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But I'm Not The Employer! Personal Liability of Officers, Managers, Supervisors, and Shareholders Under Wage and Hour Laws

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Self-employment is an important source of jobs in the United States, but the vast majority of American workers are employed by businesses owned or controlled by others. Many such businesses are almost certainly corporations or companies of various kinds such as limited liability companies, limited partnerships, or professional associations. For ease of reference, all of these various company forms will be referred to as "corporations" in this article.

Corporations present numerous advantages, especially the well-known concept of "limited liability." A corporation is legally distinct from those who work for it. You might therefore believe that if a corporate employer fails to pay all wages as and when due under federal and/or state law, the corporation's officers, managers, supervisors, and shareholders will almost never be held personally liable to the corporation's employees as a result.

Your belief may be comforting but, in many cases, it may prove quite wrong.

Just Who is "The Employer"?

The analysis under federal law begins with the definition of "employer" set forth in the Fair Labor Standards Act of 1938 ("FLSA"). Under the FLSA, an "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." As one federal court of appeals has stated:

Taken literally[,] this language would support liability against any agent or employee with supervisory power over other employees. It has, indeed, been interpreted expansively.

In determining [an] employer's status, "economic reality" prevails over technical common law concepts of agency, [as a result of which] [t]here may be several simultaneous employers.

It is important that you focus on the following well-established but underappreciated principle:

There may be several simultaneous "employers."

Whether this is so, as far as the law is concerned, does not depend on who actually pays the employee or signs the employee's paycheck but, rather, on the "economic reality" of the employee's job. The so-called "economic reality" test adopted by many courts requires an examination of the purported individual "employer's":

- Job description;
- Financial interest in the workplace;
- Involvement in decisions affecting the employee's employment terms, conditions, and compensation; and,
- Relative operational control in the workplace.

Shareholder status can be important, but personal liability has been found even against corporate officers and supervisors

who lack an ownership interest or whose ownership interest is minimal.

The potential personal liability of officers, managers, supervisors, and shareholders of a corporate employer, in addition to that of the employer, is not of mere theoretical interest. A federal appellate court has found, for example, that the president of a hotel and restaurant facility was personally liable for the corporation's unlawful compensation decisions where the president "was not just any employee with some supervisory control over other employees. He was the president of the corporation, and he had ultimate control over the business's day-to-day operations." The president also was in charge of directing employment practices, such as hiring and firing employees, requiring employees to attend meetings unpaid, and setting employees' wages and schedules. He was thus instrumental in "causing" the corporation to violate the FLSA. The president, along with the corporation itself, was found liable for back wages in the amount of approximately $141,000 and an equal amount in liquidated damages to hundreds of former employees.

Corporate presidents are not the only ones to be held personally liable for unpaid wages in accordance with the FLSA. In one case, a discharged employee sued both the university that had employed her and a former supervisor. The supervisor must have been dismayed, to say the least, when the court concluded that the employee had presented enough evidence to establish a triable issue concerning the supervisor's status as an employer and potential personal liability. The unfortunate former supervisor had completed the employee's annual performance evaluations and had only "some degree of discretionary authority over the terms" of the employee's employment, but did not enjoy "unfettered control over the plaintiff's pay scale" or possess an "ownership interest in" the university. Neither "unfettered control" over compensation matters nor "an ownership interest" in the corporate employer was necessary for the "essential ingredients for individual supervisor liability" to be found. As a result, the court denied the supervisor's pre-trial motion to dismiss the case, and the case was allowed to proceed to trial.

North Carolina Law

Applicable North Carolina law offers workplace-controlling supervisors no refuge. The definition of "employer" in the North Carolina Wage and Hour Act ("Act") is as circular as it is in the FLSA. The Act describes the concept of "employer" only by providing that the term "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee." The Act does not expressly indicate that supervisors can be held personally liable for violations of the Act as they can be under the FLSA, but there is little doubt that this is so.

To begin with, the North Carolina Department of Labor has made it quite plain that, when enforcing the Act, it will look to decisions of the federal courts construing the FLSA for direction in construing the Act.

