Whose Liability Is It Anyway?

Wage and Hour Track
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INTRODUCTION

The challenge in this presentation “Whose Liability Is It Anyway?” is to determine which persons or companies can be deemed appropriate defendants under the Fair Labor Standards Act (“Act” or “FLSA”) for violations of the minimum wage, overtime and child labor requirements of the Act. This paper reviews the scope of the FLSA’s coverage of employers including (1) individuals, including corporate officers, managers, supervisors, and owners/shareholders; (2) joint employers; and (3) successors.

I. How Employers Fall Within The FLSA’s Coverage.

There are three ways of establishing that an employer is covered by the FLSA. The first, often referred to as “traditional” or “individual” coverage, deals with the employee’s job duties. The second, referred to as “enterprise” coverage, focuses a bit more on the employer’s operations. The third, applies to state and local governments that automatically fall under the FLSA’s coverage. Under all three methods, courts resolve all doubts in favor of application of the FLSA covering an employer’s operations.

II. Individual Or Traditional Coverage Under The FLSA.

Under “individual” or “traditional” coverage, an individual is covered by the FLSA if he or she has either “engaged in commerce or in the production of goods for commerce.” To be engaged in commerce, a “substantial part” of the employee’s work must be related to interstate commerce. In other words, the work must be related to the movement of persons or things (including intangibles such as information and intelligence) between states. Under this test, the question “is not whether the employee’s activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it.”

Very little is needed to qualify as “engaged in commerce.” For example, a court found that an employee who received between 11 and 23 shipments from across state lines each month was engaged in commerce, despite spending only one-half hour per week on those tasks. Similarly, an employee who regularly made out-of-state phone calls was found to be engaged in commerce. However, a doctor’s assistant who made 29 calls or faxes to other states during her employment did not engage in commerce.

7 Curry v. High Springs Family Practice and Diagnosis Center, Inc., 2009 WL 3163221 (N.D. Fla. 2009).
Although it does not take much to be engaged in interstate commerce, courts have recognized that some activities are “purely local” in nature. Once goods reach their local destinations in the hands of ultimate consumers, they lose their interstate character. For example, employees are not engaged in interstate commerce merely because they purchase, deliver, or use goods locally that had previously traveled in interstate commerce.\(^8\) However, they may be engaged in interstate commerce if the goods are purchased or ordered from out-of-state locations.\(^9\) The employees also may be engaged in interstate commerce if they are involved in distributing or selling goods upstream – that is, before the goods reach the ultimate consumer.\(^10\) This is true unless the flow of interstate commerce is interrupted by intrastate processing of goods, such as mixing of concrete, blending of coffee, pasteurizing of milk, or creating dental prosthetics.\(^11\) An employee is not engaged in interstate commerce even though he or she sometimes provides services or intrastate transportation to out-of-state residents.\(^12\)

The other avenue for individual coverage is for employees who are engaged in the production of goods for commerce. The Supreme Court concluded that guards at production facilities met this test because their work was essential to the production process.\(^13\) Even more broadly, the Supreme Court held that employees performing maintenance and custodial services for common areas of buildings in which space was rented to tenants engaged in producing goods were themselves engaged in “production” covered by the FLSA.\(^14\) Similarly, courts have found that employees performing security services at movie filming sites are engaged in “production.”\(^15\)

### III. Enterprise Coverage Under The FLSA.

The 1961 amendments to the FLSA added “enterprise” coverage to the FLSA in Sections 203(r) and 203(s), significantly broadening the number of employees covered by the FLSA. Under “enterprise” liability, the employee does not need to be directly

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\(^12\) Sobrinio v. Medical Center Visitor’s Lodge, Inc., 474 F.3d 828 (5th Cir. 2007); Dent v. Giaimo, 606 F. Supp. 2d 1357 (S.D. Fla. 2009); Si v. CSM Inv. Corp., 2007 WL 1518350 (N.D. Cal. 2007).


involved in an activity that affects interstate commerce. Rather, if an enterprise’s annual gross volume of sales made or business done is at least $500,000, all non-exempt employees are covered under the FLSA if at least two employees are (1) engaged in commerce; (2) engaged in the production of goods for commerce; or (3) engaged in handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce. Non-profit organizations generally do not qualify as “enterprises,” except for those explicitly named in the definition of “enterprise” such as certain hospitals, institutions for the ill or elderly, and schools, or non-profits that engage in commercial activities. A challenge to an employer’s enterprise coverage implicates not only the merits of the employee’s claim, but also the court’s jurisdiction.

As with most FLSA coverage questions, courts are very careful about exempting employees, and the Supreme Court has held that courts should assume that federal law was intended to apply to the farthest reaches of interstate commerce. Sample rulings finding employers to be engaged in interstate commerce include:

- The employer of a meat cutter whose products only “indirectly” made their way into interstate commerce.
- The employer of crew members who installed pinsetter machines in bowling alleys and had to cross state lines to perform their work.
- The employer of workers at a parking lot adjacent to the Atlanta airport.

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• A fraternal organization operating a home to care for sick and aged residents, where employees used goods and materials that had traveled in interstate commerce to prepare and serve food to residents, wash laundry, clean the home, and perform maintenance tasks.  

• Ambulance drivers who transported victims of accidents on public highways within one state.  

• Restaurant employees who regularly handled materials that had been purchased from local distributors but had previously traveled in interstate commerce.  

This last example illustrates one aspect of enterprise coverage that is broader than individual coverage. Buying or using goods locally that previously traveled in interstate commerce is generally not enough for individual coverage. Enterprise coverage is different because it applies to employees “handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.”  

There has been much debate about the provisions of Section 203(s) that bring within enterprise coverage employers with employees “handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person.” 29 U.S.C. § 203(s)(1)(A)(i). What happens if the goods or materials are handled by employees after they have “come to rest” following interstate transport, and the purchase and handling of the goods or materials are purely intrastate? The Eleventh Circuit recently rejected employers’ arguments that there is a “coming to rest” exception to the “handling clause”:

The plain language of the statute compels this conclusion. Defendants fall under enterprise coverage if they have “employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.” 29 U.S.C. § 203(s)(1)(A)(i) (emphasis added). “The tense is in the past. There is no requirement of continuity in the present.” So, if a district court, ruling for a Defendant, applied the “coming to rest” doctrine—for instance,  


by looking at where Defendant bought an item instead of where an item was produced, we must vacate the judgment for the Defendant if there is a question about where the “goods” or “materials” were produced or where they have moved.30

Despite the ease with which an employer will be found to engage in interstate commerce, an employee must still present some evidence to prove FLSA coverage.31 Merely because the employer has credit cards or bank accounts with companies that have out-of-state headquarters, has a website that can be accessed by out-of-state individuals, and makes a few out-of-state phone calls, does not satisfy the test for enterprise coverage.32 Courts will consider the regularity and frequency with which the employees engaged in interstate commerce.33

There has been a bit of a battleground as of late as to whether immigrants without work authorization can make up the group of at least two employees necessary for an employer to be covered by enterprise liability. The impetus for the debate has been the Supreme Court’s 2002 decision in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, where the Court held that the National Labor Relations Board could not award backpay for work never performed to an immigrant without work authorization. Thus far, courts have been unconvinced that the rationale of Hoffman extends to the FLSA, and have adhered to prior rulings that immigrants without work authorization are employees for purposes of enterprise liability.34

IV. Enterprise Coverage, Multiple Defendants.

Section 203(r) of the FLSA also defines “enterprise” to include “the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose,” even if performed in more than one establishment or organizational unit.35 The significance is that if entities are considered a single enterprise under the FLSA, the dollar value of their sales are combined for the $500,000 enterprise threshold.36 Often, the focus in litigation is whether the multiple entities have the requisite “common business purpose.”

