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WHO WORKS FOR YOU? MASSACHUSETTS HIGH COURT CLARIFIES 4-FACTOR "JOINT EMPLOYMENT" TEST FOR EMPLOYERS

Insights
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The Massachusetts Supreme Judicial Court just provided much-needed and helpful guidance on the appropriate standard for determining whether an entity is an individual's "joint employer" in order to determine liability under the Massachusetts wage-and-hour laws (*Jinks v. Credico (USA) LLC*). In short, the Court confirmed that the same "totality of circumstances" test used when analyzing federal wage and hour matters will be used for determining joint employment status in Massachusetts, guided by four factors: whether the entity (1) had the power to hire and fire the individual, (2) supervised and controlled the individual's work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. What do Massachusetts employers need to know about this welcome change and what can you do to capitalize on this ruling?

The Facts: Credico Contracts with DFW to Provide Sales Services to Clients

DFW Consultants agreed to provide sales services for some of Credico's clients. In turn, DFW retained a number of individuals to work on marketing campaigns in Massachusetts for Credico's clients. The agreement between the parties specifically confirmed that DFW retained "sole and absolute discretion" in carrying out its assignments, and exclusive control over its policies governing wages, hours, and working conditions of its employees. DFW classified its sales workers as independent contractors.

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A group of dissatisfied workers filed a class action lawsuit against Credico and DFW in August 2017 claiming they were misclassified as independent contractors and actually should have been classified as employees. They sued both companies, alleging violations of Massachusetts wage-and-hour laws because they were not paid proper wages or overtime. They claimed Credico was liable for DFW's violations because Credico was their "joint employer."

Credico argued that it did not employ plaintiffs (jointly or otherwise) and asked the trial court to dismiss the claims against them. The trial court agreed, holding that while the issue of "joint employment" was unresolved in Massachusetts, the federal test used for the Fair Labor Standards Act (FLSA) was the most appropriate framework to review plaintiffs' claims. Against that framework, the trial court granted Credico's motion in its entirety.

The Appeal: The SJC Affirms and Adopts More Narrow Conception of "Joint Employment"

On appeal, the workers sought to import the legal standards used in the state's independent contractor statute for obvious reasons. The Massachusetts Independent Contractor Statute governs whether an individual is an employer or an independent contractor in Massachusetts. And it is stringent.

In essence, an individual "performing any service" for an entity will be considered an employee unless: (1) the individual is free from control and direction in connection with the performance of the service, both under contract and in fact, (2) the service is outside of the entity's business, and (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed. This is colloquially referred to as the "ABC" test.

Relying on this statute, the workers argued an entity should be considered an individual's employer so long as the individual is "performing any service" from which the entity derives an economic benefit. The SJC (wisely) concluded such a conception was way too broad. Instead, it rearticulated the standard it put into place in the 2013 *Depianti v. Jan-Pro Franchising International, Inc.* decision. There, it said that the entity for whom the individual directly performs services is ordinarily the individual's employer and responsible for wage-and-hour compliance subject to at

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least two exceptions: where the purported joint employer is merely the "alter ego" of the employing entity or, where one entity has engaged another as an "end run" around its wage-and-hour obligations.

After quickly dispensing with both the "alter ego" and "end run" exceptions, the Court confirmed a third exception to the general rule that one entity is not the employer of another entity's employee: that of joint employment. After confirming the concept applies to Massachusetts' wage-and-hour laws, the court set about the task of articulating factors applicable to determining whether an entity "contracting in good faith with a second entity, has retained for itself sufficient control over the terms and conditions of the second entity's employees to be considered the joint employer of those employees."

Like the lower court, the SJC adopted the FLSA's "totality of the circumstances" inquiry. That standard is guided by a "useful framework" of four factors, examining whether the alleged employer:

1. had the power to hire and fire the employee;
2. supervised and controlled employee work schedules or conditions of employment;
3. determined the rate and method of payment; and
4. maintained employment records.

The Court noted, however, this is "not a mechanical determination" insofar as these factors "are not etched in stone" and should not be "blindly applied." Nonetheless, it concluded these factors provide a framework that generally captures "both the nature and structure of the working relationship as well as the putative employer's control over the economic aspects of the working relationship."

The Application: Credico is Not a Joint Employer

The Court ultimately concluded insufficient evidence existed to conclude Credico was a joint employer. It reached this conclusion, in part, based on the language of Credico's contract with DFW. That agreement made clear that DFW had, among other things, the exclusive right to hire and fire, and substantial and sufficient control over working conditions — and the fact that no evidence showing any deviation in fact from these provisions. That Credico

retained some responsibility for ensuring "quality control" as it pertained how salespeople conducted themselves in the field (i.e., ensuring proper training, etc.) did not move the needle for the Court. Nor did the plaintiffs have sufficient evidence showing Credico determined their rates and methods of payment or maintained employment records concerning them.

The Takeaway: Consider the 4 Factors in Drafting Agreements and Conducting Business

The *Jinks* decision is a welcome one for the Massachusetts business community insofar for three main reasons:

- it rejects an exceptionally broad conception of joint employment in the wage-and-hour context that the workers in this case wanted adopted;
- it aligns federal and state law on the issue, making compliance a bit easier for the average employer; and
- it finally provides more specific guidance on an issue that has impacted (in many instances, entirely unfairly) businesses who had no role whatsoever in the alleged wage-and-hour violations at issue.

That said, the "totality of the circumstances" nature of the standard, notwithstanding existence of the four factors, means its application in any given instance may be far from certain. To minimize the risk of being on the hook for another entity's wage-and-hour violations, you should draft your business agreements with the four factors in mind, and ensure your managers do not act in a manner contrary to such provisions.

We will continue to monitor further developments and provide updates on this and other labor and employment issues affecting Massachusetts employers, so make sure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this alert, or any attorney in our Boston office.