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Joint Employer Status Under the FLSA: A Circuit By Circuit Analysis

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Background

In order for the minimum wage and overtime provisions of the Fair Labor Standards Act (“FLSA” or “the Act”) to apply, there must be an “employer/employee” relationship.² An employer is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”³ The determination of whether an employer-employee relationship exists does not depend on “isolated factors but rather upon the circumstances of the whole activity.”⁴ “Joint employer” status has evolved during the seventy years since the Act’s enactment in 1938. During that time, both the Department of Labor (DOL), in its regulations

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² See 29 U.S.C. §§206-07.

³ 29 U.S.C. §203(d).

⁴ *Rutherford Food Corp v. McComb*, 331 U.S. 722, 730 (1947).

and opinion letters, and federal circuit court decisions have defined who a “joint employer” is by looking at the Act’s purpose and scope. The intent of this paper is to set forth the various sources of the “joint employer” doctrine, describe the factors that inform the “joint employer” tests, and leave to the reader the application of these factors to his or her own particular situation.

Department Of Labor Regulations

“Joint employment” is not defined in the FLSA. In 1958, the DOL drafted Part 791 of the federal regulations, titled “Joint Employment Relationship Under the Fair Labor Standards Act of 1938.” The purpose of this regulation was set forth in Section 791.1 as follows:

The purpose of this part is to make available in one place the general interpretations of the Department of Labor pertaining to the joint employment relationship under the Fair Labor Standards Act of 1938. It is intended that the positions stated will serve as “a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it.” Skidmore v. Swift and Company, 323 U.S. 134, 138 (1944).⁵

The DOL then divided its definition of “joint employment” into two subsections, 791.2(a) and (b). 29 CFR §791.2(a)⁶ provides:

(a) A single individual may stand in the relation of an employee

⁵ 29 C.F.R. §791.1 (2000).

⁶ In Liu v. Donna Karan International, Inc., 2001 WL 8595, 6 WH Cases2d 1142 (S.D. N.Y. Jan. 2, 2001), plaintiff garment workers sued both their immigrant-owned sewing shop employers and Donna Karan International (DKI), the company to which significant amounts of the produced goods were provided. The plaintiffs asserted each was liable as a joint employer of plaintiffs for FLSA and New York state labor law violations. The district court denied DKI’s Rule 12(b)(6) motion to dismiss, applied the economic realities test, and determined that the plaintiffs’ allegation sufficiently alleged joint employment under the expansive rules established in 29 C.F.R. §791.2(a).

to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer.

A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case.

If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act.⁷

On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act.

In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.⁸ In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.

⁷ Walling v. Friend, 156 F. 2d 429 (8th Cir. 1946).

⁸ Both the statutory language (Section 3(d) defining “employer” to include anyone acting directly or indirectly in the interest of an employer in relation to an employee) and the Congressional purpose as expressed in Section 2 of the Act, require that employees generally should be paid overtime for working more than the number of hours specified in Section 7(a), irrespective of the number of employers they have. Of course, an employer should not be held responsible for an employee's action in seeking, independently, additional part-time employment. But where two or more employers stand in the position of “joint employers” and permit or require the employee to work more than the number of hours specified in Section 7(a), both the letter and the spirit of the statute require payment of overtime.

In 29 CFR §791.2(b) the DOL set forth three specific situations in which a joint employment relationship will be considered to exist:

(b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees;⁹ or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee;¹⁰ or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.¹¹

Despite the fact that Part 791 was first drafted in 1958, and amended in 1961, few of the cases deciding “joint employment” status have relied on it in reaching a decision.

⁹ Slover v. Wathen, 140 F. 2d 258 (4th Cir. 1944); Mid-Continent Pipeline Co. v. Hargrave, 129 F.2d 655 (10th Cir. 1942); Mitchell v. Bowman, 131 F. Supp., 520 (M.D. Ala. 1954); Mitchell v. Thompson Materials & Constr. Co., 27 Labor Cases Para. 68, 888; 12 WH Cases 367 (S.D. Calif. 1954).

¹⁰ 29 U.S.C. §203(d); Greenberg v. Arsenal Building Corp., 144 F. 2d 292 (2d Cir. 1944).

¹¹ Dolan v. Day & Zimmerman, Inc., 65 F. Supp. 923 (D. Mass. 1946); McComb v. Midwest Rust Proof Co., 16 Labor Cases Para. 64, 927; 8 WH Cases 460 (E.D. Mo. 1948); Durkin v. Waldron., 130 F. Supp., 501 (W.D. La. 1955); *see also* Wabash Radio Corp. v. Walling, 162 F. 2d 391 (6th Cir. 1947).