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Common or Associated Employer Determination: What does this mean for you?

Businesses engaged in a single undertaking may, in the interest of minimizing their legal risk or tax planning, conduct their business using separate legal entities. For example, a business may hold its assets in one corporate entity but hire and pay employees using a separate corporate entity that does not hold any assets or has only very limited assets. Rarely, if ever, will the employee have any say in how the business organizes itself or what corporate entity it will hold its assets in. While this may leave the employee vulnerable if she is employed by the corporate entity that does not hold assets if she needs to pursue the latter for outstanding wages or termination pay, common law and employment standards statute offer some protection to the employee in such case.

At common law, the common employer doctrine allows the court to treat separate legal entities, in appropriate cases, as a single employer for the purposes of attaching liability for such things as outstanding wages or termination or severance pay. In *Sinclair v. Dover*[1], *the BC Supreme Court* delineated the following justification for common employer determination:

> As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings and interlocking directorships. The essence of that relationship will be the element of common control.

In British Columbia, the common employer doctrine has been codified in section 95 of the *Employment Standards Act* ("*ESA*"):

> **Associated employers**
>
> **95** If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

[1] *1987 CanLii 2692*,

> (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and
>
> (b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

The legislative objective underlying section 95 is the same as the justification of the common employer doctrine at common law; namely, to protect the employees and ensure their "wage claims are not defeated by niceties of legal form".

In a recent decision, the Employment Standards Tribunal, after comprehensively reviewing both court and Tribunal decisions, delineated the following, non-exclusive criteria or considerations when determining if two or more entities are common or associated employers under section 95 of the ESA:

- There must be at least two separate entities that are being "associated";
- The nominal employer is not particularly relevant and there is no need that a formal contract of employment subsist as between the employee and the entities that are being "associated";
- The entities must be jointly carrying out some business, trade or other activity although the business, trade or activity in question need not necessarily be the only one that each entity is carrying on;
- "common control or direction" may be determined based on financial contributions from one entity to another (although this factor, standing alone, is not determinative); the fact that one entity is economically dependent on another entity, interlocking shareholdings and directorships; common management principals (e.g., corporate officers and other key employees): sharing of resources (including human resources) among the various entities; asset transfers at non-market transfer prices; operational control by one entity over the affairs of another entity; joint ownership of key assets and operational integration.[2]

If you are or contemplating to operate a business through two or more separate legal entities, particularly with a view to curtailing or minimizing the exposure of one or another of your legal entities from legal liability, it is important that you understand what will constitute indicia of associated or common employer so that you do not inadvertently expose yourself to a common or associated employer determination under the *ESA* or at common law. Conversely, if you are an employee of an impecunious company and owed wages or termination pay that you cannot collect from the company, you may want to investigate if there is any basis at law to properly associate the company with another

[2] *Re: 0708964 B.C. Ltd., BC EST #D015/11*

related company with a view to obtaining a common employer or associated employer determination to successfully collect on your claim. You may also want to consider lodging a claim under section 96 of the *ESA,* which makes directors, and officers of a corporate employer personally liable for up to two months unpaid wages. Section 96 is the subject of a separate article in our Business Blog.

Shafik Bhalloo has been a partner of Kornfeld Mackoff Silber LLP since 2000. His practice is focused on labour and employment law, and on commercial and civil litigation. He is also an Adjudicator on the Employment Standards Tribunal and an Adjunct Professor in the Faculty of Business Administration at Simon Fraser University.

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