherwise. Instead, a poorly worded agreement or rash decision in the field may unnecessarily tip the scales toward joint employment.

Whatever the goals the contract may help protect business interests and accurately describe how the relationship will actually work. Some items to consider in contractual provisions include:

- Indemnification, hold harmless, cost of defense, limitations on liability, and risk allocation
- Descriptions of workers
- Relationship and control of the companies
- Policies, training and safety
- Discrimination, harassment and retaliation
- Compliance with laws
- Communication
- Insurance
- Farm Labor Contractor (FLC) requirements

The agricultural and production industries should expect particular government scrutiny of joint employment and can take steps now to assess and mitigate risks.

If you have questions about joint employment, please contact Christie Totten (phone: 503.778.5298 or christietotten@dwt.com) or Jenna Mooney (phone: 503.778.5305 or jennamooney@dwt.com) at Davis Wright Tremaine.

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