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Joint Employment Risks for Businesses: Regulatory and Litigation Developments, Mitigating Potential Liability

Federal Agency and Circuit Factors to be Weighed; Contractual Drafting Considerations and Other Best Practices for Limiting Risk

WEDNESDAY, NOVEMBER 19, 2025

1pm Eastern 12pm Central 11am Mountain 10am Pacific

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Joint Employment Risks for Businesses:

Regulatory and Litigation Developments, Mitigating Potential Liability

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Introduction

What is joint employer liability?

In general:

- **Two otherwise actually distinct entities**
- **Share liability for employment law violations as to certain employees**
- **Because they are considered to jointly employ those employees.**

Concept specific to employment law

Different but related concepts:

- **Single employer status**
  - **Nominally** distinct
  - Operate as one integrated employer
- **Joint and several liability**
  - "Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, **at the adversary's discretion**. Thus, each liable party is individually responsible for the entire obligation, but a paying party **may have a right of contribution or indemnity** from nonpaying parties" -- Black's Law Dictionary (12th ed. 2024)

When might joint employment arise?

Typically: when two or more business entities share employees, control their work.

Horizontal joint employment when:

- **Employee has (formal) employment relationship with two or more employers**
- **Employers are sufficiently associated (but distinct)**

Vertical joint employment when:

- **Employee has (formal) employment relationship with one employer**
- **Employee is economically dependent on another entity involved in the same work**

When might joint employment arise?

Examples of horizontal joint employment:

- **Restaurant group with distinct restaurants**
  - Employee works as host at one restaurant and as server at another; payroll is managed by centralized service entity
- **Hospital group with multiple hospitals**
  - Nurse works weekday mornings at one hospital and weekends at another; scheduling is managed centrally

If not jointly employed, then what?

- Just an employee with two jobs.

When might joint employment arise?

Examples of vertical joint employment:

- **Staffing firm / client firm**
  - Production temp engaged by staffing firm is placed at client firm, which directs her work and can decide to end the assignment
  - PEO that performs HR and other administrative functions, not just outsourced payroll
- **Subcontractor**
  - Janitorial company provides cleaning staff to office building RE management, which directs their nightly work – compare: a law firm in the building receives the cleaning services
  - Roofing subcontractor provides roofer for project managed by GC, which requires compliance with safety rules – compare: the owner of the property where the work is being done

If not jointly employed, then what?

- Employee of Employer 1, independent contractor (or nothing) as to Employer 2

When might joint employment *not* arise?

Examples of no joint employment:

- **Franchise**
  - Franchisor offers template documents, requires adherence to "look and feel" - ok, so long as:
  - Franchisor merely establishes brand standards, without exercising further control over franchisee's employees
- **Supply chain**
  - Company A requires vendors to comply with applicable laws, pay minimum wages – ok, so long as:
  - Vendor's employees are not subject to contracting entity's control
- **Shared space**
  - Company A allows Company B to operate on its premises so long as Company B's employees wear similar uniform, behave professionally – ok, so long as:
  - Company B's employees, their employment terms, are not subject to Company A's control

Why do we care about joint employer liability?

Implications (depend on statute & jurisdiction):

- **Aggregation of direct & joint employees for threshold coverage / compliance obligations under some statutes**
  - Could affect a smaller employer that would not otherwise be subject to statute (e.g., FMLA)
- **Substantive liability under labor and employment laws**
  - Overtime; safety; discrimination; bargaining; etc.
- **In certain circumstances, joint and several liability for wrongful acts against a joint employee by either employer**
  - Note: some courts may hold that liability applies only to each entity's own actions

Why do we care about joint employer liability?

Example: FMLA

Primary employer responsibilities:

- Giving required notices
- Providing leave
- Maintaining group benefits during leave
- Restoring employee to same or equivalent job
- No retaliation, discrimination, or interference

Secondary employer responsibilities:

- n/a
- n/a
- Maintaining basic payroll and identifying data
- Restoring employee to same or equivalent job in certain circumstances
- No retaliation, discrimination, or interference

Why do we care about joint employer liability?

Example: NLRA

Potential responsibilities/risks for joint employers:

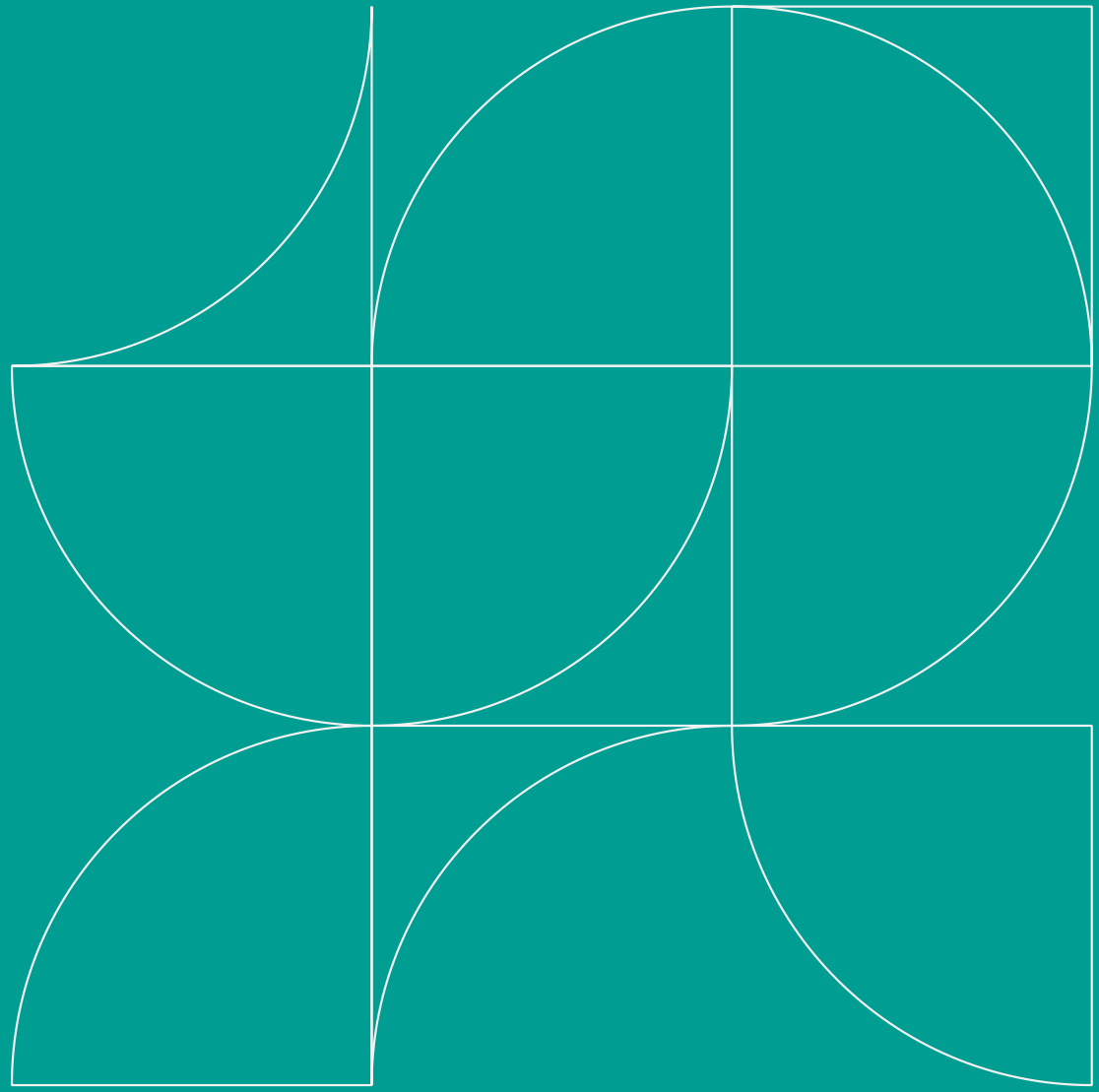
- **Duty to participate in collective bargaining for other entity's employees**
- **Joint or independent responsibility for ULPs committed by either employer**
- **Subject to accretion**
  - addition of employees to bargaining unit without election
- **Picketing by other employees may be lawful**