Quoting decisions from other circuits, the Seventh Circuit in 2011 observed that “more than a common goal to make a profit, however, must be shown to satisfy the

30 Polycarpe v. E&S Landscaping Service, Inc., 616 F.3d 1217, 1221 (11th Cir. 2010).
A common business purpose can exist where multiple entities perform auxiliary or service activities such as warehousing, bookkeeping, advertising, and other services, and there is “operational interdependence” between the entities. For example, where employees are employed interchangeably or income is shared between two businesses, there may be “operational interdependence.”

One case illustrating these principles involved a motel and adjacent supper club. Guests at the motel frequently patronized the restaurant and lounge, where they could charge meals and drinks to their motel bills. Guests at the motel could also have meals from the restaurant delivered to their rooms. The accounting, financial, and tax records of the supper club were intermingled with those of the motel. Employees at the supper club performed tasks at the motel such as delivering linens, providing room service, cleaning rooms, and performing maintenance. The Court found that “these facts establish that the operations of the motel, restaurant, and lounge are coordinated and interdependent, and that they are directed toward providing complementary lodging, food, and entertainment services to travelers.”

V. “Any Person” Liability – The Liability Of Corporate Officers And Supervisors For FLSA Violations.

If Section 203(d) of the FLSA defines as an employer “any person acting directly or indirectly in the interest of an employer in relation to an employee,” this means that corporate officers and supervisors are potentially liable for wage and hour violations. Personal liability under the FLSA usually turns on a multi-part test:

- whether the individual has a significant ownership interest in the corporation,
- whether the individual had personal responsibility for the decision that lead to the conduct which violated the FLSA,
- whether the individual supervised and controlled employee work schedules and conditions of employment;
- whether the individual maintained employment records; and

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whether the individual had control of significant aspects of the corporation’s

As many courts have noted, the definition of “employer” under the FLSA is much
broader than the usual common law concept.\footnote{Boucher v. Shaw, 572 F.3d 1087 (9th Cir. 2009); Dole v. Elliot Travel & Tours, 942 F.2d 962, 965 (6th Cir. 1991); see Chellen v. John Pickle Co., Inc., 446 F. Supp. 2d 1247 (N.D. Okla. 2006).} One does not need to be an owner of
the business to be liable under the FLSA; rather, the degree of ownership is but one
factor that courts evaluate.

Many courts applying these tests have found corporate officers personally liable
for FLSA violations.\footnote{See Boucher v. Shaw, 572 F.3d 1087 (9th Cir. 2009)(“Where an individual exercises ‘control over the
nature and structure of the employment relationship,’ or ‘economic control’ over the relationship, that
individual is an employer within the meaning of the Act, and is subject to liability.”); Luder v. Endicott, 253
F.3d 1020 (7th Cir. 2001)(“[A] supervisor who uses his authority over the employees whom he supervises
to violate their rights under the FLSA is [individually] liable for the violation.”); Baystate Alternative
Staffing, Inc. v. Herman, 163 F.3d 668 (1st Cir. 1998)(supervisory authority not sufficient for individual
liability under the FLSA; rather the individual defendant must have control over the work situation coupled
with personal responsibility for the decision that violated the FLSA); U.S. Dep’t of Labor v. Cole Enters.,
Inc., 62 F.3d 775 (6th Cir.1995)(finding an individual defendant liable under the FLSA because he had
power over, among other things, hiring, firing, rates of pay, schedule, and payroll); Reich v. Circle C.
Invs., Inc., 998 F.2d 324 (5th Cir. 1993)(“This Court has held that the FLSA’s definition of employer is
sufficiently broad to encompass an individual who, though lacking a possessory interest in the ‘employer’
corporation, effectively dominates its administration or otherwise acts, or has the power to act, on behalf
of the corporation vis-à-vis its employees.”); Lee v. Coahoma County, Mississippi, 937 F.2d 220 (5th Cir.
1991)(holding that an individual sheriff could be held an “employer” under the FLSA because the sheriff
“clearly falls within the class of managerial personnel considered employers by the FLSA” and could
exercise operational control under Mississippi law, though the district court did not make a finding to that
effect); modified on other grounds, 37 F.3d 1068 (5th Cir.1993); Brock v. Hamad, 867 F.2d 804 (4th Cir.
1989)(finding an individual defendant with power to hire and direct employees was an “employer” under
the FLSA); Donovan v. Janitorial Servs., Inc., 672 F.2d 528 (5th Cir. 1982)(upholding FLSA liability of an
individual, even though he did not direct the day-to-day management of the corporate defendant because
the individual’s “considerable investment” in the company gave him “ultimate, if latent, authority over its
affairs,” and he exercised authority by firing an employee, reprimanding others, and providing some direct
with operational control is an ‘employer,’ along with the corporation, jointly and severally liable under the
[FLSA] for unpaid wages. Further, any such corporate officer is liable in his individual, not representative,
WL 1144052 (N.D. Tex. 2004).} In a similar
case, a court found a company’s president to be an “employer” subject to FLSA liability
where the president had “continuous contact” over payroll and other personnel

\footnote{Cross v. Arkansas Forestry Commission, 938 F.2d 912 (8th Cir. 1991).}
In a third case, a court found an individual to be an “employer” where he served as president, general manager, chairman of the board and owner of 80% of the employer’s stock, he actively participated in the overall supervision of the company as well as in many day-to-day functions involved in operating the company, was frequently on the premises, and several employees testified that they received specific instructions from him on how to perform their job duties. Similarly, a court found that the owner of a farm, together with his son and daughter-in-law, were joint employers under the FLSA. In another case along the same lines, the brother of the owner of a videotape business was a joint employer where the brother hired some employees and directed their work.

At times, an employer found to have violated the FLSA may turn around and file a claim against its supervisors who allowed the uncompensated time to be worked, seeking to have the supervisors indemnify the employer (pay the damages due the employee). Courts routinely reject such indemnity claims. As the Fifth Circuit bluntly said, “No cause of action for indemnity by an employer against its employees who violate the Act appears in the statute, nor in 40 years of its existence has the Act been construed to incorporate such a theory.”

