

COMMENTARY

EMPLOYMENT LAW

BY STEPHEN A. ANTONELLI

Special to the Law Weekly



SANTONELLI@BABSTCALLAND.COM

How Many Employees Do You Have (for Purposes of the FLSA)?

Earlier this summer, our firm reminded you about major changes that take effect on Dec. 1, 2016, when the salary threshold required for employees to qualify for the executive, professional, or administrative exemptions allowed by the Fair Labor Standards Act (FLSA) is doubled. While certainly significant, the updated overtime regulations were not unexpected as the salary threshold has not been increased since 2004.

This sweeping change is not however, the only recent wage-and-hour development of which employers must be aware. There are other, far less distinct trends that have been taking shape over the past year. The Wage and Hour Division of the United States Department of Labor (DOL) and the National Labor Relations Board (NLRB) have announced new rules and cases that could increase employers' head counts and expand the concept of joint employment. In short, for purposes of the FLSA, some employers may actually have more employees than their payrolls indicate.

INDEPENDENT CONTRACTORS

In response to the trend of increasing employee misclassification investigations and private wage-and-hour lawsuits, last summer the DOL issued a 15-page interpretative memorandum with an aim to provide "additional guidance" for determining who is an employee and who is an independent contractor under the FLSA. Although classification as an independent contractor can be advantageous (or even preferable) for workers and businesses alike, improperly classified workers do not receive certain workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensa-

tion. Improper classification also frequently results in lower tax revenues for the government and an unfair advantage against those employers that do properly classify their workers.

The FLSA broadly defines the word "employ" as "to suffer or permit to work." According to the U.S. Supreme Court in *United States v. Rosenwasser*, 323 U.S. 360 (1945), and as acknowledged in the DOL's interpretive memorandum, the "suffer or permit" standard is the broadest definition that has ever been included in any one act, and it was designed to ensure as broad a scope of statutory coverage as possible.

The economic realities test determines whether an individual is an employee or an independent contractor. It involves a balancing of several factors including: whether the potential joint employer controls the supposed independent contractor and the employment conditions; the permanency of the relationship; the repetitiveness of the work being performed; whether the work is integral to the potential joint employer's business; whether the work is performed on the potential joint employer's premises; and whether the work qualifies as routine administrative work. According to the DOL, these factors should not be analyzed "in a vacuum, and no single factor, including control, should be over-emphasized." The ultimate determination to be made is whether the individual at issue is in business for him or herself or is instead economically dependent on the employer. According to the DOL, many companies misapply this

"broader concept" of the economic realities test and as a result, "most workers are employees under the [FLSA]."

NLRB'S EXPANDED JOINT EMPLOYER TEST

In August 2015, the NLRB applied an expanded joint employer test in *Browning Ferris Industries, et al.*, 362 NLRB No. 186 (2015), a case in which it held that, for the purpose of a union representation election, *Browning Ferris Industries* was a joint employer with *Leadpoint*, a staffing agency. The decision was based upon the concept that it is the "existence, extent and object" of the putative joint employer's control that matters, not whether that control is actually exercised. Though the *Browning Ferris* decision is limited to union representation elections, regulatory agencies and the plaintiffs' bar may attempt to apply a similarly expansive joint employer concept for purposes beyond collective bargaining, such as wage-and-hour matters. Moreover, many temporary employee and contractor arrangements have been structured in reliance of the NLRB's pre-*Browning Ferris* emphasis on the actual exercise of control as the determinative factor rather than the potential for such control. Those arrangements may now be susceptible to attack under the more expansive *Browning Ferris* test.

bar may attempt to apply a similarly expansive joint employer concept for purposes beyond collective bargaining, such as wage-and-hour matters. Moreover, many temporary employee and contractor arrangements have been structured in reliance of the NLRB's pre-*Browning Ferris* emphasis on the actual exercise of control as the determinative factor rather than the potential for such control. Those arrangements may now be susceptible to attack under the more expansive *Browning Ferris* test.

DOL'S JOINT EMPLOYMENT GUIDANCE

Earlier this year, the DOL issued enforcement guidance on the topic of joint employment. In recent years, many employers

have decreased the size of their workforce in recent years by relying upon staffing firms to provide temporary employees, or by outsourcing certain job functions entirely through contracts with independent businesses. Despite this, employers may still face potential liabilities under the joint employment doctrine. As the traditional direct employment model has changed, these so-called "fissured workplaces" have been targeted as alleged joint employers. As a result, traditional labor and employment laws and regulations might be applied to businesses that do not view themselves as the "employer" of temporary or contracted employees.

Many employers are surprised to know that they may be jointly responsible for paying workers overtime along with the entity that actually issues the workers a Form W-2. Regardless of whether the potential joint employment involves a horizontal or vertical arrangement, joint employers are jointly responsible for adhering to wage and hour laws. Horizontal joint employment involves workers who are employed by two technically separate yet related or intermingled entities. Vertical joint employment, on the other hand, is the classic staffing agency model.

Very recently, plaintiffs have begun to file complaints against only one (but not all) of the alleged joint employers. For instance, one the plaintiff recently alleged that a defendant "or its client" violated a wage and hour law. Another alleged that a defendant "or its contractor" misclassified the plaintiff. Perhaps this strategy is the result of genuine confusion as to which entity was the plaintiff's actual employer. A more likely conclusion may be that plaintiffs are targeting the entity they presume to have deeper pockets.

Regardless of plaintiffs' intentions, employers should be aware of the possibility that, for purposes of the FLSA, they may be responsible for workers who do not appear on their payrolls. •

Improper classification also frequently results in lower tax revenues for the government and an unfair advantage against those employers that do properly classify their workers.

Stephen A. Antonelli is a shareholder in the employment and labor practice group of law firm Babst, Calland, Clements and Zomnir. Antonelli's practice spans the full range of employment and labor issues encountered by employers in various industries.

The Legal Intelligencer

Pennsylvania Motion Practice – 1st Edition

By Steven E. Bizar and Thomas P. Manning - Buchanan Ingersoll & Rooney PC

A winning motion can significantly reshape the trajectory of your case.

Pennsylvania Motion Practice is a resource to practitioners at all levels, focusing on the rules and procedures governing motion practice in the Pennsylvania state courts.



For more information or to place an order, visit:
www.lawcatalog.com/pamp | Call 800-756-8993

www.lawcatalog.com/pamp

ALM
Insights. Innovation. Connected.