Example: OSHA/Safety

Potential responsibilities/risks for joint employers:

- **Duty to correct hazard or direct another to do so**
- **Duty to provide insurance coverage**
  - conversely, benefit of WC exclusivity

Department of Labor



DOL Generally

- Administers and enforces more than 180 federal laws.
- Fair Labor Standards Act of 1938 (FLSA)
- Employment Retirement Income Security Act (ERISA)
- Family and Medical Leave Act (FMLA)

DOL – FLSA – Overview

- The FLSA itself does not expressly reference joint employment
- Instead, the FLSA has brief definitions for “employer,” “employee,” and “employ”
  - An **“employer”** is “any person acting directly or indirectly in the interest of an employer in relation to an employee”
  - An **“employee”** is “any individual employed by an employer”
  - **“Employ”** means “to suffer or permit to work”
- Nonetheless, in 1958, the DOL implemented an interpretive regulation, noting that joint employment exists when “employment by one employer is **not completely disassociated** from employment by the other employer”
- Joint employers are jointly and severally liable for FLSA compliance, including any wages, damages, and penalties owed to the employee(s).

DOL – FLSA – Regulatory Guidance

- In 2019 promulgated an interpretative regulation modelled on four-factor test derived from *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).
  1. Hires or fires the employee;
  2. Supervises and controls the employee's work schedule of conditions of employment to a substantial degree;
  3. Determines the employee's rate and method of payment; and
  4. Maintains the employee's employment records.
- Additional factors are **only** relevant if they are indicia of "significant control over the terms and conditions" of work
- Went into effect in March 2020
- Struck down by *New York v. Scalia*, 2020 WL 5370871 (S.D.N.Y. Sept. 5, 2020)

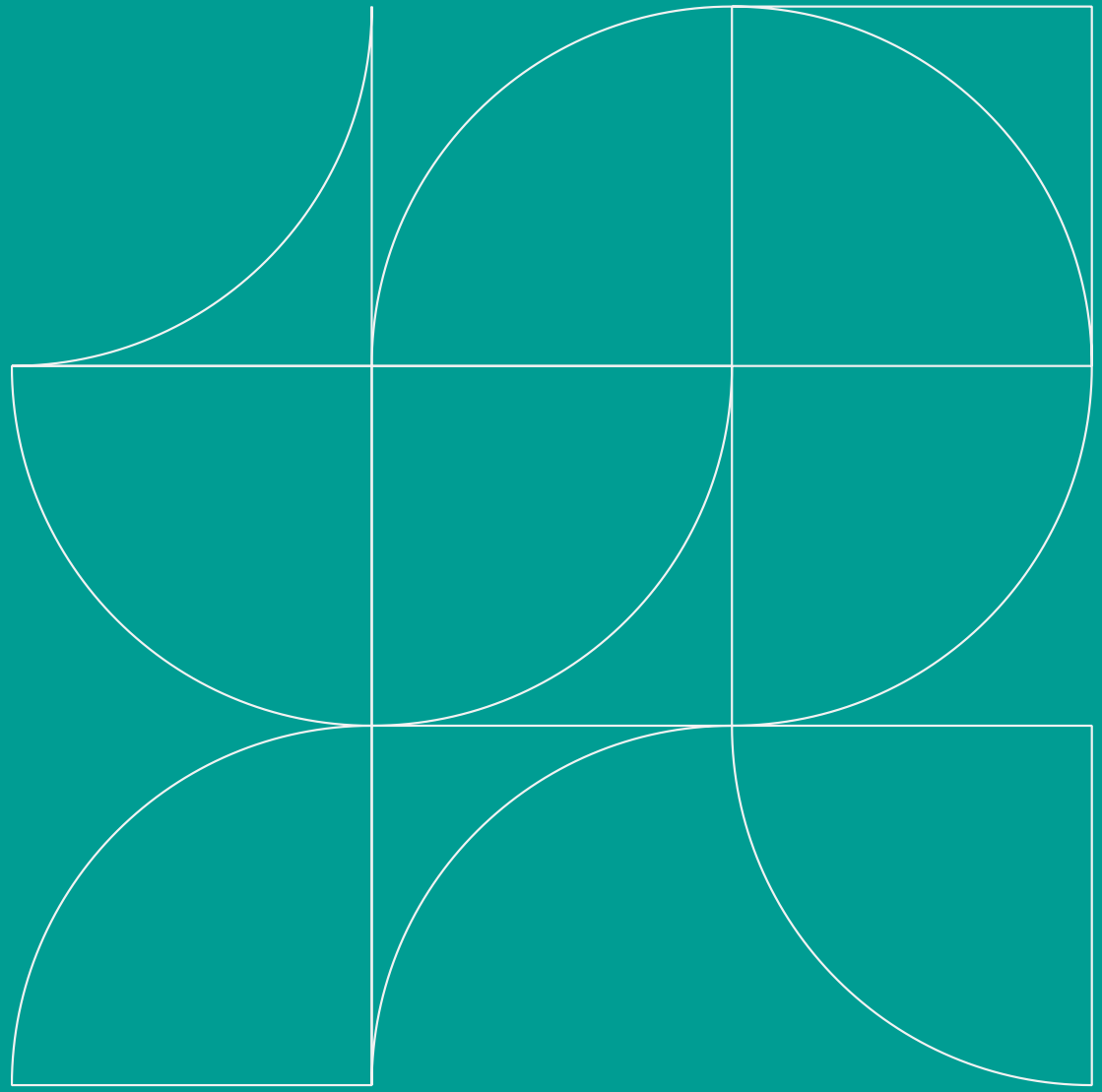
DOL – FLSA – Regulatory Guidance (Vertical JE)

- DOL has indicated that it plans to issue a new notice of proposed rulemaking with respect to vertical joint employment under the FLSA.
- For vertical joint employment (i.e., staffing agency), DOL considers the following:
  1. The nature and degree of control over the workers;
  2. The degree of supervision, direct or indirect, of the work;
  3. The power to determine the pay rates or the methods of payment of the workers;
  4. The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and
  5. Preparation of payroll and the payment of wages.

DOL – FLSA – Regulatory Guidance (Horizontal JE)

- For horizontal (i.e., two firms sufficiently associate), DOL considers whether two or more employers are “sufficiently associated” with respect to the employment of a particular employee.
- Factors:
  1. Whether there are common officers or directors of the companies;
  2. The nature of the common management support provided;
  3. Whether employees have priority for vacancies at the other companies;
  4. Whether there are any common insurance, pension or payroll systems; and
  5. Whether there are any common hiring seniority, recordkeeping, or billing systems.

Family and Medical Leave Act



DOL – FMLA – Regulatory Guidance

- Joint employment exists when an employee is employed by two (or more) employers such that the employers are responsible for compliance with the FMLA.
- According to DOL, “joint employment [may] exist when a temporary employment agency supplies employees to a second employer.”
- Factors:
  1. Who has authority to hire and fire, and to place or assign work to the employee;
  2. Who decides how, when, and the amount that the employee is paid; and,
  3. Who provides the employee’s leave or other employment benefits.

DOL – FMLA – Example

- *A large medical staffing company, Staffing Company ABC, places registered nurses in jobs at public and private hospitals operating in several U.S. states. For purposes of this example, Staffing Company ABC is an FMLA-covered employer, and the nurses meet all of the FMLA eligibility requirements. The nurses are placed at various hospitals throughout the year.*

- *Staffing Company ABC pays the nurses and provides them with retirement and insurance benefits. When the employees need leave, they call Staffing Company ABC to request time off. At the hospitals, the nurses are given their job assignments and are supervised by hospital staff. The nurses treat hospital patients, use hospital equipment, and are obliged to follow the same work protocols day to day as the hospital's regular workforce.*

- DOL opines that Staffing Company ABC is the primary employer; each hospital is the secondary employer.

