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FLSA Turns 80: The Divide Over Joint Employment Status

By **Jason Schwartz and Ryan Stewart** (June 18, 2018, 12:49 PM EDT)

Originally signed by President Franklin D. Roosevelt in 1938, the Fair Labor Standards Act turns 80 this year. In this Expert Analysis series, attorneys most familiar with the statute provide different perspectives on the law's impact and development over the course of its history.

Jason Schwartz

Ryan Stewart

Since Congress enacted the Fair Labor Standards Act in 1938, only a worker's "employer" has been required to comply with its provisions. But the basic and threshold issue of who constitutes an "employer" often has proven surprisingly difficult to resolve. This is especially true in cases involving allegations of "joint employer" status, in which plaintiffs seek to impose liability not only against their "direct" employer but also against an entirely separate entity. Over the past few decades a clear divide has developed and widened across the circuits on the proper test for determining joint employment status under the FLSA, leaving many companies to make critical business decisions in the face of unpredictable potential exposure.

How Does Joint Employment Arise?

Potential joint employer situations arise where a worker can claim that two (or more) entities both employed him for the same work. This frequently occurs in vertical business relationships. For example, joint employment cases often derive from subcontractual agreements, when a worker sues both the subcontractor that hired him and the company that contracted with the subcontractor for its services. Along the same lines, workers employed and placed by staffing or "temp" agencies frequently name both the agency and the company at which they were placed as their employers. Joint employer allegations are also often raised against parent corporations by the employees of their subsidiary entities. Finally, horizontal business relationships — in which entities, such as hospitals or other health care providers, are part of an interrelated network — are another common source of joint employment allegations when those entities share workers' services.

Who Is a Joint Employer?

The Beginning

"Joint employment" is not defined in the FLSA. In fact, the term is not included in the statute at all. Nevertheless, it is generally recognized that a worker can simultaneously have more than one employer for purposes of the act.

The U.S. Department of Labor first introduced the concept of FLSA joint employment just a year into the act's existence in response to attempts to circumvent compliance.[1] Specifically, the DOL sought to prevent "wage chiselers" from avoiding compliance with FLSA overtime requirements by having their employees perform any overtime hours for a "separate" employer that was separate in name only. The department explained that where the employment relationship between the worker and the entities is "not completely disassociated," the work for both employers "should be considered as a whole for purposes of the statute."[2] Similar language was later incorporated into department regulations.[3]

Meanwhile, courts were left the task of formulating a measurable test. One of the most influential decisions in FLSA case law was issued by the Ninth Circuit in Bonnette v. California Health & Welfare Agency.[4] In Bonnette, "chore workers" hired to provide domestic services by public assistance recipients sued the state welfare agencies that offered the welfare program under a joint employer theory. The Bonnette court held the agencies were "employers" as a matter of "economic reality" due to the "considerable control" that they exerted over the plaintiffs' work on a day-to-day basis. In doing so, the court set out four factors relevant to its ultimate determination: "whether the alleged employer (1) had the power to hire and fire the employees; (2) supervised and controlled work schedules or conditions of employment; (3) determined the rate and method of [the employee's] payment; and (4) maintained employment records."[5]

A Shifting Standard

In the aftermath of Bonnette, many courts adopted the Ninth Circuit's test.[6] Over the past couple of decades, however, courts have disagreed sharply over which factors should be considered and, of those factors, which (if any) should be given greater weight.

Many circuits — and district courts within circuits that have not set a specific standard — still employ the Bonnette factors, with their particular emphasis on direct control over plaintiffs' day-to-day work and activities.[7]