First, the text of the FLSA makes no provision for contribution or indemnification. Second, the statute was designed to regulate the conduct of employers for the benefit of employees, and it cannot therefore be said that employers are members of the class for whose benefit the FLSA was enacted. Third, the FLSA has a comprehensive remedial scheme as shown by the ‘express provision for private enforcement in certain carefully defined circumstances.’ Such a comprehensive statute strongly counsels against judicially engrafting additional remedies. Fourth, the Act’s legislative history is silent on a right to contribution or indemnification. See Joint Hearings on H.R. 7200 and S. 2475 Before the Senate Comm. on Educ. and Labor and the House Comm. on Labor, 75th Cong. (1937), reprinted in American Landmark Legislation: The Fair Labor Standards Act of 1938, at 37-116 (Irving J. Sloan ed., 2d series, 1984). Accordingly, we hold that there is no right to contribution or indemnification for employers held liable

45 Bauler v. Pressed Steel Car Co., 81 F. Supp. 172 (N.D. Ill. 1948), aff’d 182 F.2d 357 (7th Cir. 1948).
46 Reed v. Murphy, 232 F.2d 668 (5th Cir. 1956).
under the FLSA. Cases from other circuits support this conclusion. Several have followed Northwest’s reasoning in similar situations. See Martin v. Gingerbread House, Inc., 977 F.2d 1405, 1408 (10th Cir. 1992) (“a third party complaint by an employer seeking indemnity from an employee is preempted” by the FLSA); Lyle v. Food Lion, Inc., 954 F.2d 984, 987 (4th Cir. 1992) (court should not “engraft an indemnity action upon this otherwise comprehensive federal statute,” i.e., the FLSA).  

VI. Religious Organizations And The FLSA.

Though religious organizations are normally exempt from the FLSA’s coverage – since they do not have the “business purpose” necessary for enterprise coverage51 – they can lose their FLSA exemption for non-religious employees if they “serve the general public in competition with ordinary commercial enterprises.” The theory is that “the payment of substandard wages would undoubtedly give churches and similar organizations an advantage over their competitors. It is exactly this kind of ‘unfair method of competition’ that the Act was intended to prevent.” 52 In one case, a church lost its FLSA exemption by renting out meeting halls, effectively competing with short and long-term commercial landlords and special event locations. 53 Similarly, a court found that a church-operated school was covered by the FLSA. 54

VII. Individual Defendants.

The FLSA defines “employer” to include “any person acting directly or indirectly in the interest of an employer in relation any employee . . .” 29 U.S.C. § 203(d). It defines “person” to include an “individual.” 29 U.S.C. § 203(a). 55 It is not the title of the individual that matters. It is the role the individual plays on behalf of the employer in relation to the employee that matters in determining liability as an employer.

Thus, an individual who acts directly or indirectly in the interest of an employer in relation to an employee may be liable for violations of the FLSA with respect to that

50 Herman v. RSR Sec. Services Ltd., 172 F.3d 132 (2d Cir. 1999).
51 See Schleicher v. Salvation Army, 518 F.3d 472 (7th Cir. 2008).
54 Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990).
55 As discussed in more detail below, the term “employer” has been interpreted to encompass one or more joint employers. Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194 (5th Cir. 1983), citing, inter alia, Falk v. Brennan, 414 U.S. 190, 195 (1973).
employee. The individual could be an owner/shareholder of the company employing the employee or a director, corporate officer, or manager or supervisor.\textsuperscript{56}

Because individual owners, directors, officers, managers, and supervisors can be liable under the FLSA, it is not necessary to pierce the corporate veil to reach an individual employer.\textsuperscript{57} The individual is subject to liability if he or she is acting in the role of an “employer.”\textsuperscript{58} If an individual has acted in the role of an employer, it is no defense that common law principles would not impose liability on him or her.\textsuperscript{59}

As in other aspects of FLSA law (e.g., determining whether a worker is an employee or an independent contractor), the courts apply an “economic realities” test to determine if an individual is an employer.\textsuperscript{60} The key to individual liability lies in whether the individual exerted sufficient control over relevant aspects of the employer’s employment policies or practices. The Supreme Court has held that “managerial responsibilities” and “substantial control of the terms and conditions” of the employees’ work create employer status.\textsuperscript{61} The standard is an expansive one.\textsuperscript{62}

No one factor is determinative. When determining whether an individual is an “employer” for purposes of the FLSA, an “overarching concern is whether the alleged employer possessed the power to control the workers in question.”\textsuperscript{63} An individual does not have to have exclusive control of a corporation’s day to day functions to be classified as an employer. It is enough that the party have “operational control of significant aspects of the corporation’s day to day functions.”\textsuperscript{64} “Control” does not require “continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA.”\textsuperscript{65}

\textsuperscript{56} See, e.g., Donovan v. Agnew, 712 F.2d 1509, 1514 (1st Cir. 1983) (corporate officers); see also Donovan v. Sabine Irrigation Co., 695 F.2d 190, 195 (5th Cir.), cert. denied, 463 U.S. 1207 (1983) (stock ownership in corporate employer not the sine qua non of employer status where other forms of control of employment relationship have been proven).

\textsuperscript{57} Agnew, 712 F.2d at 1512-14.

\textsuperscript{58} As discussed below, the individual and a corporation can be jointly liable, as can be more than one individual and more than one corporate employer. The question as to each is whether or not that party is or was an “employer” of the employee at the relevant times.

\textsuperscript{59} Agnew, 712 F.2d at 1513.

\textsuperscript{60} Id. at 1510; see also, Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 965 (6th Cir. 1991); Sabine Irrigation Co., 695 F.2d at 194-95.

\textsuperscript{61} Falk, 414 U.S. at 195 (1973). See also Donovan v. Grim Hotel Co., 747 F.2d 966 (5th Cir. 1984); Agnew, 712 F.2d at 1514; Sabine Irrigation, 695 F.2d at 194-95.

\textsuperscript{62} Falk, 414 U.S. at 195; Herman v. RSR Security Services Ltd., 172 F.3d 132, 139 (2d Cir. 1999).

\textsuperscript{63} Herman., 172 F.3d at 139; see also Agnew, 712 F.2d at 1511.

\textsuperscript{64} Agnew, 712 F.2d at 1514.

\textsuperscript{65} Donovan v. Janitorial Servs., Inc., 672 F.2d 528, 531 (5th Cir. 1982).
of control. Ownership alone is neither a necessary nor a sufficient condition to establish that an individual is an "employer" under the FLSA.

Relevant factors under the "economic realities" test include whether the employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules and conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. The list of factors is not exhaustive, and no individual factor standing alone is dispositive. Rather, whether a particular individual is an "employer" under the FLSA is determined by looking at all of the relevant facts.

There is some dispute as to whether employer status of an individual is a question of law or of fact. In any event, sufficient facts as to an individual defendant's role must be plead to avoid the risk of dismissal. There are recent decisions granting motions to dismiss complaints against individual FLSA defendants or denying permission to amend a complaint to add individual FLSA defendants, under the Supreme Court's decision in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In those cases, the courts found that the complaints did not plead sufficient facts regarding the individual defendants' roles.

Individual liability can be relevant to enforcement of wage claims. For example, bankruptcy of a corporate defendant does not insulate an individual defendant from liability and enforcement of a wage judgment against him or her.

It is important to note that some state laws permit enforcement of wage claims against individuals who are not necessarily liable as "employers" under the FLSA. For example, under certain circumstances, mechanics' liens based on wage claims against a contractor can be filed against the owner of the property on which the laborer was working, even if the owner is not an employer under the FLSA.

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67 Herman, 172 F.3d at 139, citing Carter v. Duchess Community College, 735 F.2d 8, 12 (2d Cir. 1984), in turn, citing Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).

68 As discussed below, the Second Circuit has articulated other factors to be considered in joint employer cases. Zheng v. Liberty Apparel company, Inc., 355 F.3d 69, 72 (2d Cir. 2003).


72 See, e.g., New York Lien Law § 3; 7-21 New York Real Property Forms Annotated § 21.
Corporation Law Section 630 provides that the ten largest shareholders of a non-public corporation “shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation.” Thus, corporate liability under the FLSA can lead to individual liability by shareholders even if they themselves are not necessarily “employers” under the FLSA.