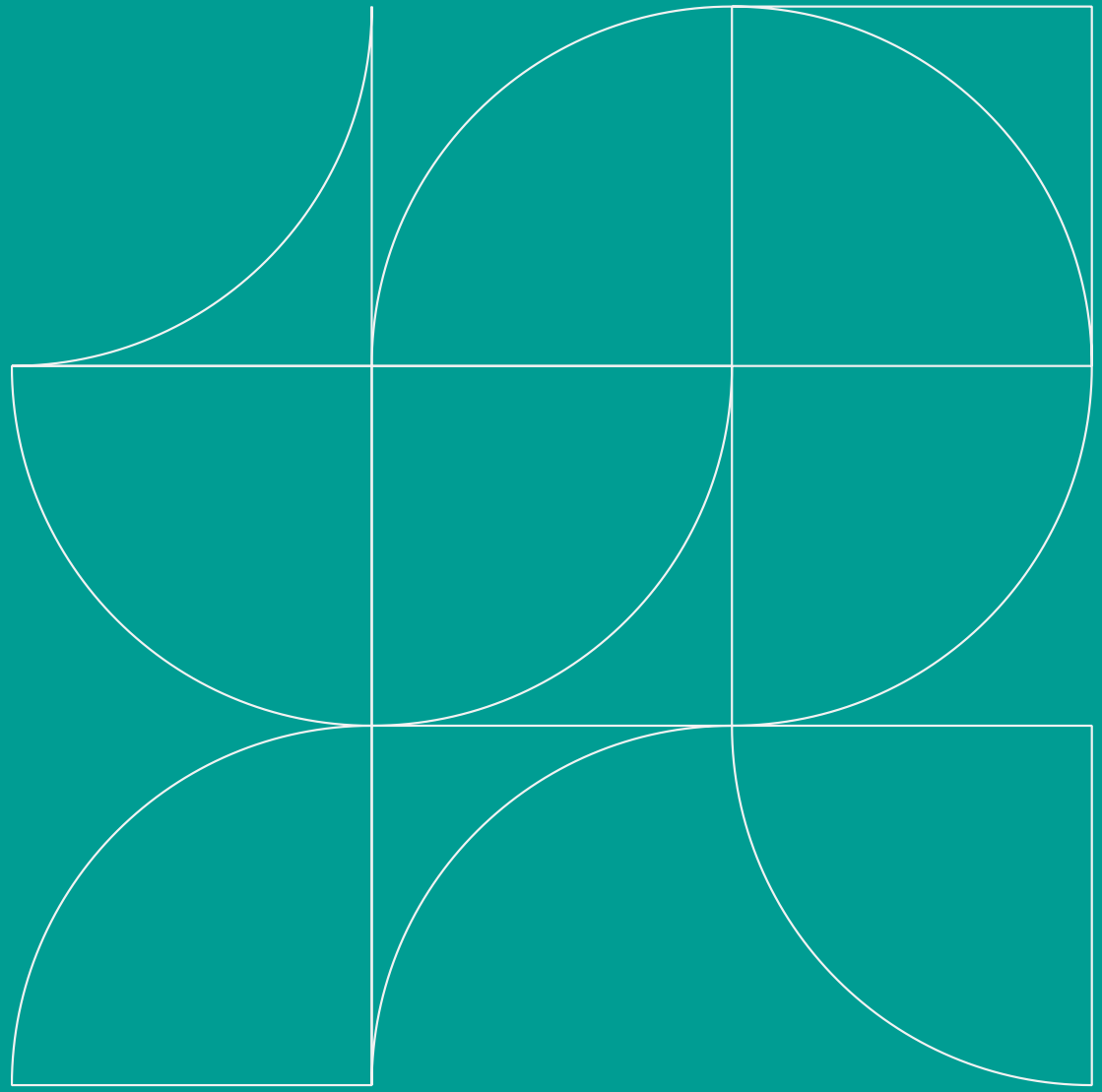
DOL – FMLA – Joint Employer Responsibilities

- Joint employers jointly responsible for:

  1. Counting hours worked to determine coverage;
  2. Not to retaliate, discriminate, or interfere;
  3. Keep and maintain records.

- Primary employer responsible for:
  1. Provide FMLA notices;
  2. Provide FMLA leave;
  3. Maintain benefits; and
  4. Restore the joint-employed employee to work.

National Labor Relations Board



NLRB Generally

- Administers and enforces National Labor Relations Act.
- Independent federal agency vested with the power to safeguard employees' right to organize and to determine whether to have unions as their bargaining representative.
- NLRB's power has been challenged recently in court.

NLRB – Regulatory History

- In 2023, NLRB promulgated a broad joint employment regulation: separate entities will be deemed joint employers if they share or codetermine the employees' essential terms and conditions of employment.

- Essential terms and conditions:
  1. wages, benefits, and other compensation;
  2. hours of work and scheduling;
  3. the assignment of duties to be performed;
  4. the supervision of the performance of duties;
  5. work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
  6. the tenure of employment, including hiring and discharge; and
  7. working conditions related to the safety and health of employees.

NLRB – Regulatory History

- On March 8, 2024, the U.S. District Court for the Eastern District of Texas struck down NLRB's 2023 JE Rule.
- NLRB initially appealed but withdrew that appeal.
- 2020 Rule in effect.
- NLRB currently lacks a quorum.

NLRB – 2020 Rule

- An employer is only considered a joint employer of a separate employer's employees if the two businesses share or co-determine the employees' essential terms and conditions of employment.

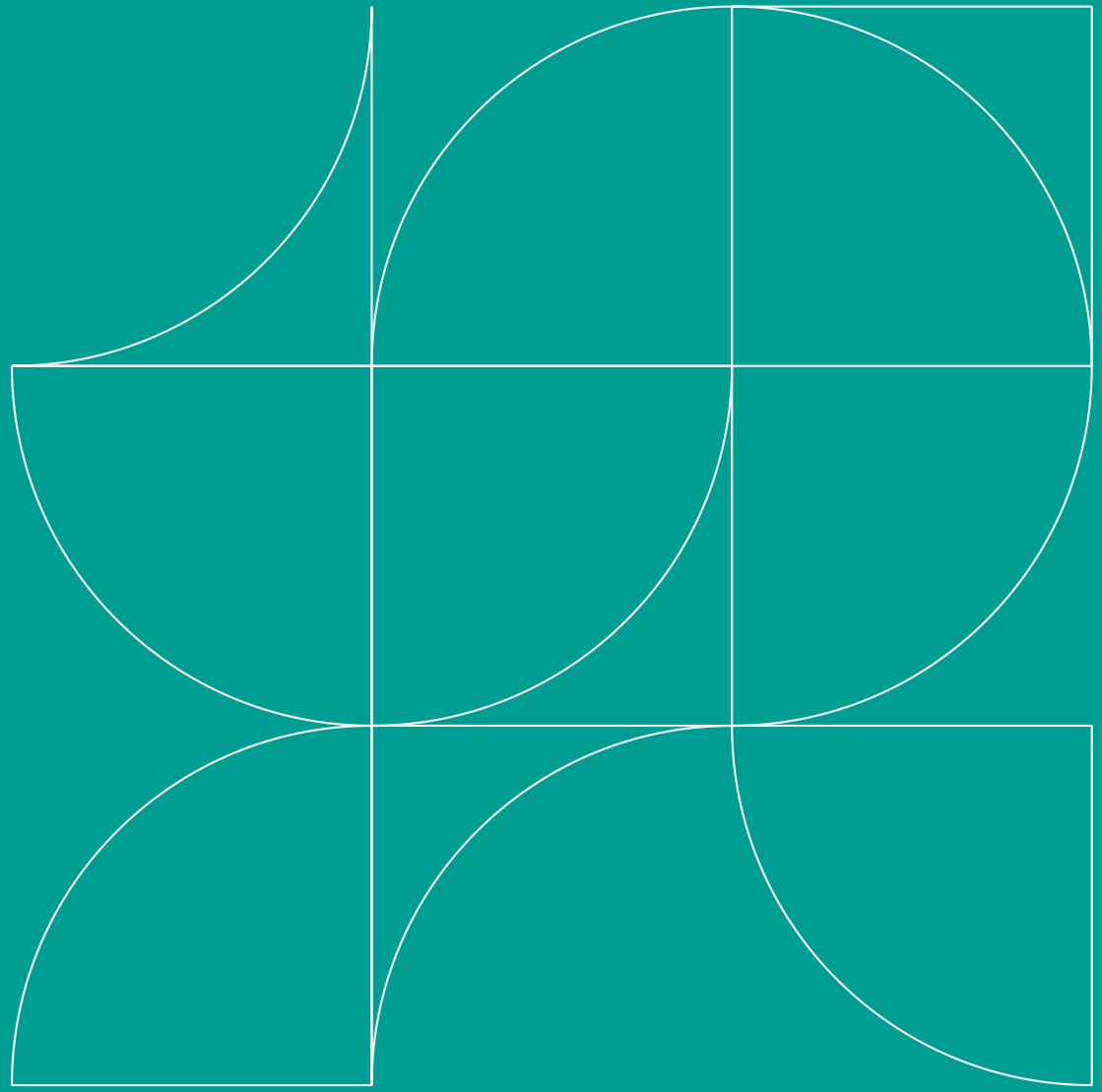
- Essential terms and conditions: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

