UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

24th Annual Labor and Employment Law Conference

June 12 – 13, 2017
Austin, TX

Who's the Boss? Update on Employee Vs. Contractor and Joint Employer Status

Audrey E. Mross

Author Contact Information:
Audrey E. Mross
Munck Wilson Mandala LLP
Dallas, TX

amross@munckwilson.com

WHO'S THE BOSS?
UPDATE ON EMPLOYEE VS. CONTRACTOR AND JOINT EMPLOYER STATUS

I. WHO'S THE BOSS?—RECENT DEVELOPMENTS IN JOINT EMPLOYER LAW

The question "Who's the Boss?" has become increasingly difficult to answer. As the U.S. economy transitioned from manufacturing to service, and more recently to an information-based economy, the occurrence of a single employee having multiple employers has become common place.[1] The joint employer doctrine arises out of agency law[2] and recognizes the economic reality that although a putative employer is not an "employer" in the traditional legal sense, the putative employer might nevertheless maintain a sufficient level of control over the employee for legal liability to attach.

Joint employers must comply with federal, state, and local labor and employment laws with respect to "jointly employed" employees. In other words, if a primary employer and secondary employer are held to be "joint employers" of the primary employer's employees, the secondary employer is directly liable for labor and employment law violations of the primary employer. Joint employer liability can be attributed under such federal statutes including but not limited to the Fair Labor Standards Act ("FLSA"), Family and Medical Leave Act ("FMLA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), Americans with Disabilities Act ("ADA"), Age Discrimination in Employment Act ("ADEA"), National Labor Relations Act

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[1] For an historical analysis of the American workplace that helps explain the problem with identifying and defining who is an employer, see generally Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 535-549, 617-624 (2001). Stone attributes the rise in joint employer issues to the rapid decline in unions in the 1980s, which paved the way for management to restructure compensation practices, ultimately tying compensation more to the individual worker and less to the job title. As we entered the 21st century, temporary employment provided by staffing agencies became the fastest growing portion of the labor market, as companies started to contract out functions that used to be performed in-house.

[2] RESTATEMENT (SECOND) OF AGENCY § 226 (AM. LAW INST. 1958) (defining a jointly employed servant as "a person [who] may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of service to the other. . . [and] . . . if the act is within the scope of his employment for both . . . . A subservant necessarily acts both for his immediate employer and the latter's master, who is also his own master.").

("NLRA"), as well as various state and local statutes. The terms "employee" and "employer" are often ambiguously defined in these laws, requiring clarification through acts of government agencies and litigation.[3]

The standard for determining when a company is acting as a joint employer may be different for each of these statutes and in different jurisdictions. At least four well-established standards exist: the common-law agency test, the primary or statutory purpose test, the economic realities test, and a hybrid combination of the common-law agency and economic realities tests.[4] The U.S. Court of Appeals for the Fifth Circuit's description of the hybrid test is instructive:

> The right to control an employee's conduct is the most important component of this test. When examining the control component, we have focused on whether the alleged employer has the right to hire and fire the employee, the right to supervise the employee, and the right to set the employee's work schedule. The economic realities component of our test focused on whether the alleged employer paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment.[5]

Joint employer liability may initially be determined by an administrative body, such as the National Labor Relations Board ("NLRB"). On appeal, the D.C. Circuit may apply or interpret the rule a completely different way than the NLRB. Because of the disparity in tests and analyses between the administrative agencies and courts, a precise definition of who can be a joint employer continues to be elusive.

Further complicating the matter is the absence of a clear line between who can be categorized as an employee versus an independent contractor. Industries potentially affected by this inconsistency include those relying heavily on temporary staffing agencies and professional

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[3] *See* Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer and Employee Relationship*, 14 U. PA. J. BUS. L. 605, 613-17 (2012).

[4] *See id*. at 617-626.

[5] *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 n.1 (5th Cir. 1997); *see also Burton v. Freescale Semiconductor Inc.*, 798 F.3d 222, 227-28 (5th Cir. 2015) (applying hybrid test).

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First appeared as part of the conference materials for the
24th Annual Labor and Employment Law Conference session
"Who’s the Boss? Update on Employee vs. Contractor and Joint Employer Status"