Joint Employment Jolt: Federal Appeals Court Creates New And Troubling Standard

Insights
1.30.17

In a pair of sure-to-be controversial decisions, the 4th Circuit Court of Appeals created a new and troubling standard to determine whether individuals should be considered "joint employees" of multiple entities. The new standard, which makes it far easier for employers to be caught up as defendants in wage and hour claims, may very well be adopted by other courts and leak into other areas of the country. For this reason, all employers should familiarize themselves with the January 25, 2017 decisions and adapt their operations as necessary.

Common Business Practices Under Attack
Both decisions came down on the same day and were authored by the same three-judge panel of the 4th Circuit Court of Appeals (which hears cases arising from North Carolina, South Carolina, Maryland, Virginia, and West Virginia). They both involve business practices that have become commonplace in the modern economic environment.

The first case was brought against DIRECTV and an intermediary company. As the nation's largest satellite television provider, DIRECTV engages thousands of technicians to install and repair their satellite systems. The company uses a provider network comprised of intermediary entities to contract with subcontractors, which in turn contract directly with individual technicians to perform installation and repair work. A group of independent contractors working for one of the intermediaries filed federal wage and hour claims against both companies under the Fair Labor Standards Act (FLSA) in November 2013. They alleged they were actually employees, not independent contractors, and that both entities should be liable for alleged wage violations under a joint employment theory. A lower court in Maryland dismissed the case in June 2015 and the technicians appealed.

A second case was brought against Commercial Interiors and J.I. General Contractors, two Maryland companies providing construction services. Commercial Interiors offered its customers general contracting and interior finishing services, and subcontracted with J.I. General Contractors to provide drywall installation. A group of workers directly hired by J.I. brought state and federal wage claims against both their employer and Commercial Interiors under a joint employment theory in 2012, and the same lower court judge in Maryland dismissed the case in November 2014. The workers also appealed the decision.

The appeals court reversed both decisions and resurrected the workers' claims against all of the named defendants, agreeing that the workers should be allowed to proceed against them all on a joint employment theory.

Why Did The Appeals Court Disagree With the Dismissals?

The 4th Circuit Court of Appeals was not pleased with the fact that both of these cases were dismissed. The judges blamed a 1983 case from the 9th Circuit Court of Appeals – *Bonnette v. California Health and Welfare Agency* – as the "genesis of the confusion over the joint employment doctrine's application." It said that the *Bonnette* case was outdated and incorrect because it didn't stretch far enough to carry out the "remedial and humanitarian" purposes of the FLSA, but yet had continued to be cited by courts across the country. The judges also pointed out that some courts, figuring out that *Bonnette* set an insufficient standard, created their own tests to supplement the legal analysis. But this just led to a hodgepodge of distinct, multifactor, at-times incoherent legal standards.

In response, the 4th Circuit set out to create "our own test for determining whether two entities constitute joint employers for purposes of the FLSA." The test, it said, should be broadly interpreted and applied to effectuate the statute's goals, not applied in a "narrow, grudging manner." No doubt the 4th Circuit hopes that this test will replace *Bonnette* as a touchstone to be relied upon by courts across the country.

The 4th Circuit's New Joint Employment Test

To begin the joint employment analysis, the court said the "fundamental question" is whether the two entities are "not completely disassociated" with respect to a worker such that the entities share, agree to allocate responsibility for, or otherwise codetermine the essential terms and conditions of the worker's employment.

In answering this question, the 4th Circuit said that courts should consider six factors:

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 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 a 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 was clear that this six-factor list is not exhaustive. If there are other "**facts not captured by these factors** that speak to the fundamental threshold question that must be resolved in every joint employment case" – whether a purported joint employer shares or codetermines the essential terms and conditions of a worker's employment – the court said that these facts must be considered as well. "The ultimate determination of joint employment," the court concluded, must be based upon "**the circumstances of the whole activity**."

The court also clarified that any analysis of whether a worker is an independent contractor (who would generally be precluded from seeking relief under the FLSA) or an employee should be postponed until after the joint employment analysis is conducted.

What Should Not Be Considered

The 4th Circuit also went out of its way to point out faulty reasoning employed by the lower court and other courts across the country, stressing that certain factors should be ignored when determining joint employment status:

- The court said it is irrelevant that the relationship between the two entities "represented a reasonable business decision."
- Similarly, it matters not that whether the business arrangement "reflected a bad faith effort to avoid compliance with wage and hour laws" or is carried out in good faith.

Once it applied the six-factor test and scrapped these factors that had been applied by the lower court, the appeals court breathed new life into both cases and permitted them to proceed against all of the named entities.

Conclusion

As a result of this decision, employers falling under the 4th Circuit's jurisdiction – those in North Carolina, South Carolina, Maryland, Virginia, and West Virginia – should review their business arrangements with other entities to determine if a joint employment relationship seems likely under the new standard. As for employers in the rest of the country, the impact of this decision certainly bears watching, as it is quite possible that it could gain momentum and its new standard could be adopted elsewhere.

If you have any questions about this case or how it may affect your business, please contact any member of our Staffing and Contingent Workers Practice Group or your regular Fisher Phillips

attorney.

This Legal Alert provides an overview of a pair of specific federal appeals court decisions. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People

C. F. W. Manning, II
Partner
803.255.0000
Email

Richard R. Meneghello
Chief Content Officer
503.205.8044
Email

Service Focus

Wage and Hour

Industry Focus

PEO