American Bar Association
Section on Labor and Employment Law
Employment Rights and Responsibilities Committee
Mid-Winter Meeting
March 27-31, 2012
Las Vegas, Nevada

JOINT EMPLOYER LIABILITY UNDER THE FLSA:
WAGE AND HOUR CLAIMS BY EMPLOYEES OF SUBCONTRACTORS AND
LITIGATION ISSUES INVOLVING UNDOCUMENTED WORKERS

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Wal-Mart, Target, Comcast, Fred Meyer, Safeway, and Time Warner Cable have all recently been sued as joint employers for wage and hour violations allegedly committed by their subcontractors. Employers who use subcontractors may be liable for the subcontractor's wage-and-hour violations if it is determined they are a joint employer of the employee. This paper explains how courts have struggled to define when an entity is liable as a joint employer and discusses the numerous and varied "joint employer" tests used in the federal circuits. The second part of this paper discusses how joint employer litigation is often complicated by discovery issues concerning the plaintiffs' immigration status. This paper explores how an employee's immigration status can make it difficult for employers to obtain information during discovery, and potentially personally expose attorneys and their law firms to retaliation claims for addressing immigration issues with a court.

This paper focuses on three areas:

- The Fair Labor Standards Act and the Supreme Court's seminal Rutherford Food Corp. v. McComb decision
- The varying federal circuit court tests for "joint employment"
- Discovery issues involving immigration and potential retaliation claims against attorneys

THE FAIR LABOR STANDARDS ACT AND RUTHERFORD

The majority of the joint employer cases fall under the Fair Labor Standards Act ("FLSA"), which requires that all employees pay a minimum wage and overtime to certain employees. Individuals can sue their employers for back wages under the FLSA. The FLSA broadly defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation." Similarly, an "employee" is "any individual employed by an employer" and "employ" is also broadly defined as "to suffer or permit to work." Federal

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4 29 U.S.C. § 207.

5 A plaintiff who prevails on an FLSA claim is entitled to attorney fees. 29 U.S.C. § 216(b).

6 Id. § 203(d).

7 Id. § 203(e)(1).
regulations interpreting the FLSA explain that multiple employers may be individually and jointly liable for the same FLSA violations if the employee's work for one employer is dependent or associated with the work for other employer(s). For agricultural workers and employers, additional federal regulations more explicitly define "joint employer." In other words, a person may be the employee of more than one employer at the same time, and an employer may be held responsible for FLSA violations committed exclusively by another employer.

The Supreme Court first addressed the issue of defining who constitutes an "employer" in the landmark decision of Rutherford Food Corp. v. McComb. Rutherford involved meat boners working in a slaughterhouse who were employed by a supervisor as independent contractors; thus, the slaughterhouse contended the boners were not employees and did not pay the boners overtime. The Supreme Court disagreed, finding an employee-employer relationship between the slaughterhouse and the meat boners when viewed in light of the "circumstances of the whole activity." The Court reasoned that because (1) the meat boners worked on a production line, (2) the contracts for each meat boner were essentially identical, (3) the meat boners used the slaughterhouse's plant and equipment, and (4) the meat boners did not perform work at other slaughterhouses, the meat boners were employees of the slaughterhouse under the FLSA. Although the Court never explicitly used the term "joint employer" in the Rutherford decision, courts cite to Rutherford as a joint employer case and look to the Rutherford factors in deciding joint employer cases.

THE "ECONOMIC REALITIES" TEST: A FLUID CONCEPT

The FLSA is intended to prevent employers from setting up "shell" operations to avoid responsibility for complying with wage and overtime requirements while excluding legitimate and beneficial subcontractor relationships from liability. To effect this purpose, courts look at the "economic realities" of the employment relationship when determining whether an employer is a joint employer under the FLSA. This section discusses the various tests used by the federal

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8 Id. § 203(g).
9 29 C.F.R. § 791.2 (a joint employment relationship is established when employers have an agreement to share the services of an employee that is mutually beneficial to the employer(s), where one employer acts directly or indirectly in the interest of the other employer with respect to the employee, where the employers share direct or indirect control of the employee, or where one employer controls the other employer).
10 See 29 C.F.R. § 500.20; Martinez-Mendoza v. Champion Int'l Corp., 340 F.3d 1200, 1208-09 (11th Cir. 2003).
12 Id. at 730.
13 Id. at 730.
14 Id.
15 See Zheng, 355 F.3d at 70 (finding that "Rutherford was a joint employer case" because the Court held that the slaughterhouse was a joint employer of the boning supervisor, who was responsible for "hiring workers, managing their work, and paying them").
16 See id. at 76.
17 See Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33, 81 S. Ct. 933, 6 L. Ed. 2d 100 (1961) (finding that members of a cooperative are employees under the FLSA because of the 'economic reality' of the employment relationship).
circuits to determine whether the economic realities of an employment relationship indicate that
an employer is liable as a joint employer.\(^{18}\)