VIII. Determining When a Joint Employment Relationship Exists.

Under Section 203(d) of the FLSA, the term “employer” includes “any person acting directly or indirectly in the interest of an employer in relation to an employee.”

This means that an individual performing a single job may actually have several employers for purposes of the FLSA.

Section 791.2(b) of the DOL’s regulations provides that two or more employers may be employers where an employee “performs work which simultaneously benefits both, or works at two or more employers at different times during the workweek,” including, for example:

1. Where there is an arrangement to share the employee’s services; or
2. Where one employer acts directly or indirectly for the other employer in relation to the employee; or
3. Where the employers share control of the employee because one employer controls, is controlled by, or is under common control with the other employer.

Perhaps predictably, the courts have expanded upon the three factors listed by the DOL, and have articulated a variety of factors to consider in evaluating whether a joint employment relationship exists. The Ninth Circuit, in a widely-followed opinion has only modestly grown the list to four:

1. Did the proposed employer have the power to hire and fire employees,
2. Did the proposed employer supervise or control employee work schedules or conditions of employment,
3. Did the proposed employer determine the rate or method of payment, and
4. Did the proposed employer maintain employment records.

The Second Circuit looks to six factors:

1. Whether the premises and equipment of the purported joint employer are used for the plaintiffs' work;

2. Whether the contractors had a business that could or did shift as a unit from one putative joint employer to another;

3. The extent to which plaintiffs performed a discrete line-job that was integral to the process of production for the purported joint employer;

4. Whether responsibility under the contracts could pass from one subcontract to another without material changes;

5. The degree to which the purported joint employer or their agents supervised the plaintiffs' work; and

6. Whether employees worked exclusively or predominantly for the purported joint employer.77

Other courts look at many additional factors, none of which are dispositive by themselves:

- The nature and degree of control over the workers.
- The degree of supervision, direct or indirect, of the work.
- The power to determine the pay rates or the methods of payment.
- The right to hire, fire, or modify employment conditions.
- Involvement in preparing payroll and paying wages.
- Investment in equipment and facilities.
- The opportunity for profit or loss.
- The permanency and exclusivity of employment.
- The degree of skill required to perform the job.
- The ownership of the facilities where the work occurred.
- Whether the employee performs a “specialty job” integral to the business.78

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77 Zheng v. Liberty Apparel Co., Inc. 355 F.3d 61, 72 (2d Cir. 2003).
Courts have found joint employment arrangements in a number of situations. Questions often arise with employees who work for employment agencies. For example, in one case a group of temporary workers brought an FLSA lawsuit against their employment agency and a consultant who controlled the agency’s day-to-day operations. The court found that both the employment agency and the consultant were "employers" covered by the FLSA, even though the work of the employees was actually performed for third parties.\(^7^9\) In another case, a hospital was the joint employer of a temporary nursing assistant who was referred by multiple health care agencies because of its power to hire, fire, and supervise, the fact that it maintained employment records and calculated hours, and that she worked at the hospital using the hospital’s equipment.\(^8^0\) However, an entity that provides merely administrative services, such as handling payroll, benefits, and records will not be a joint employer if it has no control over day-to-day activities or hiring and firing of the employees.\(^8^1\)

Companies with overlapping ownership, such as a parent company and a subsidiary company, may be joint employers where assets are under one management and operating structure or where the parent company supervises subsidiary employees and exercises control over employment decisions.\(^8^2\) Even when an employee works for separate legal entities at different locations, they may be joint employers where, for example, they have common ownership and management and share employees between locations.\(^8^3\) By contrast, standard subcontracting and franchising arrangements generally will not qualify as joint employment.\(^8^4\)

Individuals who share in directing employees, such as an owner’s family members, may also be joint employers. For instance, a court found that the owner of a


\(^8^0\) Barfield v. New York City Health and Hospitals Corp., 537 F.3d 132 (2d Cir. 2008).


farm, together with his son and daughter-in-law, were joint employers under the FLSA. In another case along the same lines, the brother of the owner of a videotape business was a joint employer where the brother hired some employees and directed their work. However, this is not to say that all such arrangements escape the FLSA’s requirements. A company that hired an independent contractor to supply agricultural labor was a joint employer where the workers performed a specialty job; the company supplied tools, supervised the workers, and laid down work rules; and the independent contractor worked exclusively for the company.

If an employee is jointly employed, then all of the employee’s work for all of the joint employers is considered one employment for purposes of calculating overtime. All joint employers are responsible for complying with the FLSA. One joint employer does not have the right to seek “contribution” from another joint employer for FLSA damages.

A. Department of Labor (DOL) Regulations and Opinion Letters.

Whether a joint employment relationship exists for purposes of the FLSA depends on all the facts and “economic realities” of a particular case. Generally, however, pursuant to the DOL’s interpretive regulations, two or more employers may be “joint employers” where an employee “performs work which simultaneously benefits both, or works at two or more employers at different times during the workweek,” including, for example:

(1) Where there is an arrangement between the employers to share the employee’s services, as, for example, to interchange employees; or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control.

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87 Reyes v. Remington Hybrid Seed Co., Inc., 495 F.3d 403 (7th Cir. 2007).
88 29 C.F.R. § 791.2(a).
90 Herman v. RSR Security Services Ltd., 172 F.3d 132 (2d Cir. 1999); see Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981); Martin v. Gingerbread House, Inc., 977 F.2d 1405 (10th Cir. 1992); “a third party complaint by an employer seeking indemnity from an employee is preempted” by the FLSA); Lyle v. Food Lion, Inc., 954 F.2d 984 (4th Cir. 1992)(Court should not “engraft an indemnity action upon this otherwise comprehensive federal statute,” i.e., the FLSA); see also LeCompte v. Chrysler Credit Corp., 780 F.2d 1260 (5th Cir. 1986).
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).

Not surprisingly, the DOL has relied upon the above factors in its opinion letters concerning “joint employment” under the FLSA. See Administrator Opinion Letter dated April 11, 2005 and Non-Administrator Opinion Letter dated June 14, 2005, attached as Appendix A.

B. **Migrant and Seasonal Agricultural Worker Protection Act (MSPA).**^{91}

Joint employment status is not presumed to exist in agriculture. See DOL Fact Sheet #35 Joint Employment and Independent Contractors Under the Migrant and Seasonal Agricultural Worker Protection Act. Rather, under the MSPA, the DOL uses an “economic dependence” test that considers the following factors relevant in determining whether a joint employment relationship exists:

1. Whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties);

2. Whether the agricultural employer/association has the power, either alone or in addition to another employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates of the worker(s);

3. The degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue;

4. The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training;

5. Whether the activities performed by the worker(s) are an integral part of the overall business operation of the agricultural employer/association;

6. Whether the work is performed on the agricultural employer/association’s premises, rather than on premises owned or controlled by another business entity; and

7. Whether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by the

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employer, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers’ compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment.)

Under this test, the ultimate concern is whether the agricultural work is economically dependent upon more than one person. No single factor is dispositive and the factors are non-exhaustive. Rather, the test is based on a totality of the circumstances.