- Alleged JE must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment – and in a manner that is not sporadic and isolated.

Significance of JE Liability under NLRA

- Joint and several liability for the other employer's unfair labor practices.
- Unions may use a JE finding as another way to get a *Cemex* bargaining order.
- Duty to bargain with another entity's employees.

Equal Employment Opportunity Commission



EEOC Generally

- Administers and enforces various federal workplace equal employment opportunity laws prohibiting discrimination.
- Equal Pay Act of 1963
- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act of 1967
- Americans with Disabilities Act of 1990

EEOC – Regulatory Guidance

- Treats joint employment similarly under Title VII, ADEA, ADA, and EPA.
- Uses a common-law agency test (i.e., right to control) to determine vertical JE employment.
- The EEOC's analysis determines if a company has enough control over a worker's employment to be considered a joint employer.

EEOC – Factors

- EEOC uses fifteen factors to determine joint employer status:

(1) whether the employer has the right to control when, where, and how the worker performs the job; (2) the level of skill or expertise that the work requires; (3) whether the work is performed on the employer's premises; (4) whether there is a continuing relationship between the worker and the employer; (5) whether the employer has the right to assign additional projects to the worker; (6) whether the employer sets the hours of work and the duration of the job; (7) whether the worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job; (8) whether the worker hires and pays assistants; *405 (9) whether the work performed by the worker is part of the regular business of the employer; (10) whether the employer is in business; (11) whether the worker is engaged in his or her own distinct occupation or business; (12) whether the employer provides the worker with benefits, such as insurance, leave, or worker's compensation; (13) whether the worker is considered an employee of the employer for tax purposes; (14) whether the employer can discharge the worker; and (15) whether the worker and the employer believe that they are creating an employer-employee relationship.

EEOC – Consequences

- According to EEOC Enforcement Guidance:

  > [a] staffing firm or its client that qualifies as an employer of a staffing firm worker may be liable for: its own discrimination against the worker; or discrimination by the other entity if it either: participates in the discrimination; or knew or should have known of the discrimination and failed to take corrective action within its control.

- In other words, joint and several liability.

EEOC – Example

- Example:

  A temporary employment agency hires a worker and assigns him to serve as a computer programmer for one of the agency’s clients. The agency pays the worker a salary based on the number of hours worked as reported by the client. The agency also withholds social security and taxes and provides workers' compensation coverage. The client establishes the hours of work and oversees the individual's work. The individual uses the client's equipment and supplies and works on the client's premises. The agency reviews the individual's work based on reports by the client. The agency can terminate the worker if his or her services are unacceptable to the client. Moreover, the worker can terminate the relationship without incurring a penalty.

EEOC – Example

- Staffing Firm: The relationship between a staffing firm and each of its workers generally qualifies as an employer-employee relationship because the firm typically hires the worker, determines when and where the worker should report to work, pays the wages, is itself in business, withholds taxes and social security, provides workers' compensation coverage, and has the right to discharge the worker.

- Client: A client of a temporary employment agency typically qualifies as an employer of the temporary worker during the job assignment, along with the agency. This is because the client usually exercises significant supervisory control over the worker.

JOINT EMPLOYMENT: Circuit Court Analysis

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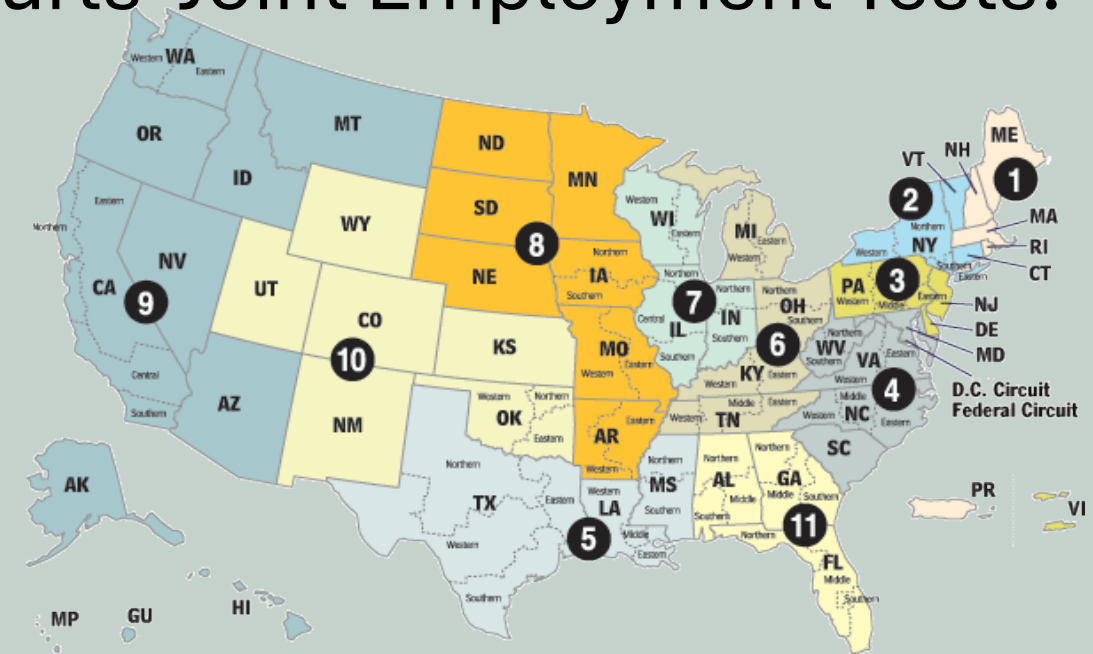
AGENDA

1. Circuit Courts' Joint Employment Tests: FLSA

- Four Circuits Have No Circuit Tests (6th; 8th; 10th; DC)
- Eight Circuits Have Tests
  - Finding of Joint Employment:
    - Four Yes (1st; 2nd; 4th; 9th)
    - Four No (3d; 5th; 7th; 11th)