The Ninth Circuit and the *Bonnette* Test

The Ninth Circuit's four-part test in *Bonnette v. California Health and Welfare Agency* is
cited by several other circuits as the foundational test in joint employer liability cases.\(^{19}\) The
court in *Bonnette* addressed the issue of whether a state welfare agency was a joint employer of
domestic in-home caregivers.\(^{20}\) The court looked at "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."\(^{21}\) The court found that the welfare agency "exercised considerable
control" by determining the hours a caregiver would work and the tasks a caregiver would
perform, choosing the rate and directly or indirectly choosing the method of paying the
caregivers, and maintaining the caregivers' employment records.\(^{22}\) Although the evidence was
disputed as to whether the agency had the power to hire and fire the caregivers, the court found
that the agency's overall influence and control made it the caregivers' employer under the
FLSA.\(^{23}\)

The court in *Bonnette* explained that the four-part test was not intended to be a rigid test,
but rather a "useful framework."\(^{24}\) The Ninth Circuit has subsequently incorporated other factors
into the joint employer test in some other cases.\(^{25}\)

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\(^{18}\) Cases where the entities alleged to be joint employers have common ownership are not analyzed under the
“economic realities” test. Those cases are deemed by courts to be of “horizontal” joint employment and are
analyzed using the regulations found in 29 CFR 791.2(b). See, e.g., *Chao v. A-One Medical Services, Inc.*, 346 F.3d
908, 917 (9th Cir. 2003). This article limits its discussion to “vertical” joint employment where there is no common
ownership of the entities purported to be joint employers.

\(^{19}\) 704 F.2d 1465, 1470 (9th Cir. 1983); see, e.g., *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir.
1998) (applying the *Bonnette* test).

\(^{20}\) *Bonnette*, 704 F.2d at 1467.

\(^{21}\) *Id.* at 1470.

\(^{22}\) *Id.*

\(^{23}\) *Id.*

\(^{24}\) *Id.*

\(^{25}\) See *Moreau v. Air France*, 343 F.3d 1179, 1184-85 (9th Cir. 2003) (citing *Torres-Lopez v. May*, 111 F.3d 633,
640 (9th Cir. 1997)) (affirming the trial court's grant of summary judgment finding that Air France was not a joint
employer of ground handling employees using the *Bonnette* and *Torres-Lopez* factors; "(1) whether the work was a
specialty job on the production line; (2) whether responsibility under the contracts between a labor contractor and an
employer passed from one labor contractor to another without material changes; (3) whether the premises and
equipment of the employer were used for the work; (4) whether the employees had a business organization that
could or did shift as a unit from one worksite to another; (5) whether the work was piecework and not work that
required initiative, judgment or foresight; (6) whether the employee had an opportunity for profit or loss depending
upon the alleged employee's managerial skill; (7) whether there was permanence in the working relationship; and
(8) whether the service rendered was an integral part of the alleged employer's business); see also *Zhao v. Bebe
Stores, Inc.*, 247 F. Supp. 2d 1154, 1157-59 (C.D. Cal. 2003) (finding that Bebe is not a joint employer of garment
workers because, unlike in *Torres-Lopez*, the garment workers contracted with a subcontractor that had its own
The First Circuit

The First Circuit has adopted the Ninth Circuit's *Bonnette* test in determining when an entity is a joint employer; although, the First Circuit has adjudicated few joint employer cases.26

The Second Circuit

The Second Circuit in Zheng v. Liberty Apparel Co., Inc.27 reasoned that the four-part *Bonnette* (known as the *Carter* test in the Second Circuit) test28 was insufficient because it focused on formal control but did not account for "functional control," as determined by additional factors based on *Rutherford*.29 The court considered six factors beyond those identified in *Bonnette*: (1) whether a worker uses an alleged employer's premises and equipment; (2) whether the subcontractor has a business that could or did operate as a unit in conjunction with more than one theoretical joint employer; (3) whether the worker performs a "discrete line-job" that is integral to the alleged joint employer's "process of production;" (4) whether the subcontractor can transfer its contract to other subcontractors without material changes to the contract; (5) the degree the alleged joint employer supervises the workers' work; and (6) whether the workers work exclusively for the alleged joint employer.30 Unlike the Ninth Circuit, the Second Circuit appears to require an examination of the additional "functional control factors" before determining that an entity is not a joint employer.31

