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Third Circuit Establishes "Refined" Standard for Determining Whether a Joint Employment Relationship Exists under the FLSA

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In *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, No. 11–2883, 2012 WL 2434747 (3d Cir. June 28, 2012), the United States Court of Appeals for the Third Circuit established a "refined" test for determining whether joint employment exists under the Fair Labor Standards Act ("FLSA"). Applying this new standard, the Third Circuit affirmed the lower court's determination that defendant Enterprise Holdings, Inc. – the stockholder of thirty-eight domestic subsidiaries – was not a joint employer of its subsidiaries' assistant managers under the FLSA. Modifying and supplementing the tests set forth by the lower court and a sister circuit, the *Enterprise* test (1) establishes a flexible four-factor inquiry, and (2) considers all relevant evidence regarding the economic realities of the work relationship.

Background

The plaintiff Nickolas Hickton – a former assistant branch manager at the Enterprise-Rent-a-Car company of Pittsburgh – filed a nationwide collective class action under the FLSA in the Western District of Pennsylvania. Hickton alleged on behalf of the class that Enterprise Rent-a-Car and its parent company, defendant Enterprise Holdings, failed to pay him and the class members overtime wages. Enterprise Holdings moved for summary judgment on the basis that it was not a "joint employer" of the plaintiffs and, therefore, could not be held liable under the FLSA.

Enterprise Holdings does not directly rent or sell vehicles; rather, these functions fall within the purview of its thirty-eight subsidiaries. Enterprise Holdings, however, directly and indirectly supplies administrative services and support to its subsidiaries. These services include business guidelines, employee benefit plans, rental reservation tools, a central customer contact service, insurance, technology, and legal services. The lower court determined that the use of these services is "optional"; although when services are provided, each of the subsidiaries pays Enterprise Holdings corporate dividends and management fees.

Enterprise Holdings has a human resources department, which also provides various services to subsidiaries, including preparation of job descriptions, establishment of best practices, and preparation and distribution of compensation guides. The H.R. department also negotiates health insurance plans which are offered to employees of Enterprise Holdings, as well as to employees of its subsidiaries. Participation in these plans is not mandatory, but if a subsidiary elects to participate and an employee enrolls, Enterprise Holdings bills the subsidiary for the benefits provided to the employee. Additionally, the H.R. department offers assistance when relocating employees who transfer from one subsidiary to another and maintains a list of available employment opportunities with any of Enterprise Holdings' subsidiaries. The H.R. department also offers training materials to subsidiaries and provides a standard performance review form to evaluate employees of subsidiaries. Finally, through distribution of business guidelines and various human resources documents, Enterprise Holdings recommends salary ranges for employees of the subsidiaries.

The Third Circuit emphasized that each individual subsidiary can "choose" to use the guidelines or services at its own discretion, stating "none of these guidelines or services are mandatory." The Court noted, in particular, that at a meeting attended by representatives of Enterprise Holdings and its subsidiaries, Enterprise Holdings "recommended" that the subsidiaries not pay overtime wages to "Assistant Managers" and "Assistant Branch Managers" who were employed by subsidiaries (other than the California subsidiaries).

Governing Legal Standards

The FLSA defines an employer 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 applicable federal regulations further provide that this definition includes "[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). Accordingly, a "single individual may stand in the relation of an employee to two or more employers at the same time under the [FLSA]." 29 C.F.R. § 791.2(a). And that "[a] determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case." *Id.*

The U.S. Supreme Court has been clear that, when determining whether someone is an employee under the FLSA, "economic reality rather than technical concepts is to be the test of employment." *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961) (internal quotation marks omitted). Given this standard, the FLSA defines employer "expansively," *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992), and with "striking breadth." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). The Supreme Court has even stated that the FLSA's definition of an employer is "the broadest definition that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n. 3 (1945).

Third Circuit's Holding

Prior to *Enterprise*, the Third Circuit had not examined the standard for determining whether a defendant was a joint employer under the FLSA. In reaching its decision, the Court used as its starting point the joint employer test set forth in *N.L.R.B. v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117, 1123-24 (3d Cir. 1982) (holding that "where 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'"). The Third Circuit also emphasized that "[u]ltimate control is not necessarily required" and even "indirect" control may suffice, *i.e.*, "significant control" is enough.

Expounding on these principles, the Third Circuit held that courts should consider the following four factors in making a determination whether a joint employment relationship exists under the FLSA:

- "the alleged employer's authority to hire and fire the relevant employees";
- "the alleged employer's 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";
- "the alleged employer's involvement in day-to-day employee supervision, including employee discipline"; and
- "the alleged employer's actual control of employee records, such as payroll, insurance, or taxes."

In establishing these factors, the Court considered the related multi-factor tests set forth in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1981) and *Lewis v. Vollmer of America*, No. 05-01632, 2008 WL 355607 (W.D. Pa. Feb. 7, 2008). The Court elected to modify and supplement these tests, stressing the "uniqueness" of the FLSA and that a determination of joint employment must consider "the total employment situation and the economic realities of the work relationship." The Third Circuit, therefore, rejected a "simple application of the *Lewis* test" which, although "instructive," could not serve as the basis for determining joint employment under the FLSA "without amplification."

In rejecting a simple application the Third Circuit stressed that the four *Enterprise* factors are not exhaustive, and should not be "blindly applied as the sole considerations" in determining whether there is a joint employment relationship. Indeed, the Third Circuit warned that lower courts should not be limited to "narrow legalistic definitions," but rather should examine "all of the relevant evidence, including evidence that does not" easily conform to one of the four factors. Thus, the Court summarized that the so-called *Enterprise* test for determining joint employment status under the FLSA is "a melding of the modified *Lewis* test and the *Bonnette* test, consistent with those considerations of the real world where such additional economic concerns are prominent."

In applying the *Enterprise* test here, the Court focused its analysis and conclusion that Enterprise was not a joint employer on the fact that Enterprise Holdings did not have authority to (1) hire or discharge assistant managers, (2) promulgate work rules or assignments, (3) set compensation, benefits, schedules, rates or methods of payment, or (4) supervise or discipline employees, or exercise control over employee records. In response to the plaintiffs' contention that Enterprise Holdings "functionally held many of these roles" given the guidelines and manuals it distributed to its subsidiaries, the Court emphasized that these policies were "suggested" and "entirely discretionary." Further, although the Third Circuit agreed with the plaintiffs that "the interlocking directorates of the Board of Directors of each of the subsidiaries" and "the nature of the business of renting vehicles" ("which involves both the subsidiaries and the parent") were relevant to determining whether joint employment exists, it still found that, given the totality of the circumstances, the lower court did not err in granting summary judgment.

Takeaway

Enterprise settles the question in the Third Circuit as to the test that courts are to apply in determining whether a defendant qualifies as an employer under the FLSA. The *Enterprise* test makes clear that for a court to make that determination, it must engage in a nuanced, fact-intensive inquiry. Precisely because courts may consider "other indicia" in addition to the four factors, this inquiry raises concern for varying interpretations and unpredictable applications. Accordingly, although the Third Circuit laid out guideposts, courts have significant latitude to exercise their own discretion in light of "real-world" considerations. And, given the wide-ranging nature of the *Enterprise* test (and despite the outcome in this case), employers who might not believe that they qualify as a plaintiff's employer (especially parent companies) under the FLSA must carefully analyze their corporate structure and relationships.

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