Courts have adopted the DOL’s test in determining joint employer status under the MSPA. In Gonzales-Sanchez v. International Paper Co., 346 F.3d 1017 (11th Cir. 2003), the Eleventh Circuit affirmed summary judgment for defendants, concluding that defendant paper companies were not the joint employer of migrant workers hired by farm labor contractors (FLCs) to plant tree seedlings on the paper companies’ forest properties. In a class action, five migrant laborers claimed the paper companies were joint employers with the FLCs and were therefore liable for overtime violations. Relying on the analysis from a similar case, the court used a seven-factor test for migrant agricultural workers to conclude that the paper companies were not the joint employers of the migrant workers. Specifically, while the paper companies may have made an instructional video for the migrant workers, they were found not to be an employer because they did not assign tasks, dictate hiring decisions, design the management structure, govern work schedules or discipline workers.

C. Impact of Zheng.

In Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003), the Second Circuit created a new six factor test for assessing when businesses are liable as “joint employers” under the FLSA for violations committed by their subcontractors. The Second Circuit held that, depending on the case, the following factors should be reviewed in determining joint employer status: (1) whether or not the workers worked exclusively or predominantly for the purported joint employer; (2) the permanence or duration of the working relationship; (3) whether or not the purported employer’s premises and equipment are used by these workers; (4) the extent of control the putative joint employer imposes over these workers; (5) whether or not the outsourced workers can be considered an integral part of the business; and (6) whether the workers had a business organization that could shift as a unit from one putative joint employer to another. The Court also found that industry custom and historical practice could be

92 29 C.F.R. § 500.20(5)(iv).

93 See 29 C.F.R. § 500.20(5)(iv).

considered in order to differentiate between legitimate subcontracting relationships and subterfuges intended to evade the FLSA.

Courts within the Second Circuit have continued to rely on the same six-factor test articulated in Zheng. See Copantitla v. Fiskardo Estiatorio, Inc., 2011 U.S. Dist. LEXIS 58670, *133-34 (S.D.N.Y. 2011). However, those courts also rely on the four-factor test established in Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983).95 That test considers “whether the alleged employer: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.” Bonnette, 704 F.2d at 1470.

In the recent case of Lawrence v. Adderley Industries, Inc., 2011 U.S. Dist. LEXIS 14386 (E.D.N.Y. Feb. 11, 2011), the Eastern District of New York applied the Zheng factors in finding that Cablevision was not a joint employer of technicians it hired to perform installation work in its customers’ homes. In so doing, the court noted that “Initially, courts must ‘examine the degree of formal control exercised over a worker’ by considering ‘whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.” The court continued by stating that after the application of these factors, a finding that a “putative joint employer does not exercise formal control over a worker does not end the inquiry.” The court must then “assess whether an entity that lacked formal control nevertheless exercised functional control over a worker” by considering ‘(1) whether premises and equipment were used for the plaintiffs’ work; (2) whether the [contractor] had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [putative employer] or (its) agents supervised plaintiffs’ work; and (6) whether plaintiffs worked exclusively or predominantly for [the putative employer].’” There is no “rigid rule for the identification of an FLSA employer as the courts must consider “‘a nonexclusive and overlapping set of factors’ to ensure that the economic realities test...is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA.”

The court held Cablevision did not exercise sufficient formal control over the technicians to be considered a joint employer. Cablevision did not have the power to: hire or fire, supervise and control work schedules or conditions of employment, determine the rate and method of compensation or maintain employment records. Nor did Cablevision’s requirements and policies bring the technicians into an employment relationship. The requirement that Adderley’s technicians meet Cablevision’s installation specifications “is entirely consistent with the standard role of a contractor who is hired to perform highly technical duties....Requiring a contractor to meet the

The client’s technical specifications is not the type of control which bestows employee status on the contractor.” The court rejected other factors as establishing an employment relationship like the requirement that the technicians wear uniforms and identification badges identifying them as being associated with Cablevision and compliance with Cablevision’s drug testing and background-check policy.

As to functional control, the technicians did not work on Cablevision’s premises and used their own tools to install and service Cablevision’s equipment. Although Cablevision performed quality control inspections and reviews of the work performed by the technicians, it “does not exercise any significant degree of supervision over plaintiff’s or any particular technician’s work.” Adderley controlled the technicians work assignments and work schedules. The identification badges and vehicle signs clearly indicated that the technicians were employed by Adderley. Cablevision did not provide the technicians with any type of employee benefits. Additionally, the technicians only performed work for Cablevision pursuant to the SIS Agreement, i.e., to the extent Adderley (or another contractor with whom they were employed) was hired to do so, and Adderley’s business could “shift as a unit” from Cablevision to another cable media provider. Although the technicians “perform discrete jobs that are integral to Cablevisions’ services, the degree of skill required to perform those jobs weighs against a finding of employer status.” The only relevant factor weighing in favor of a joint employment relationship found by the court was the fact that Adderley, although not its parent company, worked exclusively for Cablevision, albeit by its own choice.

Other Circuit courts use similar tests in determining joint employment status. For example, the First and Ninth Circuits use the four-factor Bonnette test. The Fourth Circuit considers the factors set forth in the DOL’s regulations and the Bonnette and Zheng factors. See Schultz v. Capital Int’l Sec., Inc., 466 F.3d 298, 305-306 (4th Cir. 2006). The Fifth Circuit analyzes the following five factors under Wirtz v. Lone Star Steel Co., 405 F.2d 668 (5th Cir. 1968): “(1) Whether or not the employment takes place on the premises of the company?; (2) How much control does the company exert over the employees?; (3) Does the company have the power to fire, hire, or modify the employment condition of the employees? . . . (4) Do the employees perform a ‘specialty job’ within the production line?; and (5) May the employee refuse to work for the company or work for others?” Cromwell v. Driftwood Élec. Contrs., Inc., 2011 U.S. Dist. LEXIS 19007, *5-6 (S.D. Miss. 2011). Finally, the Eleventh Circuit has relied on both the Bonnette test and its own test based on the Wirtz factors.96

IX. Use and Enforceability of Indemnification Clauses.

In the Second Circuit, claims for indemnification and contribution under the FLSA contravene the intent of the FLSA and are not viable. See Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 144 (2d Cir. 1999) (“[W]e hold that there is no right to contribution or indemnification for employers held liable under the FLSA.”). In Herman, the defendant, a fifty-percent owner of the employer and its chairman, sought contribution and

96 See Villarreal v. Woodman, 113 F.3d 202 (11th Cir. 1997); Morrison v. Magic Carpet Aviation, 383 F.3d 1253 (11th Cir. 2004).
indemnification from the employer’s other owner, its president, and its manager, arguing that as co-employers, they were also liable for the FLSA violations alleged. Id at 135-36. The Second Circuit rejected the defendant’s argument, finding that there was no right of indemnification or contribution under the FLSA. Id. at 143-44. In reaching this conclusion, the court reasoned that the Act made no provision for such remedies; the Act was designed to benefit employees not employers; the Act was comprehensive, counseling against judicially created remedies; and Act’s legislative history was silent as to such remedies. Id. at 144.

Other circuits have employed the same reasoning as Herman to dismiss claims for indemnification for FLSA liability. See Lyle v. Food Lion, Inc., 954 F.2d 984, 987 (4th Cir. 1992) (“Food Lion sought to indemnify itself against [the department manager] for its own violation of the FLSA, which the district court found, and we agree, is something the FLSA simply will not allow.”); LeCompte v. Chrysler Credit Corp., 780 F.2d 1260, 1265 (5th Cir. 1986) (“… to engraft an indemnity action upon this otherwise comprehensive Federal statute would run afoul of the Supremacy Clause of the Constitution…”).