In *Barfield*, the Second Circuit considered both the four-part *Bonnette*/*Carter* test, and the Zheng functional factors.32 The court upheld a grant of summary judgment declaring a hospital the joint employer of a nurse's assistant who worked on a temporary contract basis for the hospital.33 The hospital could hire and fire the nurse's assistant, controlled the assistant's schedule, maintained her employment records, and "functionally controlled" the assistant because all six Zheng factors were present, including that she performed integral work exclusively for the hospital.34

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27 355 F.3d 61 (2d Cir. 2003).

28 The Second Circuit previously adopted the *Bonnette* test in Carter v. Dutchess Cnty. Coll., 735 F.2d 8, 12 (2d Cir. 1984) (finding no joint employment relationship between prison inmates conducting classes in a community college and the community college itself).


30 See id. at 72.

31 See id. at 79 (finding that the district court erred in solely considering the *Carter* factors; although, the *Carter* factors may be enough to positively show a joint employment relationship).


33 Id. at 135-36.

34 Id. at 144-45.
And in Jean-Louis v. Metropolitan Cable Comm., Inc., a district court applying the Bonnette/Carter and Zheng factors found that a national cable company was not the joint employer of cable installers hired by a contractor. The court found summary judgment appropriate despite the plaintiffs’ arguments that the cable company effectively had the power to fire the workers by “deauthorizing” them from performing installations, and despite the cable company’s control of the time “windows” during which the workers had to perform the installations.

The Third Circuit

Courts in the Third Circuit appear to approve of the Bonnette four-factor test in joint employer cases. In In re Enterprise Rent-A-Car Wage and Empl. Practices Litigation, a district court made passing mention of its belief that the Bonnette test is more applicable to cases involving a "parent-subsidy relationship" (as the court applied in the case); whereas, the Zheng factors are more applicable to cases involving independent contractors. A year later, the same district court applied both the Bonnette and Zheng factors to a joint employer case "in the interest of a thorough and complete analysis," but did not express an opinion as to the appropriate use or validity of either.

The Fourth Circuit

The Fourth Circuit appears to have adopted a hybrid of the Bonnette test and modified Zheng factors, although it has not explicitly determined what test it will use. In Jacobson, cable technicians contracted with installation companies who then contracted with Comcast; the technicians, therefore, alleged that Comcast was their joint employer. The court found that Comcast had the power to fire because it could "deauthorize" technicians from installing Comcast equipment, but that this power was only exercised for quality control. The court found that there was some evidence of control and supervision but no evidence of Comcast's

36 Id. at *9-11.
39 Lepkowski v. Teletron Mktg. Grp., Inc., 766 F. Supp. 2d 572, 577-78 (W.D. Pa. 2011) (finding that Bank of America is not a joint employer of call center operators, who had contracted with a customer relations management company, because Bank of America did not hire or fire employees, did not set the hours or schedules (although it trained the employees), had no influence over the rate or method of payment, did not keep employment records, the plaintiffs did not work on the bank's premises, and the plaintiffs would not continue working for the bank if the subcontractor management company lost its contract).
41 Jacobson, 740 F. Supp. 2d at 686.
42 Id. at 689-90.
power to determine pay and no evidence that Comcast's records relating to the technicians were used for any reason other than quality control.43 Because the analysis of the four-part Bonnette test did not require that Comcast be considered a joint employer, the court then turned to the Zheng factors.44 Unlike the six-factor Zheng test,45 the court examined only three factors; (1) whether Comcast's premises or equipment were used; (2) whether the technicians could move as a business unit from one alleged employer to another; and (3) whether the subcontractor's contract with Comcast could be transferred to another subcontractor without material changes to the contract, indicating that the technicians were tied to Comcast rather than the installation subcontractor.46 While the court found evidence of hiring the technicians directly, because the technicians still would have had to apply to Comcast, and the technicians did not use Comcast's premises and equipment, the court found that Comcast was not the technicians' joint employer.47

In Jennings, the court similarly adopted the Bonnette test and Zheng factors48 and found that there was enough evidence to show that a tire distributor may have been the joint employer of delivery drivers whose contract required them to work exclusively for the tire distributor.49 The court found evidence of formal and functional control because the tire distributor set the drivers' hours and refused to give them food and rest breaks.50 Jacobson and Jennings highlight how the Fourth Circuit has not addressed what joint employer test(s) it will use, especially in deciding which Zheng factors are applicable.

