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Washington Supreme Court Decision May Spur Joint Employer Class Actions

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In a matter of first impression, the Washington Supreme Court has held that the "joint employer doctrine" is a viable theory under Washington's Minimum Wage Act (WMWA), and adopted the Fair Labor Standards Act's economic reality test to determine whether one or more entities are joint employers for purposes of minimum wage and/or overtime liability. This ruling extends the joint employer doctrine to Washington opt-out class actions under the WMWA, and potentially subjects entities to broader liability for the pay practices of their subcontractors.

Case Background

The plaintiffs in *Becerra v. Expert Janitorial, LLC*[1] worked as night janitors for various subcontractors in Seattle-area Fred Meyer grocery stores. The plaintiffs alleged they worked over 40 hours per week without being paid minimum wage or overtime in violation of the WMWA.

Fred Meyer contracted with Expert Janitorial to provide facility maintenance services at its grocery stores. None of the plaintiffs were directly employed by Fred Meyer or Expert Janitorial; rather, they were employed by independent janitorial companies that contracted with Expert Janitorial.

Remarkably, the manager of one of the independent janitorial companies admitted that his company regularly required the plaintiffs to work more than 40 hours per week, but did not pay them minimum wage or overtime.[2] The manager also testified that Fred Meyer and Expert Janitorial must have been aware that the plaintiffs were working more than 40 hours per week, as the plaintiffs were scheduled to work seven days per week beginning at 11:00 p.m. and had to wait until Fred Meyer employees arrived at 8:00 a.m. the following day in order to leave the premises.

Based on these facts, the plaintiffs argued that Fred Meyer and Expert Janitorial were their joint employers for purposes of WMWA liability as a matter of economic reality and that both companies knew the plaintiffs were denied overtime wages. Fred Meyer and Expert Janitorial moved for summary judgment on the basis that they were not the plaintiffs' employers and thus could not be held liable under the WMWA. The trial court granted the motions by focusing on whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised

1 *Becerra v. Expert Janitorial, LLC*, No. 89534-1, 2014 Wash. LEXIS 603 (Wash. Aug. 7, 2014).

2 The plaintiffs' claims against this janitorial company were stayed by the company's bankruptcy proceedings.

and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. The Washington Supreme Court reversed and remanded, ruling that the trial court had not considered all factors relevant to the joint employment determination.

Washington Adopts the Economic Reality Test for Joint Employment Under the WMWA

Based in part on the WMWA's broad definition of an employee as "any individual permitted to work by an employer," the Washington Supreme Court looked to FLSA jurisprudence and held that the parties' characterization of their employment relationship is not determinative. Rather, the court held that Washington courts must examine the facts in each case to determine whether a worker is, in fact, employed by two or more employers for purposes of minimum wage and overtime liability.

The Washington Supreme Court adopted the FLSA's economic reality test and the nonexclusive list of factors articulated in *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997), including:

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 the 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. Whether the work was a specialty job on the production line;
7. Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes;
8. Whether the premises and equipment of the employer are used for the work;
9. Whether the employees had a business organization that could or did shift as a unit from one worksite to another;
10. Whether the work was piecework and not work that required initiative, judgment, or foresight;
11. Whether the worker had an opportunity for profit or loss depending upon the worker's managerial skill;
12. Whether there was permanence in the working relationship; and
13. Whether the service rendered is an integral part of the alleged employer's business.

The court noted also that additional factors may be applicable, depending on the specific facts of the case, including whether the entity knew of the wage and hour violation, whether its contract with the subcontractor supplied sufficient funds to provide a lawful wage to the workers, and whether the subcontract agreement is a "subterfuge or sham."

Projected Impact on Future Litigation

While the joint employer doctrine and economic realities test are nothing new for employers, Washington employers should expect that employees of subcontractors will increasingly argue they are jointly employed by the businesses receiving their services when seeking damages for minimum wage or overtime violations under the WMWA. Because WMWA claims may be brought as a Rule 23 class action on an opt-out basis (as opposed to the FLSA's opt-in collective action process), any resulting class will likely be larger and the stakes will be higher.

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