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Who is an employee? Let us count the ways

When employees sue their employer under Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) or the Family Medical Leave Act (FMLA), a preliminary issue arises regarding the number of employees working for an employer.

This question can be crucial because each of these federal statutes sets a threshold number of employees. If this threshold is not met, the statute does not apply to that employer. The question also is significant in the context of compensatory and punitive damage caps under Title VII. The number of employees determines the size of the damage cap.



How to count employees under these statutes as well as the significance of the employee count will be discussed.

Title VII and the ADA both define employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." ADEA uses the same language and so does ADA, except the threshold is 20 employees. FMLA contains nearly identical language, but with a 50-employee minimum.

Title VII's compensatory and punitive damage caps also are based on the number of "employees in each of 20 or more calendar weeks in the current or preceding calendar year." Under Title VII, employers with up to 100 workers may be liable for combined compensatory and punitive damages up to \$50,000. The cap is \$100,000 for employers with 101 to 200 employees, \$200,000 for those with 200 to 500 employees and \$300,000 for more than 500.

In light of the nearly identical definitions, employees are counted in the same manner for each of the federal statutes.

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Who's an employee?

While the question might initially appear straightforward, the inquiry actually is quite nuanced, and the definition of employee in the relevant federal statutes do not provide much guidance. For example, Title VII defines an employee as "an individual employed by an employer." ADEA similarly says "any employer." Case law has provided insight as to whether independent contractors, partners, directors, shareholders and high-level officers are considered employees under those statutes.

As an initial matter, independent contractors are not counted as employees under federal anti-discrimination statutes. The analysis for determining whether a person is considered an employee or an independent contractor will not be addressed here.

In smaller businesses, whether directors, partners or shareholders are counted as employees is not as straightforward. The U.S. Supreme Court recently resolved a split between the circuits regarding this issue. Some circuits relied only on the corporate form to determine if shareholders/owners are *de facto* partners and thus not employees. Other courts looked beyond the formal organizational structure and considered factors relevant to the pertinent relationship and the organization's economic realities. A key factor considered by those courts was the extent to which the shareholder "manages, controls and owns the business." See *Devine v. Stone, Leyton & Gersham*, 100 F.3d 78; *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398; *EEOC v. Dowd & Dowd*, 736 F.2d 1177.

In its April 22 decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*, the Supreme Court considered whether doctors engaged in a medical practice as shareholders and directors of a professional corporation are to be counted as employees for purposes of the ADA. The court found the issue could not be decided by asking if the shareholder/directors were the functional equivalent of a partner. In addition, the person's title, whether shareholder, director or partner, was not determinative. The court held that the common law element of control is the principal guidepost for determining whether a director/shareholder should be counted as an employee.

Six factors from the EEOC Compliance Manual provided a standard for determining the extent of control: (1) "whether the organization can hire or fire the individual or set the rules and regulations of the individual's work"; (2) "whether and, if so, to what extent the organization supervises the individual's work"; (3) "whether the individual reports to someone higher in the organization"; (4) "whether and, if so, to what extent the individual is able to influence the organization"; (5) "whether the parties intended that the individual be an employee, as expressed

in written agreements or contracts”; and (6) “whether the individual shares in the profits, losses, and liabilities of the organization.” If the person exerts control as defined by these factors over her/his employment, that person is not an employee for the purposes of federal anti-discrimination statutes.

Affiliated/parent company

Another question arises when an employer is a parent, subsidiary, associated or affiliated with another company: Are employees of the related company counted with those of the directly employing company in determining whether the threshold number of employees has been met?

In determining whether a parent, subsidiary, associated or affiliated company should be consolidated with the employer, courts apply on a case-by-case basis the “single enterprise” test established by the National Labor Relations Board. The four factors are: (1) the interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. If a majority of these four factors is found, the entities will be considered a single enterprise and employees of both entities will be counted in determining whether the threshold number of employees has been met.

The 3rd U.S. Circuit Court of Appeals in *NLRB v. Browning-Ferris*, 691 F.2d 1117, applied a “joint employer” test in determining whether to consolidate two entities for counting employees. The joint-employer test allows worker of two employers to be combined when both employers exert significant control over employees, as shown by shared control over supervision, payroll and personnel issues. This was the case in *Browning-Ferris* because the company shared with brokers the right to hire and fire drivers, decide compensation, approve drivers and directly controlled the day-to-day supervision of drivers, work hours and the drivers’ Browning-Ferris uniforms.

If a subsidiary is wholly owned and the parent exercises control over its employment decisions, the entities will be considered integrated. Nonetheless, even wholly owned subsidiaries are considered separate for counting employees if the subsidiary makes its own employment decisions. *Hassel v. Harmon Foods*, 455 F.2d 199.

An important issue in determining the number of employees is the treatment of part-time and temporary employees. Workers are considered employees on all workdays they’re on the payroll. In *Walters v. Metropolitan Educ. Enterprises, Inc.*, 19 U.S. 202, the U.S. Supreme Court resolved a split in the federal circuit courts by adopting the “payroll method” for determining when an employment relationship exists. In light of *Walters*, all employees on the payroll are to be counted, including those who work irregular hours or only a few days a month.

Thus, in considering whether a part-time or temporary worker should be counted, the only relevant questions are when the employee was hired and when the employee left. The worker is counted as an employee for each working day between arrival and departure.

Another question is when should the number of employees be counted — at the time of trial, when the complaint is filed or when the alleged discriminatory act occurred? While all the statutes indicate employees are to be counted “in the current or preceding calendar year,” this language alone is not clear. Courts have interpreted “current year” to mean the year the discriminatory act occurred. Thus, the relevant years to be considered are the year in which the alleged discrimination occurred and the preceding year. The phrase calendar year is Jan. 1 to Dec. 31, not any 12-month period selected by the employer. In light of the definition of calendar year, an employer may be subject to the federal statutes even if it did not have the threshold number of employees at the time the discriminatory act was alleged to have occurred.

To understand the significance of the calendar year, consider *Musser v. Mountain View Broadcasting*, 578 F.Supp. 229. At the time the plaintiff was fired on Jan. 5, the defendant did not employ, and at no prior time had employed, 15 or more workers. The plaintiff’s complaint alleged a violation of Title VII. Defendant moved to dismiss, arguing it was not an employer under Title VII.

However, after the plaintiff was fired, the employer expanded its workforce, employing 15 people for at least 20 weeks during that year. As the plaintiff was fired in the same calendar year, the defendant met the 15-employee minimum and was subject to Title VII. If the plaintiff had been fired six days earlier, in December, the defendant’s motion to dismiss would have been successful.

When the alleged discriminatory acts occur in more than one calendar year, courts will look at a number of years in determining whether the threshold requirement has been met. The number of employees in three, four or more different calendar years might be considered where the alleged discriminatory actions occurred over years. As long as the threshold minimum number of employees is satisfied for any one of the years, the federal anti-discrimination statutes apply.

Whether representing plaintiff-employees or defendant-employers, determining the number of workers is a critical step in evaluating an employment discrimination lawsuit. Entire claims can be dismissed or damages caps set based on the number of employees.