Federal Appeals Court Expands Joint Employer Liability Theory For Agricultural Employers

Insights
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A federal appeals court just announced a sweeping change for agricultural employers that will make it easier for workers to bring discrimination claims against them under a joint employment theory. In last week's *EEOC v. Global Horizons, Inc.* decision, the 9th Circuit Court of Appeals held that employers who use labor contractors to recruit H-2A workers can be liable under Title VII as a joint employer for non-workplace matters—such as claims for housing, meals, and transportation—even if such matters are contractually delegated to a labor contractor.

This runs counter to typical employment relationships where the employer generally has no control over non-workplace matters; employees are usually expected to find their own housing, provide for their own meals, and arrange their own transportation. Because these items were not considered part of the terms and conditions of employment, employees could not successfully bring claims against employers—or joint employers—for alleged discriminatory treatment with respect to them. Given the recent ruling in *Global Horizons, Inc.*, however, if you are one of the many employers in the agricultural industry who utilize labor contractors, you should be aware of the potential issues discussed and take affirmative steps should similar issues arise.

Background And Decision

The case involves two fruit growers in Yakima, Washington, that were experiencing labor shortages. To solve their problem, they entered into agreements with Global Horizons—a labor contractor—to obtain temporary workers for their orchards. In turn, Global Horizons recruited and brought workers from Thailand to the United States under the H-2A guest worker program, allowing agricultural employers to hire foreign workers for seasonal and temporary work.

Under their labor agreements, the growers and Global Horizons agreed to share responsibility for managing the Thai workers and meeting the H-2A requirements. Both the growers and Global Horizons provided management, supervision, and oversight at the orchards. Regarding the applicable H-2A requirements—providing the workers with housing, meals or cooking facilities, transportation to and from the worksite, and timely wage payment—Global Horizons agreed to take on these specific responsibilities. In exchange, the growers agreed to compensate the company for the workers' wages and benefits and to pay an additional fee for its services.

In 2006, two of the Thai workers filed charges with the U.S. Equal Employment Opportunity

Commission (EEOC). The agency subsequently brought an action against the growers and Global Horizons alleging the workers were subjected to poor working conditions, substandard living conditions, and unsafe transportation on the basis of their race and national origin. The EEOC alleged that Global Horizons, in particular, provided workers with overcrowded and nearly uninhabitable housing, inadequate kitchen facilities and equipment, and unsafe transportation. The EEOC alleged that similarly situated Mexican workers were not subjected to the same conditions.

In response, the growers contended they were not liable as joint employers for the conduct of Global Horizons and filed a motion to dismiss. The lower court ruled that the EEOC had plausibly alleged the growers were joint employers of the Thai workers with respect to "workplace matters" (i.e., the working conditions at the orchards) and thus denied the growers' motion as to this issue. The lower court agreed with the growers that they were not joint employers of the workers as to "non-workplace matters" (i.e., housing, meals, and transportation, among other things), and granted their motion to dismiss. The case, therefore, proceeded against the growers only regarding the "workplace matters."

In its review of the case, the 9th Circuit Court of Appeals (which hears federal cases arising in California, Washington, Arizona, Nevada, Oregon, Hawaii, Idaho, Montana, and Alaska) addressed the issue of whether the EEOC plausibly alleged that the growers were joint employers with respect to non-workplace matters. In its groundbreaking February 6 decision, the 9th Circuit found that the growers were joint employers and can be liable for Global Horizon's alleged discriminatory conduct relating to the non-workplace matters if the growers knew or should have known about the company's conduct and failed to undertake prompt corrective measures within its control.

Court's Reasoning, Explained

Noting that the 9th Circuit has not adopted a test determining whether an employer is a joint employer under Title VII, the court concluded that the common-law test applied in Title VII matters, and that the principal guidepost at issue is the element of control. Applying this test in the context of the H-2A regulations, the 9th Circuit held that the EEOC plausibly alleged the growers were joint employers on the non-workplace matters.

The court noted that, in typical employment relationships, employers do not control an employee's housing, meals, and transportation. However, the regulations pertaining to the H-2A program expands the employment relationship with respect to foreign guest workers. According to the court, "employers" under these regulations are required to assist with housing, meals or cooking facilities, and transportation, among other things. In finding that the growers were employers under the regulations' definition of "employer," the 9th Circuit ruled that the terms of the labor agreements between the growers and Global Horizons did not absolve the growers of their legal obligations to provide housing, meals or cooking facilities, and transportation. That is, the growers were free to contract with Global Horizons or other entities to help discharge their legal obligations, but the growers ultimately remained responsible for complying with the regulations, including the requirements pertaining non-workplace matters. Thus, the court held that the growers possessed

the ultimate authority over and power to control non-workplace matters. This was sufficient to render the growers joint employers for these matters.

Finding a joint employment relationship existed, the 9th Circuit then determined that liability may be imposed as a joint employer if the growers (1) knew or should have known about Global Horizons' alleged misconduct of failing to provide adequate housing, meals, and transportation because of the H-2A workers' race and national origin; and (2) failed to undertake prompt corrective measures within its control. The record contained evidence that the Thai workers complained directly to the growers regarding the conditions of housing, transportation, and pay, but no remedial actions were taken. Accordingly, the 9th Circuit reversed the lower court's decision and remanded the matter for further action.

What Should Employers Do?

In light of this decision, those businesses employing H-2A workers you should make sure to take prompt actions if you learn of any potential concerns related to both workplace and non-workplace matters required under the H-2A program. This should occur even if you have delegated non-workplace matters, such as housing, meals, and transportation for the H-2A workers, to a labor contractor. Further, you should consider ensuring your supervisors and employees are adequately trained to spot and address the issues raised in *Global Horizons, Inc.* In line with this, it may help to review your policies and procedures to ensure you are in a position to take prompt corrective measures within your control should such issues arise.

Because employment policies may present legal concerns even after revising them, it is always a good idea to discuss any proposed additions and revisions to workplace policies with your legal counsel before implementation.

This Legal Alert provides information about a specific court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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