

The Fourth Circuit's New Test for Joint Employment Under the FLSA and Why You Should Care

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The Fourth Circuit Court of Appeals' recent articulation of a new test for joint employment under the Fair Labor Standards Act (FLSA) sets a challenging standard for general contractors and others that seek to minimize labor costs by subcontracting out work, and highlights the importance of carefully choosing business partners and subcontractors in order to avoid wandering into wage and hour violations.

The Fourth Circuit Court of Appeals' recent articulation of a new test for joint employment under the Fair Labor Standards Act (FLSA) sets a challenging standard for general contractors and others that seek to minimize labor costs by subcontracting out work, and highlights the importance of carefully choosing business partners and subcontractors in order to avoid wandering into wage and hour violations. In formulating the test, the court relied upon Congressional intent to define "employer" expansively under the FLSA and set aside decades of [precedent from sister circuits](#) and their progeny. *Salinas v. Commercial Interiors, Inc.*, No. 15-1915 (January 25, 2017).

Companies found to be joint employers of a worker or workers under the FLSA are responsible, both individually and jointly, for compliance with all provisions of the act, including minimum wage and overtime requirements for the entire workweek. As a practical matter, this means that the hours worked by an individual in a given workweek for each joint employer must be aggregated to determine certain things, such as whether the employee is entitled to overtime payments in a given week.

Background

The plaintiffs in *Salinas v. Commercial Interiors, Inc.* were drywall installers employed by a subcontractor. They brought claims for unpaid wages and overtime against both their employer, J.I. General Contractors, Inc., and the general contractor for which their employer had almost exclusively worked for years—Commercial Interiors, Inc. The plaintiffs claimed that Commercial was jointly and severally liable as a joint employer for unpaid overtime and wages because, among other things, the plaintiffs had performed nearly all

of their work on Commercial jobsites and for its benefit; Commercial had provided uniforms, tools, materials, and equipment; Commercial supervisors administered assignments, provided training, and dictated schedules—including overtime hours—and supervised the plaintiffs' work; the plaintiffs reported their arrivals and departures with Commercial foremen; Commercial kept time records of their work so that the subcontractor could run payroll; and the subcontractor's supervisor had instructed the plaintiffs to tell third parties while on-site that they were Commercial employees.

Applying a novel test of its own device, the U.S. District Court for the District of Maryland concluded that Commercial was not a joint employer of the plaintiffs because Commercial and J.I. General Contractors, Inc.'s relationship was a traditionally recognized, legitimate contractor-subcontractor relationship not entered into to avoid compliance with the FLSA or state law. Based on this finding, the district court dismissed Commercial from the case. After the plaintiffs received a trial verdict in their favor against their direct employer, they appealed the lower court's ruling with respect to Commercial.

The Fourth Circuit's Decision

On appeal, the Fourth Circuit rejected the lower court's conclusion that the legitimacy and good faith nature of the business relationship between subcontractor and general contractor was dispositive of the issue. The Fourth Circuit ruled that joint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker's employment and (2) the two entities' combined influence over the essential terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor.

Joint Employment

To address the first element—whether two companies are joint employers—the Fourth Circuit enumerated six, non-exhaustive factors for consideration:

(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 of 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.”

Applying these factors to the facts in *Salinas*, the court concluded that Commercial had jointly employed the plaintiffs with J.I. General Contractors.

Employment Relationship

The court then turned to the separate question of whether the plaintiffs were employees or independent contractors. For this second issue, the court's ruling focused on the relationship between the worker and the putative employer. The answer, the Fourth Circuit stated, rests on whether the worker is economically dependent on the business to which it renders services or is in business for himself as a matter of economic reality.

Notably, the Fourth Circuit indicated that while control over the subcontractor's employees is a sufficient condition for an entity to be held a joint employer for purposes of the FLSA, it is not a necessary one. Hence, companies seeking to avoid joint employment status under the FLSA in the Fourth Circuit—whether in the subcontractor-general contractor formulation or in other arrangements—would have to do more than simply avoid exercising control over workers.

With respect to possible concerns over the implication of its ruling on the economic viability of the contractor-subcontractor relationship, the court noted that a contractor could avoid FLSA liability by either (1) disassociating itself from the subcontractor with regard to key terms and conditions of the worker's employment or (2) ensuring that its subcontractor abides by the requirements of the FLSA. As the court noted, one way to avoid the risk of liability is to choose subcontractors carefully to ensure they are substantial businesses that comply with the law. Another is to hold back enough on the contract price to ensure that workers are paid in full.

Although instructive in other federal circuits, the Fourth Circuit's opinion will directly impact and control decisions involving employers in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

TOPICS

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