These decisions are consistent with the principle recognized in both New York and New Jersey that indemnification is not available to a party which is liable because of its own conduct. See, e.g., Glaser v. Fortunoff, 71 N.Y.2d 643, 646 (N.Y. 1988); Correia v. Prof’l Data Mgmt., Inc., 259 A.D.2d 60 (N.Y. 1st Dep’t 1999); Cartel Capital Corp. v. Fireco of New Jersey, 81 N.J. 548, 566 (N.J. 1980) and KBL Corp. v. Arnouts, 646 F.Supp.2d 335, 344 (S.D.N.Y. 2009) (applying New York law). This is equally true with respect to any claim for contractual indemnification which is governed by New York law. Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36, 41 (N.Y. 1936) (“It is a general rule long established that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms.”).

Moreover, in Herman, the Second Circuit relied on the United States Supreme Court’s reasoning in Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 67 L. Ed.2d 750, 101 S. Ct. 1571 (1981), where the Supreme Court held there was no right of contribution available to Northwest Airlines against a flight attendants’ union under Title VII and the Equal Pay Act. Analogizing the facts of that case to an employer’s claim for indemnification and contribution under the FLSA, the Second
Circuit expressly noted that, under the Supreme Court’s reasoning in *Northwest Airlines*, there could be no such right without explicit statutory authority, “even assuming that the union was culpable as a co-employer.” See *Herman*, 172 F.3d at 143 citing *Northwest Airlines*, 451 U.S. at 90.

The *Herman* rule, as applied in the decisions of this Circuit discussed above, is consistent with important Second Circuit decisions in other areas of the law. In *Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969), cert. denied 397 U.S. 913 (1970), for example, Judge Kauffman held that indemnification is unavailable for intentional, reckless, and even negligent violations of federal securities laws because the converse would “encourage flouting the policy of the common law and the Securities Act.” See also *Credit Suisse First Boston, LLC v. Intershop Commc’ns AG*, 407 F.Supp.2d 541, 547 (S.D.N.Y. 2006) (citing cases across the country prohibiting indemnification for violations ranging from negligent to intentional violations).

Finally, courts have squarely rejected any argument that contractual agreements to allocate risk are not inconsistent with the purposes of the FLSA:

[A] holding that the indemnification clause is enforceable would indeed mean that employers would have little reason to be concerned over whether labor agreements comply with the statutorily mandated and unwaivable overtime pay requirements of the FLSA, knowing full well that if they are later found to have violated such requirements, such employers would be totally compensated for any injuries resulting from such action … This Court is unwilling to create such a potential exception to the general rule against using indemnification clauses to potentially immunize a defendant from liability for its own wrongful acts.

*Pepsi*, 99 F.Supp.2d at 221-22.


Successorship liability was originally adopted in cases brought under the National Labor Relations Act (NLRA), “to avoid labor unrest and provide some protection for employees against the effects of a sudden change in the employment relationship.”97 Following the development of successor liability under the NLRA,

97 *Steinbach v. Hubbard Ambulance Service*, 51 F.3d 843, 845 (9th cir. 1995), citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 182-85 (1975) (successor corporation may be liable for predecessor corporation’s unfair labor practices under the NLRA if the successor acquired the predecessor with full knowledge of a previous NLRB order requiring reinstatement and back pay); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964)(successor employer required to arbitrate grievances pursuant to prior employer’s labor agreement even though the successor had not signed or assumed that agreement or agreed to arbitrate).
federal courts created a federal common law of successorship that now extends to almost every employment law statute. In extending successorship liability to other employment law statutes, courts have recognized that extending liability to successors “will sometimes be necessary in order to vindicate important statutory policies favoring employee protection.” As the Seventh Circuit has noted “judicial importation of the concept of successor liability is essential to avoid undercutting Congressional purpose by parsimony in provision of effective remedies.”

B. Successor Doctrine Under the FLSA.

In Steinbach v. Hubbard Ambulance Service, the ninth circuit wrote:

We are faced with a question of first impression: does successorship liability exist under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 et seq.? We conclude that it does, but not on the facts of this case.

In reaching its conclusion that successorship liability did exist under the FLSA, the court noted that the fundamental purpose of the FLSA – to protect workers’ standards of living through the regulation of working conditions – “is as fully deserving of protection as the labor peace, antidiscrimination, and workers security policies under the NLRA, Title VII, 42 U.S.C. § 1981, ERISA, and MPPAA.” Moreover the court found that the analysis set forth in the cases extending potential liability under those statutes “justifies application of the doctrine here as well.”

The court then turned to the standards to be applied in determining successorship liability, and found that it would borrow the same basic standards that were used in other employment contexts. Under the NLRA for example, successor liability can attach when (1) the subsequent employer is a bona fide successor and (2) the subsequent employer had notice of the potential liability. The court then noted

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98 Id at 845. Citing Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1975) (NLRA); Upholsterers’ Int’l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323 (7th Cir. 1990) (Multiemployer Pension Plan Amendments Act); Secretary of Labor v. Mullins, 888 F.2d 1448 (D.C. Cir. 1989 (Mine Safety and Health Act); Criswell v. Delta Airlines, Inc. 868 F.2d 1093 (9th Cir. 1989); (Age Discrimination in Employment Act); Trustees for Alaska Laborers-Construction Industry Health & Sec. Fund v. Ferrell, 812 F.2d 512 (9th Cir. 1987 (ERISA); Musikiwamba v. ESSI, Inc., 760 F.2d 740 (7th Cir. 1985 (42 U.S.C. §1981); Bates v. Pacific Marine Ass’n, 744 F.2d 705 (9th Cir. 1984 (Title VII).
99 Id. Citing Upholsterers’ Int’l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323 (7th Cir. 1990); Musikiwamba v. ESSI, Inc., 760 F.2d 740 (7th Cir. 1985); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1091 (6th Cir. 19724).
100 Wheeler v. Snyder Buick Inc., 794 F.2d 1228, 1237 (7th Cir. 1986).
101 51 F.3d 843, 845 (9th cir. 1995).
102 Id.
103 Id.
104 Id.
that whether an employer qualifies as a bona fide successor hinges principally on the
degree of business continuity between the successor and predecessor. The court
then stated that the Ninth Circuit adds a third consideration when dealing with other
employee individual rights statues: the extent to which the predecessor is able to
provide adequate relief directly.

The court concluded by noting the balancing test that must be accorded in
successorship cases:

As this and other courts have recognized, successorship’s
roots lie in equity...[citations omitted.] Consequently,
‘fairness is a prime consideration in [successorship’s]
application’...[citations omitted.] Decisions on successorship
must balance, inter alia, the national policies underlying the
statute at issue and the interests of the affected parties.

In the end, “in light of the difficulties of the successorship question, the myriad
factual circumstances and legal contexts in which it can arise, and the absence of
congressional guidance as to its resolution, emphasis on the facts of each case as it
arises is especially appropriate.”