2. Circuit Courts' Joint Employment Tests: Title VII



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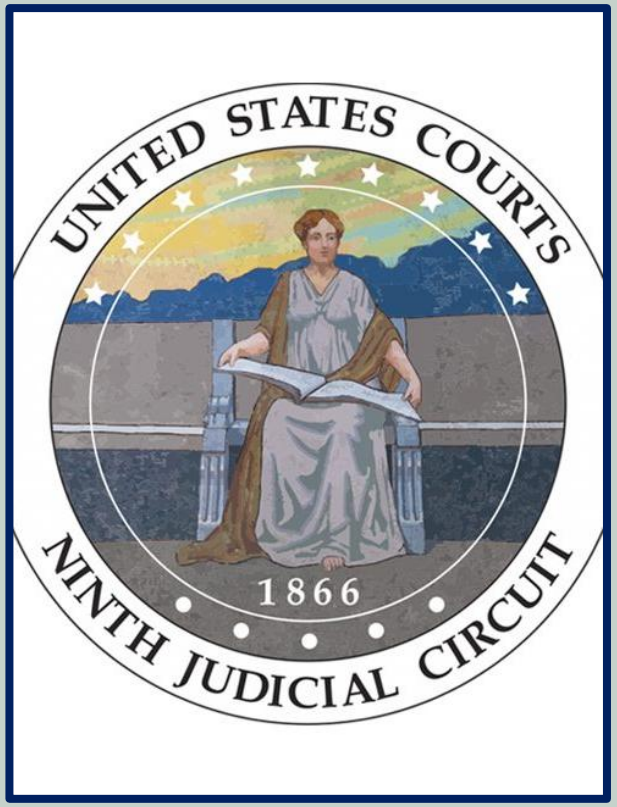
JOINT EMPLOYMENT TESTS

-FLSA-

FLSA: KEY JOINT EMPLOYMENT CASES BY CIRCUIT

CIRCUIT	CASE
FIRST	*Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998) • Applies and follows the *Bonnette* test
SECOND	*Barfield v. NYC Health and Hospital Corporation*, 537 F.3d 132 (2d Cir. 2008) • Applies two tests including the *Bonnette* test
THIRD	*In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462 (3d Cir. 2012) • Applies and follows a modified *Bonnette* test
FOURTH	*Salinas v. Commercial Interiors, Inc*., 848 F. 3d 125 (4th Cir. 2020) • Repudiates the *Bonnette* test and establishes its own
FIFTH	*Gray v. Powers,* 673 F.3d 352 (5th Cir. 2012) • Applies without citing or referencing *Bonnette* test
SIXTH	No definitive test adopted or applied
SEVENTH	*Karr v. Strong Detective Agency, Inc*., 787 F.2d 1205 (7th Cir. 1986) • Applies and follows the *Bonnette* test
EIGHTH	No definitive test adopted or applied
NINTH	*Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983) • *Bonnette* 4-Factor Test
TENTH	No definitive test adopted or applied
ELEVENTH	*Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172 (11th Cir. 2012) • Applies and follows a modified *Bonnette* test without any reference to *Bonnette*
DC	No definitive test adopted or applied

NINTH CIRCUIT (part one)



Case (Seminal Case): *Bonnette v. California Health and Welfare Agency*

Citation: 704 F.2d 1465 (9th Cir. 1983)

Context: State and County Social Service Agencies As Joint Employers; Public Assistance Recipients

Claimed Violations: Minimum Wages

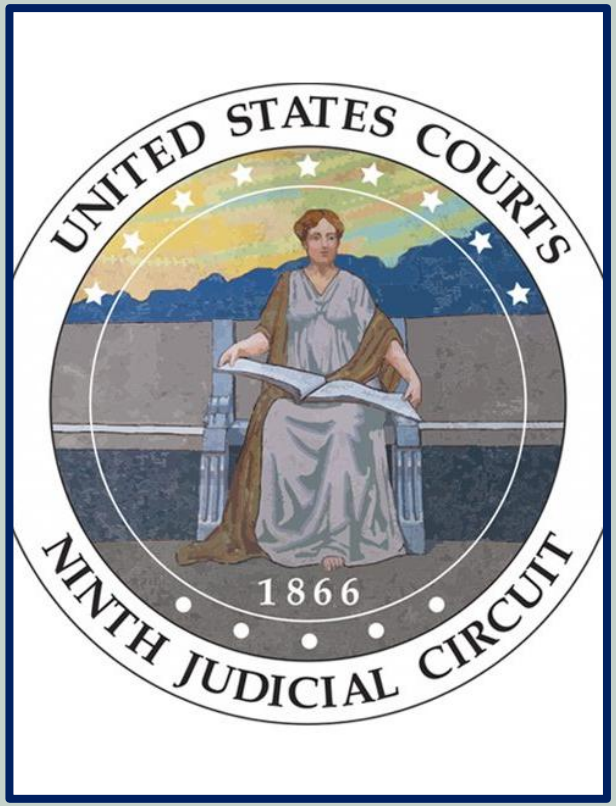
Issue: Whether state and county agencies constitute joint employers with disabled, in-home public assistance recipients in regard to "chore workers" who provide care and treatment to the recipients based on federally-funded programs

Holding: Yes; as such, district court decision affirmed on appeal.

Reasoning:

- Broadly-worded and expansive definition and interpretation of "employer" under the FLSA
- Broad remedial purposes of the FLSA
- Economic realities of the work relationship; consideration of the total employment situation; economic dependence of employee on putative, secondary employer
- DOL regulations (29 C.F.R. Section 791.2(a) (1981)

NINTH CIRCUIT (part two)

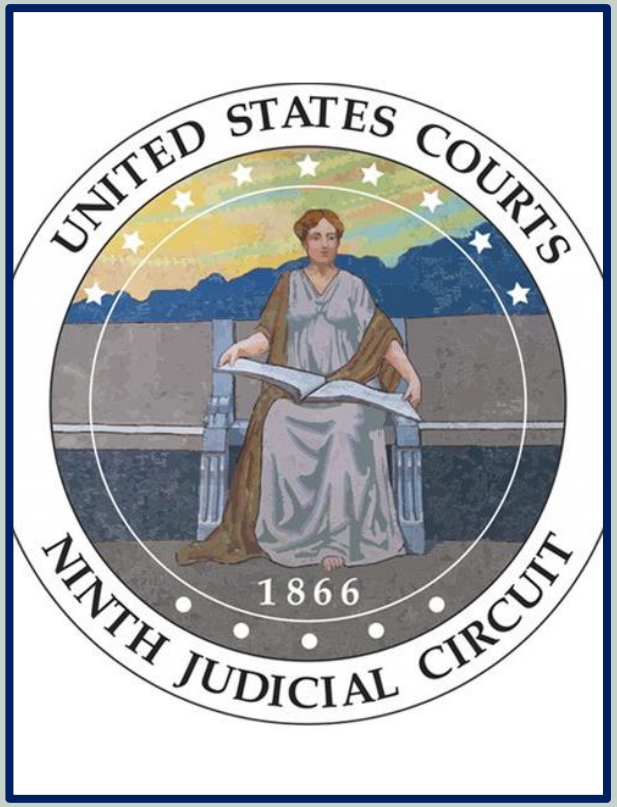


TEST APPLIED: 4-FACTOR TEST

Whether the Alleged Employer:

1. **had the power to hire and fire the employees**
   - power over the employment relationship was "substantial" by virtue of control over the "purse strings;" complete economic control over the relationship
   - ["Regardless of whether the appellants (state and county social service agencies) are viewed as having had the power to hire and fire, their power over the employment relationship by virtue of their control over the purse strings was substantial."]
2. **supervised and controlled employee work schedules or conditions of employment**
   - exercised considerable control over the structure and conditions of employment
   - had periodic and significant involvement
   - made the final determination of the number of hours each chore worker would work and exactly what tasks would be performed
   - although the recipients were responsible for the day-to-day supervision of the chore workers, the state and county agencies intervened when problems arose which the recipient and chore worker could not resolve
3. **determined the rate and method of payment**
4. **maintained employment records**
   - Four factors not "etched in stone and will not be blindly applied."

