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Employment Practices Liability

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Fourth Circuit Creates New Joint Employment Test under the Fair Labor Standards Act

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Executive Summary: The United States Court of Appeals for the Fourth Circuit recently issued a decision which clarifies and expands the circumstances under which entities may be held liable as joint employers under the Fair Labor Standards Act (FLSA). The Court emphasized that the proper focus should be on the relationship between the alleged joint employers and not on an analysis of the economic dependency between the worker and the entities. The Court concluded that "joint employment exists when the facts establish that employment by one employer is not completely disassociated from employment by the other employer." See *Salinas v. J.I. General Contractors* (4th Cir. January 25, 2017).

Background: The joint employment doctrine treats a worker's employment by joint employers as "one employment" to determine compliance with wage and hour laws and holds joint employers jointly and severally liable for any violations of such statutes. Traditionally, courts have analyzed joint employment by focusing on the relationship between the worker and the putative joint employer. Courts have generally utilized various multifactor versions of an "economic realities" or "control" test to determine whether the putative employer is a "joint" employer of the worker. Noting the discord among the circuits and no clear test, the Fourth Circuit created a new test.

In a matter that originated in the U.S. District Court for the District of Maryland, former employees of J.I. General Contractors (a subcontractor) sued J.I. and Commercial Interiors, Inc. (the general contractor they worked for almost exclusively) for violations of the FLSA, claiming they were jointly employed by J.I. and Commercial. Applying a multifactor test that focused on the legitimacy of the contracting relationship between the companies and whether they intended to evade wage and hour laws, the District Court granted summary judgment, holding that Commercial did not jointly employ the workers because Commercial and J.I. entered into a traditionally recognized contractor-subcontractor relationship.

On appeal, the Fourth Circuit reversed the lower court, finding that Commercial was responsible for the unpaid wages of its subcontractor's employees. In doing so, the court stressed that the legitimacy of a business relationship between the alleged joint employers and their good faith in entering into such a relationship is not dispositive of whether the entities constitute joint employers under the FLSA. The court ultimately articulated a new standard for evaluating joint employer liability under the FLSA, holding that joint employment exists when:

- Two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine – formally or informally, directly or indirectly – the essential terms and conditions of a worker's employment; and
- The two entities' combined influence over the essential terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor.

The Fourth Circuit criticized the various "economic realities" tests used in other circuits. It noted that other circuits have conflated economic dependency with whether two entities are "not completely dissociated" with respect to a worker's employment. This, in the opinion of the Fourth Circuit, has led courts to focus improperly on the relationship between a putative joint employer and a worker rather than the relationship between the putative joint employers.

In contrast, the Fourth Circuit focused on the relationship between the two corporate entities as "dictated by" 29 C.F.R. § 791.2(a) and established its own test for determining whether two persons or entities constitute joint employers for purposes of the FLSA. The Fourth Circuit enumerated six non-exclusive factors courts should consider:

1. Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, by direct or indirect means;
2. Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to – directly or indirectly – hire or fire the worker or modify the terms or conditions of the worker's employment;
3. The degree of permanency and duration of the relationship between the putative joint employers;
4. Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
5. Whether the work is performed on premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
6. Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll, providing workers' compensation insurance, paying payroll taxes, or providing the facilities, equipment, tools, or materials necessary to complete the work.

The Court stressed that this is not an exhaustive list of all potentially relevant considerations, nor is any one factor controlling. The Court further emphasized that joint employment is a highly factual analysis.

In applying these factors to the case at hand, the Court found that Commercial and J.I. were joint employers. Here, the J.I. employees worked almost exclusively for Commercial during the course of their employment. Commercial required several of the workers to complete applications and to work directly for Commercial on certain projects. Commercial further required the workers to sign in on timesheets, while J.I. did not maintain written records of the workers' hours. Commercial also required the workers to attend daily meetings run by Commercial foremen, during which they gave instructions to the workers for the day. And even though Commercial's contract with J.I. provided that J.I. was obligated to provide all materials and equipment, Commercial owned and provided nearly all the tools and materials the workers used to compete their tasks.

The Fourth Circuit discounted Commercial's argument that it merely had a typical contractor-subcontractor relationship with J.I., which is standard in the construction industry. The court noted that the traditional business relationship "has no bearing on whether they jointly employ a worker for the purposes of the FLSA." However, the court conceded that given the expansive definition of "employee" under the FLSA, joint employment under that statute does not necessarily mean there will be joint employment for the purposes of other federal and state laws.

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On the same date as this decision, the Fourth Circuit also issued an opinion in *Marlon Hall v. DirecTV, LLC*. In Hall, satellite television technicians argued that even though they were employees of DirectSat, DirectTV should also be liable as a joint employer for wages they claimed were owed to them. The district court dismissed the complaint, holding that the two entities were not joint employers. Relying upon the new six-factor test, the Fourth Circuit reversed, finding that the technicians' allegations were sufficient to make out a plausible claim that DirectSat was "not completely disassociated" from DirecTV.

Employers' Bottom Line: The Fourth Circuit, which covers Maryland, North Carolina, South Carolina, Virginia, and West Virginia, has blazed new territory. This decision extends joint employer liability beyond the parameters set by other circuits. While federal courts throughout the country have applied different, inconsistent tests in evaluating joint employment under the FLSA, the Fourth Circuit's new test is consistent with the Department of Labor's 2016 Administrative Interpretation which expanded the definition of joint employment under the FLSA. Further, it sets up a different test that appears to be more favorable for many employees. Given the Fourth Circuit's broad approach, employers should not rely upon traditionally recognized business relationships as sufficient protection from a claim of joint employment. It is difficult to predict the influence this decision will have on other circuits, but it is possible that they may adopt a similar test. Alternatively, circuit courts may continue to use or create their own tests, leading to a circuit split that the Supreme Court must eventually resolve.

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