Other courts, however, have determined that the Bonnette factors are too narrowly focused on direct control to correctly analyze employer status within the meaning of the FLSA.[8] The Second Circuit's decision in Zheng v. Liberty Apparel Co. is a notable example. In Zheng, garment workers sought minimum wage and overtime pay from both their direct employer and the manufacturing company that had subcontracted with their direct employer for its stitching services. The district court applied the Bonnette factors and granted the manufacturer's motion for summary judgment. But the Second Circuit reversed, holding it was error for the court to "limit[] its analysis to the four factors identified in [Bonnette]."[9] The court explained that the Bonnette factors looked only to the defendant's "formal right to control the physical performance of another's work," which "can be sufficient," but is not necessary "to establish employer status."[10] The Second Circuit added six additional factors that analyze whether the defendant held "functional control over [the] workers even in the absence of the formal control measured by the [Bonnette] factors."[11] These functional control factors include, for

example, whether the defendant's premises and equipment are used for the plaintiffs' work and whether the plaintiffs' direct employer had a business that could shift as a unit from one alleged joint employer to another.

Nearly a decade after the Second Circuit and others expanded upon Bonnette, the Third Circuit directly addressed FLSA joint employer status for the first time and adopted a narrow set of factors, similar to those in Bonnette, that again focused primarily on direct control.[12] Like most circuits to address the issue, however, the court also noted that this was not an "exhaustive list" and that courts should "consider all relevant evidence [even if it] does not fall neatly within one of the [] factors."[13] The appeal — In re Enterprise Rent-A-Car Wage & Employment Practices Litigation — arose from a consolidated MDL proceeding brought on behalf of assistant branch managers at Enterprise car rental branches nationwide. The district court granted summary judgment in favor of parent company Enterprise Holdings Inc., or EHI, holding EHI did not jointly employ its regional operating subsidiaries' assistant branch managers. The plaintiffs claimed that EHI exerted considerable control over their working conditions through its subsidiaries. On appeal, EHI prevailed again because, among other reasons, its operating subsidiaries were independently managed and the administrative support services that EHI offered to its subsidiaries, such as pooled insurance and technology, were optional and provided in exchange for payment of management fees and corporate dividends.

Other circuits have either never expressly considered FLSA joint employment or have refused to set out a factor-based test altogether.[14] In these circuits, district courts have been left to their own devices: some have applied standards employed in their circuit for other employment contexts like the NLRA and Title VII,[15] some have applied the factors applicable to the independent contractor analysis,[16] some have applied DOL regulations directly without any factor-based test,[17] and some have even created their own tests.[18]

Even within circuits that have set out specific factors, district courts sometimes apply and consider factors not expressly enumerated, further increasing unpredictability. Indeed, catch-all provisions, like that in In re Enterprise, are commonplace and permit district courts to consider any other factors they deem relevant, thereby providing plaintiffs a foothold for arguing that other, more expansive factors — like the functional control factors in Zheng and/or the "entirely new" Fourth Circuit factors addressed below — should also be considered.

On top of this widespread variation, some courts have mistakenly confused joint employment with the "single integrated enterprise" test — a separate FLSA doctrine that deals not with joint employer liability but with the determination of whether the sales of multiple businesses should be aggregated for purposes of classifying them as employers subject to the FLSA at all.[19]

The Fourth Circuit Rocks The Boat

Despite this wide variation across jurisdictions, courts have primarily agreed on at least one thing: Joint employment status is determined based on the economic realities of the relationship between the worker and the alleged joint employer. But even that changed in 2017 when the Fourth Circuit, in Salinas v. Commercial Interiors Inc.,[20] abandoned its use of the economic realities test and crafted "an entirely new joint employment test," which asks an entirely different "threshold question," and is comprised of an entirely different set of factors. In Salinas, the Fourth Circuit criticized Bonnette and its progeny — including more expanded tests like Zheng — for asking the wrong question entirely. Relying on 29 CFR § 791.2, the Fourth Circuit no longer analyzes the relationship between the employee and the alleged joint employer, but instead focuses "on the relationship between the [two] putative joint

employers."[21] If the two entities "are not completely disassociated with respect to [the] worker," a joint employment relationship exists. In answering this question, the Fourth Circuit provided six relevant but nonexclusive factors, including whether the two entities share management and the degree of permanency and duration of the relationship between the putative joint employers.

Why Does Joint Employment Matter?