The Fifth Circuit

The Fifth Circuit appears to use both the four-factor Bonnette test as well as a modified five-factor test that incorporates the Zheng factors of (1) whether the work takes place on the alleged joint employer's property; (2) whether the work is a "specialty job" on a production line; (3) whether the worker can refuse to work for the alleged joint employer and work for others.51

In Reese v. Coastal Restoration and Cleaning Servs., Inc., the court determined that a cleaning services franchisor was not the joint employer of a cleaning technician who worked for an independent franchisee because the court found that the franchisor's power to conduct

43 Id. at 691-92.
44 Id. at 692-93.
45 See supra text accompanying note 30.
46 Jacobson, 740 F. Supp. 2d at 693.
47 Id.
48 Jennings, 2011 WL 2470483 at *3 (the court described the Zheng test excluding the factor of the alleged employer's degree of supervision over the worker). This factor is encompassed in the Bonnette factor examining the degree of supervision and control the alleged employer has over the worker.
49 Id. at *4-5.
50 Id. at *4.
background checks did not amount to the power to hire and fire, the franchisor did not set hours or other conditions of employment, the franchisor had no say in what or how the technician was paid, and the franchisor did not keep any employment records.52 There is no apparent consistency in applying either of the tests. In Reese, the court only considered the four Bonnette factors, whereas in Cromwell and Itzep, the court applied both the Bonnette and other factors.53

The Sixth Circuit

The Sixth Circuit has not decided on a definite joint employer test and uses several tests in ruling on joint employment cases.54 In Keeton v. Time Warner Cable, Inc., the Sixth Circuit used its own four-factor test first adopted in International Longshoremen’s Ass’n, Local Union No. 1937 v. Norfolk S. Corp.55 The court looked at (1) the interrelation of operations between the alleged joint employers; (2) whether there was common management; (3) whether there was "centralized control of labor relations;" and (4) whether there was common ownership between the alleged joint employers.56 The court found that Time Warner and its subcontractor, who initially provided workers to perform lawn maintenance and later changed to providing cable installation workers, did not share common ownership or management, but that Time Warner did maintain centralized control over daily operations; thus, a genuine issue of material fact remained as to Time Warner's joint employment status.57

In addition to using the Bonnette test and the four-factor Keeton/Longshoremen's Ass'n test, other recent Sixth Circuit cases have declined to examine any sort of "economic realities" test and instead used the language of the federal code and regulations without examining the issue in much detail.58

The Seventh Circuit

Few cases in the Seventh Circuit have meaningfully addressed the joint employer issue.59 While the Seventh Circuit has cited the Bonnette test; it has so far declined to adopt it or any

53 See id. at *4-5; Cromwell, 2011 WL 761564 at *2; Itzep, 543 F. Supp. 2d at 653.
56 Id.
57 Id. at 13-15.
59 See, e.g., Bastian v. Apartment Inv. and Management Co., 2008 WL 4671763 at *2 (N.D. Ill. 2008) (explaining that the Seventh Circuit has not adopted a joint employment test and declining to adopt one); Morgan v. SpeakEasy, LLC, 625 F. Supp. 2d 632, 649 (N.D. Ill. 2007) (explaining that the Seventh Circuit has "not yet addressed the factors a court should consider in determining joint employment" but finding the "Bonnette analysis most appropriate").
other joint-employer test. For example, in a recent Seventh Circuit joint employer case, the court denied a motion for summary judgment on the joint employment issue relying solely on the federal guidelines, reasoning that "there are disputed facts as to who has control over the working conditions" of the restaurant workers, who were employed by several restaurants who all shared a common banquet hall as their restaurant location. It therefore not apparent what test, if any, a Seventh Circuit court would use in a joint employment case.

The Eighth Circuit

The Eighth Circuit also has not formally adopted a joint employer test. Several recent district courts in the Eighth Circuit cite to the Bonnette test in joint employment cases. In Woellert, the court applied the Bonnette test to an employee of a bed and breakfast who was also suing a video systems manufacturer because the manufacturer's part owner also owned the bed and breakfast and employed the plaintiff. The court granted summary judgment, finding that the manufacturer was not a joint employer because it had no control or even remote involvement in the bed and breakfast or the plaintiff's employment, despite the fact that the manufacturer handled the plaintiff's payroll and tax forms.

