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4th Circuit Significantly Expands Joint Employer Liability Under FLSA With Incredibly Broad New Test

Much has been written about the National Labor Relations Board's controversial *Browning-Ferris* decision that significantly expanded the scope of joint employer liability under the National Labor Relations Act. But virtually no attention has been given to the Fourth Circuit Court of Appeals' recent panel decision in *Salinas v. Commercial Interiors, Inc.*, No. 15-1915 (4th Cir. 2017), which creates an altogether new and incredibly broad joint employment standard under the Fair Labor Standards Act that makes the NLRB's *Browning-Ferris* joint employment standard seem temperate at best. Absent a successful appeal to the US Supreme Court or Department of Labor intervention, the *Salinas* decision could open the floodgates to joint employment FLSA litigation and liability within the Fourth Circuit (Maryland, Virginia, West Virginia, North Carolina and South Carolina) and beyond.

Case Background

Commercial Interiors, Inc. — the putative joint employer in *Salinas* — was a general contractor that offered interior finishing services, such as drywall installation, carpentry, framing, and hardware installation. Commercial Interiors, in turn, subcontracted with J.I. General Contractors to provide framing and drywall installation. The plaintiff-employees were employed by J.I. General Contractors as drywall installers. They claimed that J.I. General Contractors failed to pay them overtime wages under the FLSA. They also sued Commercial Interiors on the theory that Commercial Interiors was a joint employer with J.I. General Contractors for purposes of the FLSA violation.

The district court held that the relationship among Commercial Interiors, J.I. General Contractors, and the employees was a typical contractor-subcontractor relationship and that Commercial Interiors was not a joint employer of the subcontractor's employees. On appeal, the Fourth Circuit panel disagreed, ruled that Commercial Interiors was a joint employer, and in doing so, set forth a new joint employment test for FLSA violations.

Employment Under the FLSA Must Be Interpreted Broadly

The Fourth Circuit panel began its analysis with a summary of the legislative history and intent behind the FLSA. The court concluded that Congress intentionally chose expansive definitions of the terms "employ" and "employee" in the FLSA in order to bring a "broad swath" of workers within the FLSA's protections. Of particular significance to the panel was legislative history reflecting that Congress intended the definition of "employ" under the FLSA to be the "broadest definition that has ever been included in any one act." Based on that legislative history, the court held that the concept of joint employment under the FLSA should be broader than the common law joint employment test and the joint employment standards under other employment laws (including the *Browning-Ferris* standard).

The "Completely Disassociated" Joint Employment Test

With that background in mind, the panel held that the FLSA joint employment inquiry involves "one fundamental question: whether two or more persons or entities are *not completely disassociated* with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or

otherwise codetermine – formally or informally, directly or indirectly – the essential terms and conditions of the worker's employment." (emphasis added) The panel identified six nonexhaustive factors that courts should use to guide their analysis of whether putative joint employers are "completely disassociated":

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.

Is The Fourth Circuit's Test Correct?

The panel's focus on whether the two entities are "completely disassociated" is a game-changer. Unlike virtually all other joint employment standards, the Fourth Circuit's "completely disassociated" test focuses on the relationship between the two entities, and *not* on the relationship between the putative joint employer and the employee. According to the court, focusing the joint employment analysis on the relationship of the two entities is the only way to "squarely address the 'joint' element of the 'joint employer' doctrine."

Though this reasoning has some theoretical, intellectual appeal, it in practice sets up an unrealistic and unworkable standard. Indeed, it is virtually impossible for two business entities to collaborate and yet at the same time be "completely disassociated." Whether it be a hotel or restaurant franchise arrangement, a vendor or supplier agreement, or a contractor-subcontractor relationship, some degree of "association" will always be necessary in order to make the arrangement work. Yet, the Fourth Circuit failed to account for this business reality. In its view, either the two entities are completely disassociated from one another or they are joint employers. No other court, and not even the Obama-era DOL, has interpreted joint employment this broadly.

Moreover, in arriving at the "completely disassociated" standard, the Fourth Circuit misapplied a DOL regulation designed to address an altogether different joint employment scenario than the one before the court in *Salinas*. That regulation — 29 C.F.R. § 791.2(a) — addresses "horizontal" joint employment in which an employee is admittedly employed by two separate entities and the question is whether those two entities are joint employers of the employee for purposes of aggregating the employee's hours worked for overtime purposes. *See* 29 C.F.R. § 791.2(a) ("If all the relevant facts establish that two or more employers are acting entirely independent 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* …") (emphasis added). Because the employee is admittedly an employee of both entities in a horizontal joint employment scenario, the joint employment question correctly focuses on whether the entities are sufficiently disassociated from one another to avoid jointly employing the employee in question.

But horizontal joint employment is a completely different scenario than the case before the Fourth Circuit in *Salinas*, which involved the more common "vertical" joint employment scenario. In vertical joint

employment scenarios, the employee is employed by only one entity and the question is whether another entity should also be deemed the employee's employer (as was the case in the NLRB's *Browning-Ferris* decision). In that context, the focus always has been, and always should be, on the relationship between the putative joint employer and the employee, not the relationship between the two entities.

The DOL's Wage and Hour Administrator recognized this important distinction in a January 20, 2016 Administrator's Interpretation regarding joint employment under the FLSA. In that Administrator's Interpretation, the Administrator discussed the important differences between horizontal and vertical joint employment scenarios, and he specifically cited to 29 C.F.R. § 791.2(a) as a horizontal joint employment regulation. Yet the Fourth Circuit's opinion makes no mention of the Administrator's Interpretation or the distinction between horizontal and vertical joint employment. In this sense, the Fourth Circuit panel's holding is legally flawed and ripe for appeal.

In addition to the incredibly broad "completely disassociated" standard, the Fourth Circuit panel's opinion also suggests that a putative joint employer's reserved (but not exercised) indirect control is sufficient to find a joint employment relationship. Readers familiar with the NLRB's *Browning-Ferris* joint employment standard will recognize the concepts of reserved and indirect control. But even the NLRB made clear in *Browning-Ferris* that reserved, indirect control, alone, was *not* sufficient to create joint employment liability. The Fourth Circuit panel, on the other hand, held the opposite. Indeed, the court went much further and stated that "one factor alone" can serve as the basis for finding that two entities are not "completely disassociated" and thus lead to a joint employment finding.

Where Do We Go From Here?

Browning-Ferris was bad for employers. Amazingly, *Salinas* is even worse. For now, the *Salinas* decision applies only to FLSA litigation in the Fourth Circuit. However, it won't be long before plaintiffs and unions urge district and appellate courts around the country to adopt the *Salinas* standard in FLSA cases. Thus, though there is still a chance that the *Salinas* decision will be successfully appealed to the US Supreme Court or that a newly appointed Secretary of Labor will take steps to lessen the impact of the decision through regulation, franchisors and other employers who rely on vendors and subcontractors must take steps to lessen the potential impacts of the *Salinas* joint employment standard. Among other things, they should ensure that their franchisees, vendors, and subcontractors comply with their FLSA obligations to pay minimum wage and overtime. Those who don't may find themselves unwittingly footing the bill for FLSA violations over which they had no control or oversight.

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