Joint employer liability represents significant potential exposure for businesses. A joint employer is liable "individually and jointly, for compliance with all of the applicable provisions of the act ... with respect to the entire employment for the particular workweek."[22] In short, a business may find itself on the hook for FLSA wages owed to the employees of its subsidiaries or its subcontractors — even on a nationwide basis. And the damage figure can multiply quickly from there, given the FLSA's provisions permitting liquidated damages[23] and more lenient cost-shifting.[24]

Plaintiffs and their attorneys are typically eager to include joint employment allegations in their FLSA actions because they provide significant settlement leverage. Larger joint employers have the potential to substantially broaden the reach of the putative class. And joint employers may also have deeper pockets that provide a stronger likelihood of relief.

Finally, this inherent risk is compounded and heightened by the currently unpredictable application of joint employer status from jurisdiction to jurisdiction (and even within certain jurisdictions). A business potentially could be subjected to joint employer FLSA liability in one jurisdiction but not in another, even based on the same business structure and control over the workers. This is perhaps best highlighted by Hall v. DirecTV LLC,[25] in which the Fourth Circuit recently applied its new Salinas test and held that technicians servicing DirecTV's customers in the field were jointly employed by DirecTV, as well as an intermediary outsourcing service provider with which it contracted and the subcontractor of that outsourcing provider who had directly hired the plaintiffs. Meanwhile, the great weight of authority among federal (and state) courts, in similar contexts, is that telecommunications service providers like DirecTV "are not joint employers of contract technicians who install those services."[26]

The level of exposure (or even the potential exposure) stemming from joint employer status has the power to alter business models to their core. This is especially true in today's gig economy, in which many businesses increasingly rely on outsourcing, crowdsourcing and an array of other contractual relationships that permit increased specialization in an attempt to reduce costs and maximize efficiency and flexibility for workers and companies.

What's Next, and What Can Businesses Do?

While many courts and practitioners have chastised the Salinas decision, other courts outside of the Fourth Circuit have adopted and applied it.[27] In January, the U.S. Supreme Court bypassed an opportunity to review the Fourth Circuit's new methodology and also resolve the substantial differences across jurisdictions when it declined to grant certiorari on DirecTV's appeal from the decision in Hall.[28]

Others, however, have at least started to take action. In June 2017, the U.S. Department of Labor withdrew informal guidance it had published on joint employer status in 2016, which had included consideration of factors — like overlapping officers and management — similar to those ultimately adopted in Salinas.[29] A few months later, the U.S. House of Representatives approved a bill that, if enacted, would amend the FLSA to provide a clear definition of "joint employment."[30] Similar to the Bonnette factors, the bill would limit joint employer liability "only" to situations in which the entity

"directly, actually, and immediately, and not in a limited and routine manner, exercised significant control over terms and conditions of employment," such as hiring and firing, determining pay rate, day-to-day supervision, assigning work schedules, and administering discipline.

In the meantime, some alleged joint employers have successfully defended against expanding joint employer doctrines, in part, by invoking the DOL's original purpose for implementing it in 1939 and developing a strong factual record to demonstrate that the company's business model and contractual relationships have legitimate business purposes and are not shams to avoid compliance with the law. Credico (USA) LLC, for example, is an outsourced sales company that serves as the intermediary in three-tiered subcontracting arrangements for face-to-face sales and marketing services. Credico prevailed on the issue of joint employer status on summary judgment in the Southern District of New York based, in part, on its ability to build, through affidavit and deposition testimony, a factual record that its three-tiered subcontracting arrangements are customary in the industry and that they provide economic value to all parties involved through efficiencies and cost savings. The district court applied the Zheng factors, noted that there was "no evidence to suggest that this outsourcing model has been devised here or elsewhere to evade application of labor laws," and held Credico was not a joint employer as a matter of law.[31]

Jason C. Schwartz is a partner and co-chairman of the labor and employment practice group at Gibson Dunn & Crutcher LLP.

Ryan C. Stewart is an associate at Gibson Dunn & Crutcher LLP.

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[1] Interpretive Bulletin No. 13 (1940).

[2] Id. ¶ 17.

