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July 12, 2012

The Third Circuit Sets Forth New Test for Joint-Employer Status Under the FLSA

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The Third Circuit recently elaborated on the test for joint-employer status under the Fair Labor Standards Act (FLSA) in the context of a parent company providing shared services to its subsidiaries in *In re: Enterprise Rent-a-Car Wage & Hour Employment Practices Litigation*, 2012 U.S. App. LEXIS 13229 (3d Cir. June 28, 2012).

Enterprise Holdings, Inc. is the parent company and sole stockholder of 38 domestic subsidiaries operating rental car agencies. Plaintiff Nickolas Hickton, a former assistant manager at one of the subsidiaries, filed a nationwide collective action in the United States District Court for the Western District of Pennsylvania, alleging that he and other similarly situated managers were misclassified as exempt, and were due back wages for overtime, liquidated damages and attorneys' fees under the FLSA. Hickton sued both the subsidiary and Enterprise Holdings, alleging that Enterprise Holdings was liable as a joint employer. After the district court granted summary judgment to Enterprise Holdings on the ground that it was not a joint employer (and thus not liable under the FLSA), Hickton appealed to the Third Circuit, arguing that summary judgment was improper because, on the evidence before the district court, a reasonable jury could conclude that Enterprise Holdings was a joint employer under the FLSA.

The Third Circuit disagreed. The Court of Appeals began its analysis by citing the statute, which defines "employer" broadly as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The court then noted that the FLSA's implementing regulations provide that an entity may be found to be a joint employer "[w]here the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." 29 C.F.R. § 791.2(b). The court also cited Third Circuit precedent holding that the degree of control over essential terms and conditions of employment is the touchstone for joint employer status under the FLSA:

> "[W]here two or more employers exert significant control over the same employees – [if] from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment – they constitute 'joint employers' under the FLSA."

Because no Third Circuit opinion squarely set forth an analytical framework for determining when sufficient control exists to create joint-employer status under the FLSA, the Third Circuit surveyed the opinions of other federal appellate courts and the district courts within the Third Circuit. Although the Third Circuit regarded these authorities as instructive, it concluded that, without amplification, they could not serve as a test for determining joint employment under the FLSA. Accordingly, the Third Circuit set forth its own analytical framework.

The court noted that the test for joint employment under the FLSA must be broader than the test used under other statutes such as the Age Discrimination in Employment Act (ADEA) and Title VII because the FLSA provides for joint-employment status where there is "indirect" as well as "direct" control over the relevant employees. It then held that courts must begin the joint-employer analysis by considering whether the alleged employer has or exercises:

1. authority to hire and fire employees;
2. authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits and hours;
3. day-to-day supervision, including employee discipline; or
4. control of employee records, including payroll, insurance, taxes and the like.

The court stressed, however, that the analysis may not end with evaluation of those factors. The four criteria are not exhaustive, and district courts must therefore take into account any other, unspecified, "real world" indications of "significant control." Further, whatever factors the district court takes into account must be balanced; no one factor will necessarily be determinative.

Because *Enterprise* requires district courts to consider "real world" indications of "significant control" that the Third Circuit did not attempt to delimit, the decision leaves some ambiguity concerning how much control is too much. An examination of the Third Circuit's application of the *Enterprise* test to the facts of the case, however, dispels some of that uncertainty and gives employers reason to take heart.

Hickton marshaled what, at first blush, might appear to be significant evidence of control: the same three individuals who were Enterprise Holdings' directors were also the only board members of each of the subsidiaries; Enterprise Holdings provided shared services (including employee benefit plans, rental reservation tools, a central customer contact service, insurance, technology, legal services, business guidelines, and human resources services) to its subsidiaries that were optional in the discretion of the subsidiary, which were paid for via dividends and management fees. The Human Resources services provided included providing job descriptions, best practices, training materials, performance review forms, and compensation guidelines; during 2005, representatives of Enterprise Holdings recommended that the subsidiaries not pay overtime wages to assistant managers who were employed by certain subsidiaries.

Notwithstanding that array of evidence, the Third Circuit concluded that Enterprise Holdings was not a joint employer of Hickton, even though the "fact of the interlocking directorates and the nature of the business being conducted by the parent and subsidiaries" weighed in favor of the plaintiff. The court also rejected the argument that the provision of guidelines and manuals rose to the level of "significant control," reasoning that they were merely *suggested* policies and practices, the subsidiaries had the discretion as to whether to adopt them, and Enterprise Holdings' recommendations were akin to those of a third-party consultant. In sum, the court concluded that, even though some of the evidence favored Hickton, the balance of the evidence under the four factors so favored Enterprise Holdings that no reasonable juror could conclude that Enterprise Holdings was a joint employer. The Third Circuit therefore affirmed summary judgment in Enterprise Holdings' favor.

Employers may draw several lessons from *Enterprise Holdings*:

- Although the black-letter law of *Enterprise Holdings* is not radically different from the black-letter law of other jurisdictions, the Third Circuit's conclusion that Hickton could not satisfy the *Enterprise* test even though he had some evidence of control suggests that plaintiffs asserting a joint-employer theory in the Third Circuit face a steep climb. For example, in the franchise context, where franchisors typically exercise no more control over franchisees' employees than *Enterprise Holdings* exercised over the employees of its subsidiaries, it is unlikely that the franchisor will be held to be a joint employer under the *Enterprise* test.
- Even though the *Enterprise* test for joint-employer status under the FLSA is easier for a plaintiff to satisfy than is the test for joint-employer status under other statutes, and the *Enterprise* test presents a fact-bound inquiry, the outcome in *Enterprise Holdings* suggests that summary judgment is a realistic possibility even for companies that exercise some control over the primary employer.

- Under the *Enterprise* test, however, to avoid joint employer status, a holding company, franchisor, or parent company providing shared services to a subsidiary, franchisee, or affiliate should make certain that the shared services really are optional and must avoid exerting day-to-day control over the essential terms and conditions of employment of the employees of the recipient of the shared services.
- Because the Third Circuit emphasized that the *Enterprise* test represents the most permissive test for joint-employer status, companies facing joint-employer claims under other statutes, such as Title VII, may argue that, if the plaintiff cannot satisfy the *Enterprise* test for joint employer status under the FLSA, he cannot satisfy the more difficult test for joint-employer status under other statutes. This is significant because the law in the Third Circuit for determining joint-employer status under Title VII and other statutes is not thoroughly developed. The *Enterprise* test therefore gives companies a new tool for arguing by analogy in non-FLSA cases that joint-employer status does not exist.

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