NINTH CIRCUIT (Part three)

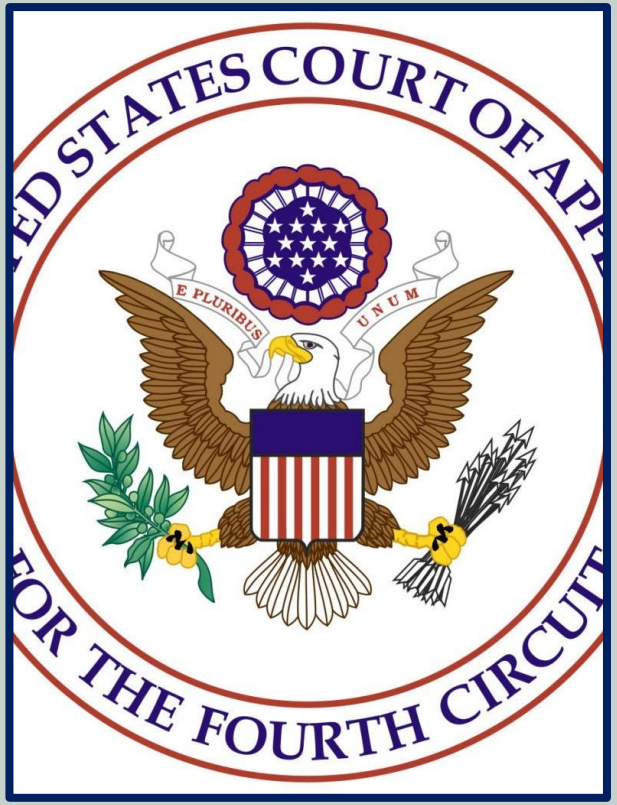


First, it appears that the 9th Circuit simultaneously established and then distinguished its 4-factor test based on the facts presented

Second, the 4-factor test was used to determine whether the state and county agencies were employers of the "chore workers;" focus being more on the employer/employee (worker) relationship than on the employer/employer relationship.

The Court concluded: "The 'economic realty' was that the appellants employed the chore workers to perform social services for the benefit of the recipients. The fact that the appellants delegated to the recipients various responsibilities does not alter this; it merely makes them joint employers."

FOURTH CIRCUIT (Part one)



Case: Salinas v. Commercial Interiors, Inc.

Citation: 848 F.3d 125 (4th Cir. 2017)

Context: Contractor; Subcontractor

Claimed Violations: Overtime

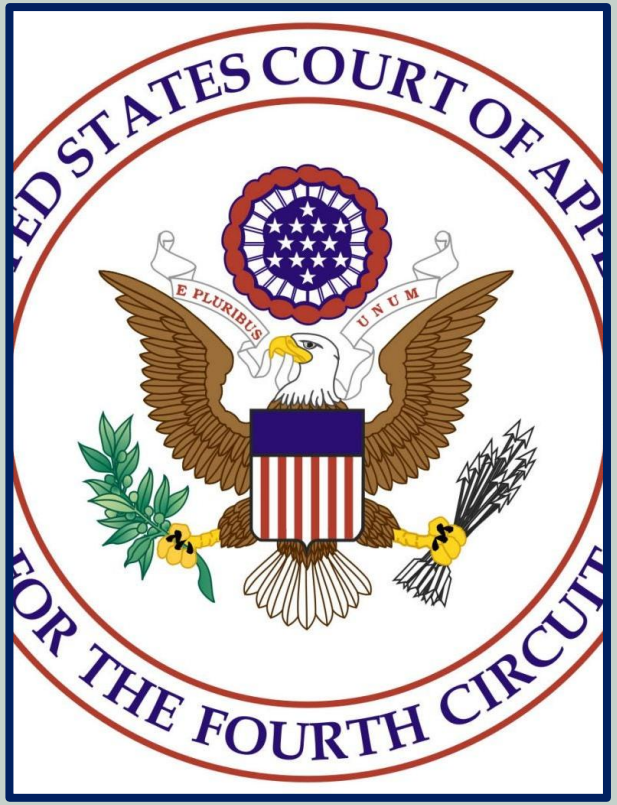
Issue: Whether contractor was a joint employer of employees hired directly by subcontractor

Holding: Yes; as such, district court decision reversed on appeal

Reasoning:

- Repudiates the *Bonnette* joint employment test
- *Bonnette* was based on a traditional, common-law, agency-principle approach which has no place in the FLSA context which is broadly written including, but not limited to, definitions of "employer," "employee," and "employment" and to be liberally construed pursuant to the FLSA itself
- Joint employment doctrine: (1) treats a worker's employment by joint employers as "one employment" for purposes of determining compliance with the FLSA's wage and hour requirements; and (2) holds joint employers jointly and severally liable for any violations of the FLSA
- *Bonnette's* reliance on common-law agency principles does not square with Congress' intent that the FLSA's definition of "employee" encompass "a broader swath of workers" than would constitute employees under common law
- *Bonnette's* "errant reliance on common-law agency principles"

FOURTH CIRCUIT (Part two)



Reasoning (Ctd.):

- *Bonnette* incorrectly "focus[ed] on the relationship between a worker and a putative joint employer" and not the relationship between the two entities
- *Bonnette* incorrectly focused on an employee's "economic dependence" on a putative joint employer (that goes to the issue of employee v. independent contractor; not joint employment)
- "*Bonnette* and its progeny do not squarely address the 'joint' element of the "joint employer' doctrine"
- "In sum, courts have failed to develop a coherent test for determining whether entities constitute joint employers. The myriad existing tests – most of which derive from *Bonnette* – improperly (1) rely on common-law agency principles; (2) focus on the relationship between a putative joint employer and a worker, rather than the relationship between putative joint employers; and (3) view joint employment as a question of economic dependency. Accordingly, district courts should not follow *Bonnette* and its progeny in determining whether two or more persons or entities constitute joint employers for purposes of the FLSA." *Id*. at 139

FOURTH CIRCUIT (Part three)

TEST APPLIED: SIX FACTOR TEST

"**(1)** Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;

(2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to – directly or indirectly – hire or fire the worker or modify the terms or conditions of the worker's employment;

(3) The degree of permanency and duration of the relationship between the putative joint employers;

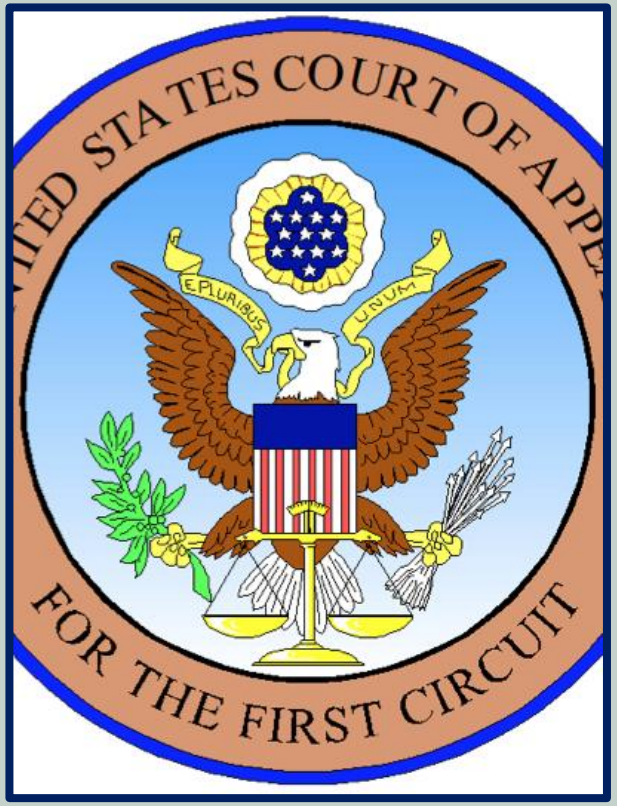
(4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;

(5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and

(6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work." *Id*. at 141-142.

