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The Third Circuit Establishes a "Joint Employment" Test: Guidance for Employers Who May Be Subject to Liability in FLSA Actions as a Joint Employer

By Ola A. Nunez

The Fair Labor Standards Act ("FLSA") broadly defines an employer as "any person acting directly or indirectly in the interest of an employer in relation to the employee." 29 U.S.C. § 203(d). At first blush, the definition may seem simple enough. However, it raises myriad complex questions for companies at a time when large collective FLSA wage-and-hour actions unfortunately are becoming commonplace. For example, under the FLSA, when is a parent company considered a "joint employer" of a subsidiary's employees? The United States Court of Appeals for the Third Circuit (covering Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands) recently considered precisely that question on June 28, 2012, in [*In Re: Enterprise Rent-A-Car Wage & Hour Practices Litigation*](#), 683 F.3d 462 (3d Cir. 2012).

The plaintiffs in this nationwide collective action were assistant branch managers at various Enterprise Rent-A-Car locations. The plaintiffs claimed they should have been classified as non-exempt employees, thus entitling them to overtime wages for any hours worked beyond the forty-hour workweek. The plaintiffs sued both the parent holding company and one of its subsidiaries, alleging that the parent, which was the sole shareholder of its thirty-eight separate operating subsidiaries in the United States, should be subject to liability under the FLSA as a "joint employer" based upon facts indicating that the parent company had some level of control over the subsidiaries' employees, primarily through certain administrative services

and support provided by the parent company directly and indirectly to each subsidiary. While the plaintiffs argued that the subsidiaries' use of and participation in those administrative services and support were mandatory, the federal district court hearing the case found that the subsidiaries' use of the parent's services was optional and in the discretion of the individual subsidiaries, as were the recommendations by the parent relating to compensation of the subsidiaries' employees. The plaintiffs also argued that the nature of the car rental business, which involved both the parent and the named subsidiary, compelled a finding of a joint employment relationship.

In considering whether the parent could be a joint employer of the subsidiary assistant branch managers, the Third Circuit considered the definition of "employer" under the FLSA, as well as the FLSA's corresponding Department of Labor ("DOL") regulations. The pertinent DOL regulation defines the employer-employee relationship under the FLSA to be one "[w]here 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." 29 C.F.R. § 791.2(b)(3). Additionally, the Third Circuit also reviewed prior case law within its circuit, as well as tests established in other circuits, before ultimately establishing its new "joint employment" test.

The Third Circuit's joint employment test now requires the examination of the following list of four factors when considering whether a joint employment relationship exists under the FLSA:

- the alleged joint employer's authority to fire and hire the relevant employees;
- the alleged joint employer's authority to promulgate work rules and assignments, and to set the employees' conditions of employment, including compensation, benefits, and hours;
- the alleged joint employer's involvement in day-to-day supervision of the employees, including discipline; and
- the alleged joint employer's actual control of the employees' records, which include payroll, taxes and insurance.

The Third Circuit cautioned that these four factors "do not constitute an exhaustive list of all potentially relevant facts, and should not be 'blindly applied,'" as other indicia of "significant control" can be persuasive in conjunction with the above factors. In other words, "a determination as to whether a defendant is a joint employer 'must be based on a consideration of the total employment situation and the economic realities of the work relationship.'"

In applying its new test to the facts of the plaintiffs' case, the Third Circuit panel concluded that the parent was not a joint employer because the parent did not have the authority to hire or fire the assistant managers;

promulgate work assignments and rules; or set compensation, benefits, schedules, rates, or methods of payment. Additionally, the parent was not involved in daily employee supervision or discipline, and it did not exercise or maintain any control over employee records. The Third Circuit relied on the finding below that the administrative services, support, and recommendations provided by the parent to each subsidiary were only "suggested policies and practices" that were "entirely discretionary on the part of the subsidiaries" such that the parent was more like a third-party consultant than an employer to the assistant managers. The Third Circuit commented that legal standards that require the balancing of multiple factors, such as the standards in this case, leave open the possibility that a party may succeed on a motion for summary judgment even if one or more factors do not favor the party seeking summary judgment.

While the Third Circuit's test provides guidance for inquiries of joint employment under the FLSA, employers with a presence in the Third Circuit should realize the analysis under this test is still very fact intensive and that courts may take into consideration other facts presented that suggest "significant control" by the alleged employer. For example, the outcome for the parent may have been different if the policies and practices were mandatory, or if the parent had a role in the daily supervision and discipline of the subsidiaries' employees. Ultimately, employers should bear in mind the Third Circuit's four-factor joint employment test, as well as other factors that may indicate control over employees, when evaluating their potential exposure under the FLSA as a joint employer.

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