[3] See 29 C.F.R. § 791.1-2 (23 FR 5905, Aug. 5, 1958, as amended by 26 FR 7732, Aug. 18, 1961).

[4] 704 F.2d 1465 (9th Cir. 1983).

[5] Id. at 1470.

[6] See, e.g., Baystate Alternative Staffing v. Herman, 163 F.3d 668 (1st Cir. 1998); Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984).

[7] See, e.g., Williams v. Henagan, 595 F.3d 610 (5th Cir. 2010); Hamilton v. Partners Healthcare System Inc., 209 F. Supp. 3d 379 (D. Mass. 2016); Howe v. Johnny's Italian Steakhouse L.L.C., 2017 WL 3471469 (S.D. Iowa Jan. 10, 2017); Dowd v. DirecTV LLC, 2016 WL 28866 (E.D. Mich. Jan. 4, 2016).

[8] See, e.g., Layton v. DHL Express (USA) Inc., 686 F.3d 1172 (11th Cir. 2012); Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003); Moreau v. Air France, 356 F.3d 942 (9th Cir. 2004).

[9] 335 F.3d at 64.

[10] Id. at 69.

[11] Id. at 72.

[12] The Third Circuit set forth four factors in its "Enterprise test:" (1) authority to hire and fire; (2) authority to promulgate work rules and assignments; (3) involvement in day-to-day supervision; and (4) actual control over personnel records. In re Enterprise, 683 F.3d 462, 469-470 (3d Cir. 2012).

[13] Id.

[14] See, e.g., Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr., 536 F.3d 640 (7th Cir. 2008).

[15] See, e.g., Keeton v. Time Warner Cable Inc., 2011 WL 2618926 (S.D. Ohio July 1, 2011) (considering factors under Sixth Circuit's NLRA joint employment test); Bacon v. Subway Sandwiches & Salads LLC, 2015 WL 729632 (E.D. Tenn. Feb. 19, 2015) (considering factors under Sixth Circuit's test for joint employment under Title VII).

[16] See, e.g., Matrai v. DirecTV LLC, 168 F. Supp. 3d 1347 (D. Kan. 2016).

[17] See, e.g., Brown v. Creative Rests. Inc., 2013 WL 11043343 (W.D. Tenn. Feb. 19, 2013).

[18] See, e.g., Sutton v. Cmty. Health Sys. Inc., 2017 WL 3611757, at *5 (W.D. Tenn. Aug. 22, 2017).

[19] See Roman v. Guapos III Inc., 970 F. Supp. 2d 407, 415 (D. Md. 2013) (collecting cases).

[20] 848 F.3d 125 (4th Cir. 2017).

[21] Id. at 141.

[22] 29 CFR § 791.2(a).

[23] 29 U.S.C. § 216(b).

[24] Id.; see also Lucio-Cantu v. Vela, 2007 WL 1324513 (5th Cir. May 8, 2007).

[25] 846 F.3d 757 (4th Cir. 2017).

[26] Jean-Louis, 838 F. Supp. 2d 111 (S.D.N.Y. 2011); see also, e.g., Lawrence v. Adderly Indus. Inc., 2011 WL 666304 (E.D.N.Y. Feb. 11, 2011); Jacobson, 740 F. Supp. 2d 683 (D. Md. 2010); Rodriguez v. Metro Cable Commc'ns Inc., No. 21517/2008 (N.Y. Sup. Ct. July 26, 2011).

[27] See Ali v. Piron LLC, 2018 WL 1185271 (E.D. Mich. Mar. 7, 2018).

[28] Directv LLC v. Hall, U.S. Sup. Ct., cert. denied, Dkt. No. 16-1449, 1/8/18.

[29] https://www.dol.gov/newsroom/releases/opa/opa20170607.

[30] Save Local Business Act, H.R. 3441, 115th Cong. (2008).

[31] Vasto v. Credico (USA) LLC, 2017 WL 4877424 (S.D.N.Y. Oct. 27, 2017); see also Martin v. Sprint United Mgmt. Co., 273 F. Supp. 3d 404 (S.D.N.Y. 2017).