- Not an exhaustive list; "[t]o the extent that facts not captured by these factors speak to the fundamental threshold question that must be resolved in every joint employment case – whether a purported joint employer shares or codetermines the essential terms and conditions of a worker's employment – courts must consider those facts as well." *Id*. at 142.
- "ultimate determination of joint employment to be based upon the circumstances of the whole activity" *Id*. at 142.

FIRST CIRCUIT (Part 1)



Case: Baystate Alternative Staffing, Inc. v. Herman

Citation: 163 F.3d 668 (1st Cir. 1998)

Context: Temporary Employment Agencies As Secondary, Putative or Joint Employers

Claimed Violations: Overtime

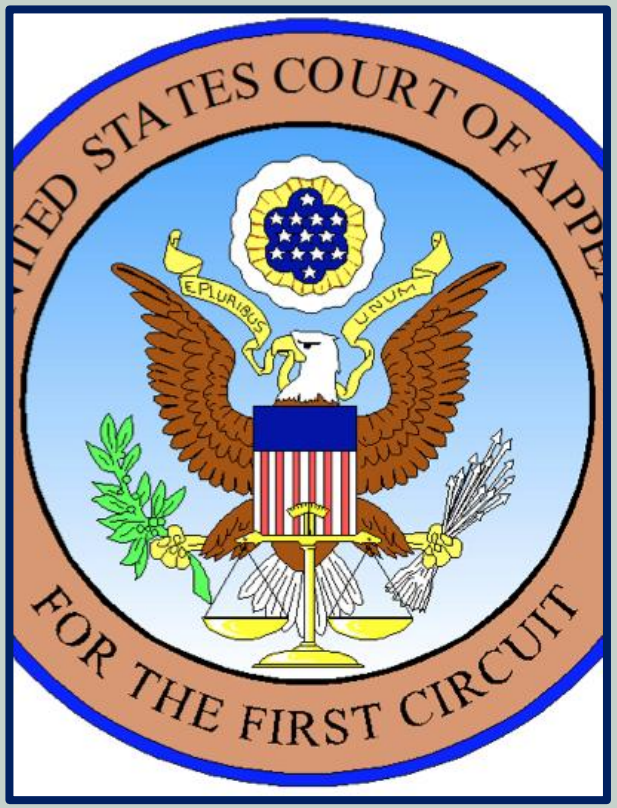
Issue: Whether the temporary employment agencies constitute joint employers to the assigned non-exempt, hourly-rate workers

Holding: Yes

Reasoning:

- Economic reality of the totality of the circumstances determine whether the worker is economically dependent on the putative or alleged secondary employer
- Cites to the Ninth Circuit decision and the 4-Factor Test established in *Bonnette*
- Also decides issue of personal liability and whether certain individual owners and officers of the temporary employment agencies are also joint employers based on degree of supervisory control and personal responsibility on how business was conducted

FIRST CIRCUIT (Part 2)



TEST APPLIED: 4-FACTOR *BONNETTE* TEST

Whether the Alleged Employer:

1. had the power to hire and fire the employees

2. supervised and controlled employee work schedules or conditions of employment

- direct supervisory oversight neither required nor dispositive to establish joint employment
- an employer need not "look over the shoulders" of a worker on a daily basis in order to exercise control

3. determined the rate and method of payment;

4. maintained employment records

Again, the Court's focus is more on the employer/employee (worker) relationship than on the employer/employer relationship.

SECOND CIRCUIT (Part 1)

Case: Barfield v. New York City Health and Hospitals Corporation

Citation: 537 F.3d 132 (2d Cir. 2008)

Context: Hospital as Secondary Employer in Relation to Temporary Employment Agencies

Claimed Violations: Overtime

Issue: Whether Bellevue Hospital constitutes a joint employer with the temporary agencies that assigned/made available a nursing assistant

Holding: Yes

Reasoning: Economic reality of the totality of the circumstances determined on a case-by-case basis and not technical concepts; employee not independent contractor

TESTS APPLIED: FORMAL (4-FACTOR) CONTROL TEST AND/OR THE FUNCTIONAL (6-FACTOR) CONTROL TEST

Formal (4-Factor Factor) Control Test

References its earlier decision in *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984) which cites to *Bonnette*.

Whether the Alleged Employer:

(1) had the power to hire and fire the employees;
(2) supervised and controlled employee work schedules or conditions of employment;
(3) determined the rate and method of payment; and
(4) maintained employment records

SECOND CIRCUIT (Part 2)

TESTS APPLIED: FORMAL (4-FACTOR) CONTROL TEST AND/OR THE FUNCTIONAL (6-FACTOR) CONTROL TEST

Functional (Six-Factor) Control Test

- References it earlier decision in *Zheng v. Liberty Apparel Co*., 355 F.3d 61 (2d Cir. 2003)
- Identifying the economic realities of the employment relationship
- Broadens *Bonnette* which is based on traditional agency principles
- Joint and several liability
- References USDOL Opinion Letters as probative not determinative; may be consulted by courts for guidance

1. Whether alleged secondary employer's premises and equipment were used for the employee's work
2. Whether the primary employer had a business that could or did shift as a unit from one putative joint employer to another;
3. The extent to which the employee performed a discrete line-job that was integral to the alleged secondary employer's process of production;
4. Whether responsibility under the contracts could pass from one subcontractor to another without material changes;
5. The degree to which the alleged secondary employer or its agents supervised the employee's work;
6. Whether the worker worked exclusively or predominantly for the secondary employer

THIRD CIRCUIT (Part 1)

Case: In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litig.

Citation: 683 F.3d 462 (3d Cir. 2012)

Context: Parent Company and Subsidiaries

Claimed Violations: Overtime (Assistant Managers Allegedly Misclassified as Exempt Employees)

Issue: Whether parent car rental company is a secondary employer to assistant managers employed by subsidiary companies

Holding: No; summary judgment affirmed on appeal for parent company

Reasoning:

- Acknowledges broad and expansive definition of "employer"
- Economic reality rather than technical concepts to be the test of employment relationship
- Total employment situation
- Significant not ultimate control required; indirect control may suffice

THIRD CIRCUIT (Part 2)

Test Applied: Bonnette+ 4-Factor Test

- Case of first impression; looks to jurisprudence of lower courts and sister circuits
- Creates its own test which it refers to as the "Enterprise" test
- References and cites with approval the *Bonnette* test which the 1st and 2nd Circuits (*Baystate Alternative Staffing* and *Zheng,* respectively) cite with approval and apply

Whether the Alleged Employer has:

1. authority to hire and fire the relevant employees

2. authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment;

3. involvement in day-to-day employee supervision, including employee discipline

4. actual control of employee records, such as payroll, insurance, or taxes,

- Broadens/supplements the *Bonnette* test which relies on traditional agency principles
- The 4 factors do not constitute an exhaustive list and should not be blindly applied

FIFTH CIRCUIT (Part 1)

Case: Gray v. Powers

Citation: 673 F.3d 352 (5th Cir. 2012)

Context: Primary Employer (Nightclub); An Owner of the Primary Employer

Claimed Violation: Minimum Wage

Issue: Whether individual owner/member of employer limited liability company is a secondary employer and, thus, personally liable to bartender of the LLC

Holding: No; as such, district court decision affirmed on appeal

Reasoning: Economic reality test to evaluate whether there is an employer/employee relationship

Test Applied: 4-Factor Test of *Bonnette* (Without Citing or Referencing *Bonnette*)

Whether the Alleged Employer:

1. possessed the power to hire and fire the employees
2. supervised and controlled employee work schedules or conditions of employment
3. determined the method and rate of payment
4. maintained employment records

FIFTH CIRCUIT (Part 2)

- "In cases where there may be more than one employer, this court 'must apply the economics realty test to each individual or entity alleged to be an employer and each must satisfy the four part test.'" *Id*. at 355.
- " ... employer status may be appropriate where operational control coincides with one's position as a shareholder, officer, or owner. The cases do not suggest, however, that merely being an officer or shareholder subjects an individual to FLSA liability." *Id*. at 355-356.
- " ... those who have operational control over employees within companies may be individually liable for FLSA violations committed by the companies." *Id*. at 357
- "We decline to adopt a rule that would potentially impose individual liability on all shareholders, members, and officers of entities that are employers under the FLSA based on their position rather than the economic reality of their involvement in the company." *Id*. at 357.
- Focuses more on testing the employer/employee relationship than on the employer/employer relationship.

