Are You Liable for Your Subsidiaries' Wage Obligations?

Many companies have complex corporate structures in which related organizations or individuals share ownership and control of business operations. Although it's a legitimate way to facilitate corporate control and limit liability, these structures can also be abused to as shell games to cheat employees out of their wages. That's why most jurisdictions include "single employer" (aka, "common employer") rules in their employment standards laws.

WHAT THE LAW SAYS

Employment standards laws require employers to provide employees a minimum level of wages, notice, vacation and other benefits. The device of imposing payment obligations on "employers" opens a loophole. Companies can evade their obligations by shifting their assets to a separate but related company. Since the latter company isn't their "employer," employees of the original company have no recourse against it.

The "single employer" rule closes the loophole and lets employees to seek the wages they're owed from the related company. Essentially, the original employer and its related entities are treated as one "employer" for purposes of ESA liability regardless of the company's actual legal structure. This potentially allows employees to collect their wages from:

- Separate companies that are related to their employer via common ownership or control;
- Successor companies that take over for the employer after insolvency, merger or acquisition; and/or
- Individual directors of the original or related company.

"Single employer" liability for companies and directors is "joint and several." Translation: Employees can collect some or all of the money they're owed from any one or group of defendants. Thus, the defendants with the deepest pockets can be held responsible for the lion's share or even all of the debt, regardless of blame.

Forms of the Single Employer Rule

The fact that separate companies may be considered liable for each other's payroll debts doesn't automatically mean they are. Conditions must be met for "single employer" liability to be imposed:

The 9 ESA Jurisdictions: Nine jurisdictions specifically include "single" or "common employer" requirements in their employment standards laws—Fed, AB, BC, MB, NS, NL, NT, NU, ON and YK. Although there are slight differences, the precondition for single employer liability is basically the same: There must be common control or direction. This can be via:

- Ownership by the same shareholder(s);
- Management by the same people; and
- Control financially or operationally as a single entity.

Ontario: In Ontario, for a group of commonly controlled or owned companies to be treated as a single employer there must also be evidence that the intent or the effect of their carrying on business as separate entities is to prevent employees from achieving their rights under the ESA. In other words, single employer status isn't based simply on corporate structure but on management actions.

Example: An electroplating company went bankrupt without paying wages it owed to 100 laid off employees. The employees tried to get the money from the successor company and the corporate group that owned it. But the court ruled that while the companies had common owners, they didn't deliberately or effectively set up or operate the arrangement to evade their wage obligations under the ESA. So the employees couldn't hold either the successor or owner liable as a "single employer." According to the court, the rule isn't "simply a deep pockets provision that requires only a finding of relatedness between a company that can meet its ESA and a company that cannot" [*Abdoulrab v. Ontario (Labour Relations Board),* [2009] O.J. No. 2524].

Example: A family controlled 3 companies in the Ontario auto parts industry. One of them fell on hard times and went bankrupt. This time, the employees won. As in *Abdoulrab*, there were strong financial links among the companies. All 3 were led by the same individual and dealt with the same chartered bank; that bank wouldn't led to the other two companies unless the third entity, which was the most financially solvent guaranteed the loans. There were also unsecured inter-company loans between the firms and the family member in charge of all 3 companies used his knowledge of the financial health of each in making decisions on the repayment of inter-company loans. The Labour Board ruled that the effect of these financial ties had been to frustrate the purpose of the ESA. So the other 2 companies were liable as a single employer for the wages of the bankrupt company [*CAW, Local 136 v. Zettel Metalcraft Ltd.,* 2000 CANLII 13175, ON.L.R.B.].

The 5 Common Law Jurisdictions: The employment standards laws of 5 provinces—SK, QC, NB, PE and NL—don't specifically include a "single employer" requirement. But employees can still rely on a common law "single employer" rule to collect wages from related entities (although not individual officers and directors). Explanation: The origin of this rule isn't just in the ESA or any other piece of legislation but also in common law, i.e., non-statutory law made by judges in deciding individual cases.

The common law version of the "single employer" uses the same basic "common control" rule followed by the ESA provinces (other than ON which requires common control and intent to evade). . In other words, the courts look at the ownership, management, financial or operational factors to determine if common control or direction exists.

Example: A former regional sales manager accused 3 previous employers he worked for of wrongful dismissal and sued for damages. The court held that the common ownership, management and operational integration among the 3 made them in effect a single employer. For example, publicly the 3 companies referred to themselves as a single group, rather than operating in the name of each separate entity [*Vanderpol v. Aspen Trailer Company Ltd.*, 2002 BCSC 518 (CanLII)].

How 'Single Employer' Liability Affects Payroll

"Single employer" liability is something that the lawyers and business principles must consider when setting up their corporate structures. But the rule also has an effect on payroll operations.

1. Calculation of Time Worked under ESA

Many of the rights granted to employees under the ESA are based on how long they've worked, e.g., overall length of service with an employer, days worked before a statutory holiday or hours worked in a week. For example:

- In BC, to qualify for stat holiday pay, they must have been in consecutive employment for at least 30 days before the holiday and worked 15 days in the same 30-day period;
- In Alberta, employees get 3 weeks' paid vacation after 5 years of consecutive service;
- In Ontario, employees terminated without cause get as much as 26 weeks' severance pay if the employer's payroll, calculated on an annualized basis, is $2.5 million or more; and
- In Nova Scotia, female employees get up to 52 weeks' maternity and parental leave after one year's service.

The upshot: If multiple businesses or legal entities are considered a "single employer," you must include time the employee worked for any company in the group in your time worked calculations.

Example: In Ontario, a holding company owns several franchises in different restaurant chains. Each separate restaurant has its own Business Number registration with the CRA as a separate legal entity; but each are controlled by one common shareholder and are considered a "single employer." Janet is a food server who works lunches, 5 hours per day, Monday to Friday, at one restaurant in the group, and then evenings, Tuesday to Saturday, another 5 hours per day, at another restaurant in the group. All of her earnings at any restaurant in the group would have to be counted in determining Janet's pay for a stat holiday.

2. Determining Frequency of Remittances

Frequency of remittances, i.e., monthly, quarterly, twice a month (Threshold 1) and 3 days after each pay (Threshold 2), is determined by the employer’s monthly average remittance amount. For the CRA, this amount is based on remittances for income tax, CPP and EI. For Revenu Québec, the average is based on remittances for provincial income tax, QPP, QPIP and the Health Services Fund. In both cases, this includes any employee or employer portions. This amount is calculated using the remittances from one of 2 years prior to the current tax year. The employer may base its remittance frequency from whichever year is less: either the year immediately prior to the current tax year or the second prior year.

Remittance Frequency Chart

Monthly Average remittance	Frequency
Less than $3,000	Quarterly
Between $3,000 and $15,000	Monthly
Between $15,000 and $50,000	Twice Monthly
$50,000 or greater	3 Days After Each Pay Date

Example: An employer’s source deduction remittances averaged $65,000 per month in 2013 and $43,000 in 2014. For 2015, the employer may choose the twice monthly (Threshold 1) remittance frequency.

Where corporations are related or associated, the averages used to determine this frequency must be based on total remittances across all related employers. Caveat: This only applies to legally incorporated corporations, not to other types of companies such as sole proprietorships, partnerships or other entities such as non-profit societies and co-operatives.