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Tightening the Screws: Fourth Circuit Establishes New Test for Evaluating Joint Employment Claims Under the Fair Labor Standards Act

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On January 25, 2017, the United States Court of Appeals for the Fourth Circuit, which governs cases pending in North Carolina, issued two opinions which serve to clarify and expand the circumstances under which entities may be held liable as joint employers under the Fair Labor Standards Act (FLSA).

In the case of *Salinas v. Commercial Interiors, Inc.*, a group of drywall installers for J.I. General Contractors (J.I.), sued both J.I. and Commercial Interiors, a general contracting company for which J.I. served as a subcontractor, for wage and hour violations under the FLSA, claiming that both companies jointly employed them. Finding that J.I. and Commercial Interiors had entered into a "traditionally . . . recognized," legitimate contractor-subcontractor relationship and that Commercial Interiors "did not intend to avoid compliance with the FLSA, the United States District Court in Maryland granted Commercial Interiors' motion for summary judgment.

On appeal, the 4th Circuit reversed the District Court, holding that Commercial Interiors was responsible for the unpaid wages, including overtime pay, of its subcontractor's employees. In so holding, the *Salinas* court emphasized 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 relationship constitutes joint employment for purposes of evaluating FLSA liability. The *Salinas* court 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.

In evaluating liability under the first prong, the *Salinas* court relied upon regulations interpreting the FLSA, which require examining whether the two potential employers are "entirely independent" and "completely disassociated" from each other with respect to a worker's employment. The 4th Circuit stated that the proper focus should be on the relationship between the alleged joint employers, and not on an agency analysis of the economic dependency of the relationship between the worker and the entities. In making such an analysis, the 4th Circuit set forth six (6) factors for district courts to consider in determining whether two entities constitute joint employers under the FLSA:

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, whether 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, directly or indirectly, to 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 of 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 4th Circuit emphasized that no one factor is controlling and that the six factors do not constitute an exclusive list of all potentially relevant considerations. Further, the determination of whether such factors constitute joint employment "must be based upon the circumstances of the whole activity" and need not depend upon proof that a majority of the above factors are present.

Despite Commercial Interiors' argument that a finding of joint employment would undermine the traditional and time-honored contractor-subcontractor relationship, the 4th Circuit held that under the circumstances presented, the two entities are joint employers for purposes of FLSA liability. The facts were not favorable to Commercial Interiors' position that they should not be held liable as a joint employer of J.I.'s employees. The installers performed nearly all of their work on job sites for Commercial Interiors' benefit; Commercial Interiors provided the tools, materials, and equipment necessary for the installers' work; and Commercial Interiors actively supervised the installers' work on a daily basis. Commercial Interiors also required the installers to attend frequent meetings and to sign in and out each day, required J.I. managers to wear clothing branded with the Commercial Interiors logo and rented a house near the job site for J.I. employees to stay while they worked on one of the projects.

On the same date, the 4th Circuit also issued an opinion in *Marlon Hall v. DirecTV, LLC, et al*. The *Hall* case was brought by satellite television technicians against DirecTV and DirectSat, a home service provider which acts as an intermediary between DirecTV and the technicians who service DirecTV equipment. The technicians were employees of DirectSat but claimed that DirectTV should also be liable as a joint employer for wages they claimed were owed to them. As in the *Salinas* case, the district court dismissed the technicians' complaint, holding that the two entities are not joint employers. Relying upon the six-factor test outlined in *Salinas*, the 4th Circuit reversed the dismissal, finding that the technicians' allegations were "sufficient to make out a plausible claim that DirectSat was 'not completely disassociated' from DirecTV and other service providers with regard to setting the essential conditions under which [the technicians] worked."

Key Considerations for Employers

The effect of holding entities jointly liable under the FLSA is that both employers are responsible, jointly and severally, for complying with the wage and hour protections provided by the FLSA. Accordingly, a worker's employment by joint employers is treated as "one employment" for purposes of compliance, including the aggregating of hours worked for each employer in order to determine whether and to what extent the worker is entitled to payment of overtime compensation.

It is evident that joint employment is an issue of paramount concern to federal courts and agencies in today's flexible gig economy. While different tests have been applied by federal courts throughout the country and exhibit some inconsistencies in evaluating joint employment under the FLSA, Title VII, and other federal laws, the 4th Circuit's approach is consistent with the United States Department of Labor's Administrative Interpretation that was issued in 2016 which served to expand the definition of joint employment under the FLSA. While the facts in the *Salinas* case were clearly not favorable to Commercial Interiors, what these two decisions left unanswered is whether a scenario in which control over the other entity's workers is theoretically reserved, but not exercised, by the putative joint employer would tilt the balance in favor of holding the putative joint employer liable for wage and hour violations. Given the 4th Circuit's broad approach, employers would be wise not to rely upon traditionally recognized business relationships as sufficient protection from a claim of joint employment.

If you have questions regarding these court decisions or other legal issues, please feel free to contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

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