C. Application of the FLSA’s Successor Liability Standard in Steinbach.

After setting forth its standard for “successor liability” in FLSA cases, the
Steinbach v. Hubbard Ambulance Service court applied that standard to the facts before
it and concluded: “Care’s dipping its toe in the water and exploring the acquisition of
Hubbard does not make it a bona fide successor. Considering all the equities, we find
Care not liable.”

To reach that conclusion the court first reviewed whether Care Ambulance
Service met the requirements to be a bona fide successor. Care hired the same
employees, operated out of the same office, provided the same general services, kept
the same operational supervisors, and used the same or similar equipment. Despite
these factors the court concluded:

This case presents an additional circumstance neither
present nor addressed in any of the successorship cases on
which the employees rely: in this case, no permanent

106 See Upholsterers’ Int’l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d at 1329; Criswell v.
Delta Airlines, Inc. 868 F.2d at 1094; Bates, 744 F.2d at 709.
107 Citing to Criswell, 868 F.2d at 1094; Bates, 744 F.2d at 709-10.
108 51 F.3d at 846, citing Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 262-63
n.9 (1974); Bates, 744 F.2d at 709.
109 Howard Johnson, 417 U.S. at 256; accord Bates, 744 F.2d at 709.
110 Id.
transfer occurred. Care leased equipment from Hubbard and used its employees on a temporary basis only. No agreement for a permanent transfer was ever reached, and indeed, when negotiations fell through, Care ended the lease and returned Hubbard’s assets to Hubbard. On the facts of this case, we find such a failure to ever permanently transfer the business dispositive.\textsuperscript{111}

The fact that the case involved the attempted purchase of a company in distress concerned the court since “distressed companies like Hubbard do not always have an easy time finding suitors, …and the possibility of statutory liabilities only makes those difficulties worse.”\textsuperscript{112} The court found that the temporary arrangements, entered into by Care and Hubbard, benefits the seller and the former employees because it increases the chances that buyers will be found who might satisfy the FLSA liabilities. Thus, the court determined that “the interests of the affected parties, as well as the policies underlying the FLSA and supporting free transfer of capital lead us to conclude that Care does not qualify as a bona fide successor.”\textsuperscript{113}

With respect to the second factor in determining successorship liability—the putative successor had notice of the potential FLSA liability—the court found that although Care had knowledge of the FLSA lawsuits “the reality is that Care was in little better position to protect itself than were the former employees….Because we are dealing in equity, we decline to close our eyes to the reality of the situation: in this case, because of the pending bankruptcy, there was little room for negotiation of protection… the equities underlying the notice prong do not weigh heavily in the employees’ favor.”\textsuperscript{114}

Finally the court looked at the fairness doctrine in determining whether the successor Care should be liable for the predecessor’s FLSA violations.

Finally, fairness plays a significant role as well. Care is faced with the possibility of nearly $100,000 in liability for having paid $600 monthly to lease Hubbard’s assets for three to four months. In contrast, Hubbard’s employees chances of recovering from Hubbard were by no means certain. While this fact does not foreclose liability, the purpose of successorship liability is not to provide windfalls for employees. [citations omitted.] The fact that Hubbard might

\textsuperscript{111} 51 F.3d 843, 846 (9th cir. 1995).
\textsuperscript{112} Id at 847.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
not have had the resources to recompense the plaintiffs prior to the transfer further tips the equities towards Care.\textsuperscript{115}

In sum, the court found that its decision rested primarily on the nature of the arrangement between Care and Hubbard and concluded that because the arrangement involved a temporary trial lease of assets, FLSA's policies would best be promoted by finding no successor liability.


As referenced above, successor liability under the FLSA uses the federal common law successorship doctrine applicable to most employment law statutes. Under that doctrine, successor liability can occur when (1) there is a bona fide successor; (2) the subsequent employer had notice of the potential liability; and (3) the predecessor is unable to provide full relief to the injured plaintiff. Each of these factors is discussed below.

1. Bona Fide Successor.

In considering whether a subsequent employer is a bona fide successor, courts view the following factors as relevant:

- Substantial continuity of the same business operation;
- New employer operates at the same plant or workplace;
- The same or substantially the same workforce is currently employed;
- The same jobs exist under the same working conditions;
- The same supervisors are currently employed;
- The same machinery, equipment, and methods of production are used; and
- The same product is manufactured or the same service is offered.\textsuperscript{116}

\textsuperscript{115} Id.

\textsuperscript{116} Trujillo v. Longhorn Mfg. Co., 694 F.2d 221, 224 & n.3 (10\textsuperscript{th} Cir. 1982) (Title VII case citing Mac Millan Bloedel factors with approval)(district court found successor liability for Title VII violations despite the fact that predecessor was probably able to pay for violations since successor had notice, continuity, failure to provide nonliability or indemnity in asset purchase agreement, successor's receipt of "benefit" of discriminatory employment practices, and concern about limitations period if only predecessor held liable on appeal); EEOC v. Mac Millan Bloedel Containers, 503 F.2d 1086, 1089-93 (6\textsuperscript{th} Cir. 1974)(reversing summary judgment on successorship issue and applying nine-factor test combining notice and ability of predecessor to provide relief with seven factors referenced above.)
Each of these factors do not have to be present to find a bona fide successor, but the more of them that are present, the stronger the likelihood that the subsequent employer will be classified as a bona fide successor.

2. **Requirement of Notice of Potential Liability.**

The second factor in determining successorship liability is that the putative successor have notice of the potential FLSA liability. Courts are reluctant to impute liability to a successor corporation if it did not have notice of the predecessor’s violation. In *Brock v. LaGrange Equipment Co.*, the court found that the notice requirement was satisfied because the president of the predecessor corporation, who initially held the same office with the successor company, had actual knowledge of the FLSA violations. The court rejected the successor’s argument that it did not have knowledge of the FLSA violations because no court or administrative body had determined that La Grange owed back wages at the time the successor purchased its assets.

3. **Predecessor’s Inability To Provide Adequate Relief.**

As noted in *Steinbach v. Hubbard Ambulance Service*, successorship liability is an equitable doctrine, and fairness must be considered in its application. Thus, successor liability determinations balance the national policies underlying the FLSA and the interests of the affected parties.

Courts have held that the predecessor who committed the FLSA violation is primarily liable for the monetary relief to the extent that it is able to provide that relief. The successor would only be secondarily liable for the amount of money, or other nonmonetary relief such as reinstatement that could not be provided by its predecessor.

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117 *Dominguez v. Hotel, Motel, Restaurant & Misc. Bartenders Union*, 674 F. 2d 732, 733 (8th Cir. 1982)(court found that there was insufficient evidence (direct or indirect) of successor’s knowledge about pending discrimination charge precluding imposition of successor liability under Title VII.)

118 28 WH Cases 780 (D. Neb. 1987)

119 *Id* at 782.

120 51 F.3d at 846.

121 *Brown v. Evening News Ass’n*, 473 F. Supp. 1242, 1246 (E.D. Mich. 1979)(dismissing suit against successor corporation despite the fact that plaintiff would not be reinstated in exact same job where predecessor company could provide same job in different locale; recognizing that imputing liability to innocent successor involves delicate balancing of interests).

122 *See Rojas v. TL Communications*, 87 F. 3d 745, 750 (5th Cir. 1996)(successor not liable for predecessor corporation’s alleged harassment violations because predecessor operated other viable entities and could supply plaintiff with full relief and plaintiff had rejected reinstatement).