Moreover, while very few North Carolina cases address supervisors' personal liability under the Act, the few that have been decided indicate that supervisors with sufficient operational control over working conditions may be liable to employees for back pay and other remedies provided by the Act. Skeptics only need to consider a case decided in 2003 by a United States Magistrate Judge (who is now a United States District Court Judge) in which numerous former employees sued a corporate employer and three former officers or managers of the corporate employer, one of whom was the chief operating officer. The plaintiffs claimed that all of the defendants had failed to pay prescribed vacation benefits and commissions.

The chief operating officer asked the court to dismiss the claims against him personally because the plaintiffs had failed "to state a claim upon which relief can be granted." The plaintiffs did not even bother to respond to his motion. The court denied it anyway.

The Magistrate Judge observed that courts will look to federal decisions to supplement any state decisions interpreting pertinent provisions where the North Carolina and federal statutes contain identical language, as they do when the definition of "employer" is at issue. The Magistrate Judge then noted that "individuals may be held liable as 'employers' even without 'piercing the corporate veil,'" and that "there may be several employers responsible for compliance" with the Act within one corporation or other business organization. The Magistrate Judge went on to hold that in deciding whether a particular

individual is an "employer" for purposes of the FLSA and, therefore, presumably, for purposes of the Act, "courts apply an 'economic reality' test, examining the totality of the circumstances to determine whether the individual has sufficient operational control over the workers in question and the allegedly violative actions to be held liable for unpaid wages or other damages." The Magistrate Judge wrote that "[p]ersonal liability does not require an ownership interest in the corporation; instead, the more salient measure is the extent of the individual's operational control over the enterprise and its employees."

The Magistrate Judge noted, in particular, that personal liability of an officer or supervisor of a corporate employer requires only that the officer or supervisor "be involved in the day-to-day operation or have some direct responsibility for the supervision of the employee," and that numerous factors come into play, including whether the officer or supervisor:

- Had the power to hire and fire the employees;
- Supervised and controlled employee work schedules or conditions of employment;
- Determined the rate and the method of payment; and,
- Maintained employment records.

Finally, the Magistrate Judge ruled that the determination of whether a particular individual had sufficient operational control to be considered an "employer" for purposes of the FLSA requires a consideration of all of these circumstances.

Translation: An unfortunate supervisor who gets sued can be in for a long and expensive fight.

In a 2006 decision, the North Carolina Business Court adopted a similar approach. In that case, the plaintiff claimed that several individual defendants had been involved in the management of one or more of the corporate defendants, and that the individual defendants had "all exercised some measure of control" over the plaintiff's work activities and the decision to deny the plaintiff a bonus the plaintiff felt was owed.

The court, in determining whether the individual defendants could be held personally liable under the Act, noted the identical definitions of "employer" under the FLSA and the Act, recognized that the North Carolina Department of Labor looks to the judicial and administrative interpretation and rulings established under federal law as a guide for interpreting the North Carolina law, and ruled that the court would do the same.

The evidence showed that the individual defendants were involved to "some degree" in the management of one or more of the corporate employers and had "exercised some measure of control" over the plaintiff's "work activities and the decision to deny" him his alleged bonus. That was enough to persuade the court to deny the individual defendants' motions for summary judgment. Next stop: an expensive trial.

Lest the trend be in doubt, the United States District Court for the Eastern District of North Carolina, in a case involving alleged violations of both the FLSA and the Act, noted explicitly that, "[i]n accordance with federal courts' interpretation of 'employer' within the FLSA, under certain circumstances, individual liability also exists under the [Act]."

Conclusion

The foregoing cases tell a cautionary tale. Where alleged violations of federal and state wage and hour laws are concerned, officers, managers, supervisors, and shareholders who exercise operational control over employees may be held personally liable for their corporate employer's obligations to employees. They, just like their corporate employer, may find themselves on the hook for back wages, interest, liquidated damages, and the employees' attorneys' fees.

Officers, managers, supervisors, and shareholders therefore, have a keen interest in whether their corporate employer complies with its legal obligations. They should be especially concerned when employees have reason to doubt their ability to collect a judgment against a common corporate employer, such as where the employer has threatened to file for bankruptcy or appears to be in financial trouble and, thus, "judgment proof." As a result, if an officer, manager, supervisor, or shareholder can plausibly be accused of having "operational control" over a corporate employer's employees, they should

learn what those practices are and ensure that they, and the employer, comply with applicable law.

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