SEVENTH CIRCUIT

Case: Karr v. Strong Detective Agency, Inc.

Citation: 787 F.2d 1205 (7th Cir. 1986)

Context: Detective Agency; Surveilled Company

Claimed Violations: Minimum Wage; Overtime

Issue: Whether detective agency is secondary employer for employee assigned to work undercover with and for warehouse employer?

Holding: Yes; as such, summary judgment for detective agency affirmed on appeal. Detective agency need not provide duplicative minimum wage and overtime payments to detective who already was properly paid by warehouse employer

Reasoning:

- CFR Regulations
- Economic reality

Test Applied:

- CFR Regulations
- Economic reality based on a totality of the circumstances of the whole activity; a "shared control"
- Reference made to *Bonnette*

ELEVENTH CIRCUIT (Part 1)

Case: Layton v. DHL Express (USA), Inc.

Citation: 686 F.3d 1172 (11th Circuit 2012)

Context: Carrier (DHL); Contractor

Claimed Violations: Minimum Wage; Overtime

Issue: Whether Carrier (DHL) constitutes joint employer with contractor in regard to package delivery drivers

Holding: No; as such, district court decision granting summary judgment for contractor affirmed on appeal

Reasoning:

- realities of the economic relationship between the package delivery drivers and the carrier
- totality of the economic circumstances
- carrier was not an employer much less a joint employer
- as a matter of economic reality, driver is not dependent on the carrier (i.e., economic dependency)

ELEVENTH CIRCUIT (Part 2)

Test Applied: 8-Factor Test [References Earlier Decision in Aimable v. Long & Scott Farms, 20 F. 3d 434 (11th Cir. 1994) and First Five Factors of Regulations relating to the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA")]:

1. the nature and degree of control of the workers
2. the degree of supervision, direct or indirect, of the work;
3. the power to determine the pay rates or methods of payment of the workers;
4. the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers
5. preparation of payroll and the payment of wages
6. ownership of the facilities where work occurred
7. performance of a specialty job integral to the business
8. investment in equipment and facilities

- no one factor is determinative
- not determined by a mathematical formula
- only useful in shedding light on economic dependence
- Focused more on the employer/employee (worker) relationship than on the employer/employer relationship

JOINT EMPLOYMENT TESTS

-Title VII-

TITLE VII: JOINT EMPLOYMENT CASES BY CIRCUIT

CIRCUIT	CASE
FIRST	No definitive test adopted or applied
SECOND	*Felder v. US Tennis Association*, 27 F.4th 834 (2d Cir. 2022)
THIRD	*Fausch v. Tuesday Morning, Inc.*, 808 F.3d 208 (3d Cir. 2015) • expressly rejects *Enterprise* for Title VII purposes
FOURTH	*Butler v. Drive Automotive Industries of America, Inc*., 793 F.3d 404 (4th Cir. 2015)
FIFTH	No definitive test adopted or applied
SIXTH	*Sanford v. Main St. Baptist Church Manor, Inc.*, 327 F. App'x. 587 (6th Cir. 2009)
SEVENTH	*Nischan v. Stratasphere Quality, LLC*, 865 F. 3d 922 (7th Cir. 2017)
EIGHTH	No definitive test adopted or applied
NINTH	*EEOC v. Global Horizons, Inc*., 915 F.3d 631 (9th Cir. 2019)
TENTH	*Knitter v. Corvias Military Living, LLC,* 758 F. 3d 2014 (10th Cir. 2014)
ELEVENTH	*Virgo v. Riviera Beach Associates, Ltd*., 30 F. 3d 1350 (11th Cir. 1994)
DC	No definitive test adopted or applied

SECOND CIRCUIT (part one)

Case: Felder v. United States Tennis Association

Citation: 27 F.4th 832 (2d Cir. 2022)

Context: Contractor (United States Tennis Association [“USTA”]); Subcontractor (AJ Security)

Claimed Violations: Discrimination (Race); Retaliation

Issue: Whether USTA was a joint employer subject to Title VII in regard to a security guard employed by AJ Security for job referrals;

Holding: No as to the race claim; remanded as to the retaliation claim

Reasoning As to Race Claim:

- Case of first impression
  - “Although this Court has not previously identified a specific test for determining what renders an entity a ‘joint employer’ in a Title VII case, today we join our sister Circuits in concluding that non-exhaustive factors drawn from the common law of agency, including control over an employee’s hiring, firing, training, promotion, discipline, supervision, and handling of records, insurance, and payroll, are relevant to this inquiry.” *Id*. at 838.
- Title VII has “circular” statutory definitions of “employer” and “employee”
- Must rely on the general common law of agency
- As such, must apply a set of “non-exhaustive factors” that when present, may indicate the existence of an employer-employee relationship under the common law.

Reasoning As to Remand for Retaliation Claim:

- New allegations presented that USTA refused to credential/employ security guard in retaliation for his prior claim of discrimination against another security contractor

SECOND CIRCUIT (part two)

Test Applied: 13-Factor Test

Factors Include:

1. hiring party's right to control the manner and means by which the product is accomplished
2. the skill required
3. the source of the instrumentalities and tools
4. the location of the work
5. the duration of the relationship between the parties
6. whether the hiring party has the right to assign additional projects to the hired party
7. the extent of the hired party's discretion over when and how long to work
8. the method of payment
9. the hired party's role in hiring and paying assistants
10. whether the work is part of the regular business of the hiring party
11. whether the hiring party is in the business
12. the provision of employee benefits
13. the tax treatment of the hired party

- the crux of these factors is the element of control; "significant" control; control is the "guiding indicator"
- Court finds in favor of USTA that no joint employer relationship existed for purposes of the race discrimination claim

Mitigating Risk: Best Practices

Considerations

What are the business needs and risk tolerance? Do you need to …

- **Outsource functions to take advantage of expertise?**
  - Finding talent
  - Running payroll, HR, scheduling, management functions
- **Ensure control over location for safety or brand consistency?**
  - Construction site dangers
  - Restaurant customer expectations for brand

Versus…

- **Receive services without needing to control?**
  - Outsourced janitorial services

Strategies

Reduce operational control / economic dependence by foregoing:

- **Power to hire and fire**
- **Supervision and control of work schedules or conditions of employment**
- **Setting the rate and method of payment**
- **Maintenance of employment records**
- **Requiring use of premises and equipment**
- **Engaging secondary employees to perform work "integral" to production process**
- **Engaging secondary employees full-time, or for extended period**
- **Right to discipline**
- **Control over usual employer functions such as payroll, benefits, WC, taxes, tools, materials**

BONUS: Consider role in setting standards, auditing compliance of other business

Strategies

Bolster contractual protections:

- **Clearly allocate power/control, other factors relevant to joint employment tests**
  - Who is the "primary" employer
  - Who has right to hire, fire, discipline, set wages, set hours of work
  - Who has obligation* to issue pay, provide benefits, maintain documentation
    - Not all statutes permit shifting of responsibility – hence indemnification
  - Who sets the assignments, specifies the methods for performance
  - Who provides training, tools, materials, facilities
  - When will status change
- **Clearly allocate indemnification responsibility**

Questions?

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