123 *See, e.g. Rolosy v. Anchor Hocking Corp.*, 585 F. Supp. 746, 750 (W.D. Pa. 1986)(allowing joinder of successor corporation because the relief requested by plaintiffs could not be provided by predecessor).
This is in response to your request for an opinion concerning the application of the overtime requirements of section 7 of the Fair Labor Standards Act (FLSA) to groups of health care facilities operated by one management company. It is our opinion that all hours worked at any of the facilities must be combined for the purpose of calculating hours worked under the FLSA.

As you described, two individuals own and operate 19 health care facilities, which you refer to as the “core” facilities. These two individuals also own and operate a management company that manages each “core” facility. Additionally, there are 19 health care facilities (“non-core” facilities) owned by other individuals but operated under the same business name. The two individuals who own the “core” facilities have no ownership in the “non-core” facilities but do own a management company that is responsible for managing all “core” and “non-core” facilities. The management company ensures proper staffing of the facilities and provides payroll and other management services. Sometimes the management company will provide the opportunity for an employee to work for one “core” and one “non-core” facility or two different “non-core” facilities in the same week. Other times employees arrange such work on their own. The “core” and “non-core” facilities have a common benefits package including 401K and health insurance, which are provided to the employees even when they are working extra hours at a “core” or “non-core” facility which is not their regular facility. In a phone conversation with a member of the Wage and Hour Division staff, you indicated that each facility is responsible for scheduling employees at their facility. Employees of any “core” or “non-core” facility are not given priority for opening and vacancies at other “core” or “non-core” facilities.

Based on the above described facts, you ask for the following:

1) When an employee, in the same workweek, works for one “core” facility and one “non-core” facility, must the hours be grouped for purposes of overtime calculation?
2) When an employee, in the same workweek, works for two different “non-core” facilities, must the hours be grouped for purposes of overtime calculation?

The FLSA defines employer, employee, and employment at 29 U.S.C. §§ 203(d), (e), and (g), respectively. The courts and the Department of Labor have construed these terms to mean that more than one employer may employ an employee during the same workweek and that these employers may be jointly responsible for compliance with the FLSA for this employee. The Department states that 29 C.F.R. § 791.12, footnote 5, “where two or more employers stand in the position of “joint employers” and permit or require the employee to work more than the number of hours specified in section 7(a), both the letter and the spirit of the statute require payment of overtime.” Whether an employment relationship by two or more employers is to be considered a joint employment situation so that an employee’s hours or work for two or more employers must be aggregated, or whether those hours are to be considered separate and distinct employments for purposes of the FLSA, will depend on all the facts in a particular case. 29 C.F.R. § 791.2(a) (copy enclosed). When employment by one employer is not completely disassociated from employer by the other employer(s),” joint employment exists. Id. For example, when 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,” a joint employment relationship exists. See 29 C.F.R. 791.2(b)(1)-(2). A joint employment relationship also generally will be found where there is an arrangement between the employers to share an employee’s services or where one employer is acting in the interest of the other employer in relation to the employee. 29 C.F.R. 791.2(b)(1)-(2). The arrangement need not be a “formal” one in order to lead to joint employment.

Factors that are relevant in finding joint employment include, for example, whether there are common officers or directors of the companies; the nature of the common management support provided; whether employees have priority for vacancies at the other company; whether there are any common insurance, pension or payroll systems; and whether there are any common hiring, seniority, recordkeeping or billing systems. See Chao v. A-One Medical Services, Inc., 346 F.3d 908 (9th Cir. 2003) and Opinion Letters dated July 13, 1998 and May 20, 1999. (copies enclosed). As stated above, the “core” and “non-core” facilities, the management company is exercising control over both groups and facilities. This control, coupled with the fact that the same two individuals who own the “core” facilities own the management company, leads us to the conclusion that the “core” and “non-core” facilities are joint employers for purposes of the FLSA. Joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the FLSA, including the overtime pay provisions, with respect to the entire employment for the particular workweek. 29 C.F.R. 791.2(a); Field Operations Handbook, §32j12 (copy enclosed). Therefore, your client’s facilities must group all of the hours an employee works in a given week, for any combination of “core” and “non-core” facilities for purposes of calculating employee overtime.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not obtained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that his opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above information is responsive to your inquiry.

Sincerely,
Barbara Releford
Office of Enforcement Policy
Fair Labor Standards Act Team

Enclosure: 29 CFR 791.2
Field Operations Handbook 32j12
Wage and Hour Division (WHD)

FLSA2005-15

April 11, 2005

Dear [Name]*,

This is in response to your request for an opinion on the application of "joint employment" under the Fair Labor Standards Act (FLSA) to one of your clients, a health care system (the System) consisting of two acute care hospitals, a nursing home, and one combined long-term hospital and nursing home. The System is owned by a single, not-for-profit parent holding company that has no employees.

Each facility within the System has its own Human Resources Department, employee handbook, payroll system, retirement plan, and Federal Identification Number. There is no regular interchange of employees among the facilities. You present the example of a Licensed Practical Nurse who works at an acute care hospital during the week and at the nursing home on the weekend. You ask whether this employee would be due overtime pay if the total of his or her hours at both locations exceeds 40 in a week.

As you know, "employee" under Section 3(c) of the FLSA means any individual employed by an employer, and "employer," under Section 3(d), includes any person acting directly or indirectly in the interest of an employer in relation to an employee. The term "employ" means to suffer or permit to work, and includes the principles of joint employment. Joint employment refers to a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case. If the facts establish that two or more employers are not completely disassociated with respect to the employment, a joint employment situation exists (29 CFR 791.2(b)).

The regulations on joint employment are located in 29 CFR Part 791, copy enclosed. Nothing in the FLSA prevents an individual employed by one employer from also entering into an employment relationship with a different employer. An employee who performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, generally will be jointly employed where the employers are not completely disassociated with respect to the employment of the 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 CFR 791.2(b)(3)). For example, where one business entity controls another through total stock ownership and/or interlocking directorates and common corporate officers, we have concluded that employees of the latter are simultaneously employees of the former. See opinion letters of January 7, 1986 and December 4, 1984.

Based on the information you have provided, it is our opinion that all employees of the System's facilities are under the control of the parent company. You have provided numerous instances of association between the System's various employing entities. For example, the nursing home and the combined hospital/nursing home share a common President and Board of Directors. At times, the hospital's Human Resources Department provides administrative support for the Human Resources staff of the nursing home. The System's Vice President of Human Resources and several senior executives and senior managers "have responsibility for more than one entity" within the System. Some of the facilities' personnel policies are the same, such as those regarding the Family and Medical Leave Act, workplace harassment, and anti-nepotism. Non-union employees of the System have a common health care plan. System job vacancies are posted within the System before they are advertised publicly. Thus, multiple associations exist within the System and we believe these outweigh the fact that each entity does its own hiring and has its own pay scale and payroll system. Thus, we believe that a joint-employment relationship exists in weeks in which an individual works for more than one of the System's employers.

As you know, joint employers are responsible, both individually and jointly, for compliance with the FLSA, including the overtime compensation provisions. Therefore, the entities must aggregate all hours worked in a workweek by an employee who works for more than one entity.


This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. 259. See 29 C.F.R. 790.17(d), 790.19; Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosure: 29 CFR 791

Note: * The actual name(s) was removed to preserve privacy.