The Tenth Circuit

Few Tenth Circuit cases have addressed joint employment. Most of the cases that address the joint employer issue cite solely to the federal regulations and briefly discuss the specific facts of each case. As in several previously discussed circuits, a few Tenth Circuit cases positively use the Bonnette test.

In Zachary, the court found that a national health services provider was plaintiff's joint employer, along with its subsidiary. The court applied the Bonnette factors but made a point of expressing that these four factors were "not exhaustive" nor "exclusive" and also looked to

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60 See id.
61 See statute cited supra note 9.
64 See id.; Woellert v. Advanced Commc'n Design, Inc., 2007 WL 2310063 at *4 (Minn. 2007) (citing Catani v. Chiodi, 2001 WL 920025 at *6 (Minn. 2001)).
65 Woellert, 2007 WL 2310063 at *1-2.
66 Id. at 4.
67 See statute cited supra note 9.
69 See, e.g., Johnson v. Unified Gov't of Wyandotte Cnty./Kansas City, 180 F. Supp. 2d 1192, 1196-97 (Kan. 2001) (without citing to Bonnette or any other case, the court reasoned that the city government was not the joint employer of security guards working at the housing authority because there was no evidence that the city government "exercised any control over the work schedules or conditions of employment," had the power to hire or fire, kept employment records, or determined the method and rate of pay).
whether the alleged joint employer "possessed at least an 'indicia' of control over plaintiffs" and at the "economic realities" (treating it as a separate analysis from Bonnette).

The Eleventh Circuit

The Eleventh Circuit appears to have adopted a seven-part hybrid test based on the federal regulations for agricultural workers, which closely mirror the Bonnette factors, and common law factors similar to the Zheng factors. The factors are slightly different in different cases but generally include: (1) the nature and degree of control the alleged employer has over the employee; (2) the degree of supervision; (3) the right to "hire, fire, or modify the terms of employment;" (4) the right to determine the rate and method of pay; (5) whether the alleged employer determines pay roll; (6) whether the work is performed on facilities owned by the alleged employer; and (7) whether the alleged employer owns the equipment.

In Phillips, the court denied summary judgment, finding that two landscaping companies were not joint employers of the lawn care supervisors because the supervisors only presented evidence that the same person owns and is the president of both landscaping companies, but did not show who hired the employees, who supervised them, or any of the other aforementioned factors.

The D.C. Circuit

The D.C. Circuit has infrequently addressed the joint employer issue, citing both the Bonnette and Zheng tests but suggesting that cases should be determined considering additional factors beyond Bonnette.

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71 Id. at 1181 (citing and quoting Harbert v. Healthcare Servs. Grp., Inc., 173 F. Supp. 2d 1101, 1106 (Colo. 2001)).
72 Id.
73 See statute cited supra note 10.
74 See Phillips v. M.I. Quality Lawn Maint., Inc., 2011 WL 666145 at *4 (S.D. Fla. 2011) (citing Antenor v. D & S Farms, 88 F.3d 925, 932 (11th Cir. 1996)); Spears v. Choctaw Cnty. Comm'n, 2009 WL 2365188 at *6 (S.D. Ala. 2009). But see Morrison v. Magic Carpet Aviation, 383 F.3d 1253, 1256 (11th Cir. 2004) (interpreting "joint employer" under the FMLA and using a three part test that examines; "(1) whether or not the employment took place on the premises of the alleged employer; (2) how much control the alleged employer exerted on the employees; and (3) whether or not the alleged employer had the power to fire, hire, or modify the employment condition of the employees") (citation omitted).
76 Id.
77 See McKinney v. United Stor-All Ctrs. LLC, 656 F. Supp. 2d 114, 133-34 (D.C. 2009) (finding that there are material questions of fact as to whether the plaintiffs managers of self-storage facilities were employed by both the management company and the owner of the facilities, considering both the Bonnette test as well as unspecified other non-traditional factors); Ivanov v. Sunset Pools Mgmt. Inc., 567 F. Supp. 2d 189, 194 (D.C. 2008) (applying both the Bonnette and Zheng factors and explaining that "depending on the circumstances, the inquiry should not be limited to [the Bonnette] factors," without explaining what circumstances would trigger examining the additional Zheng factors).
EEOC Guidelines

In addition to the federal case law, the Equal Employment Opportunity Commission has issued a series of guidelines providing broad support for use of the joint employer doctrine in employment discovery cases involving employees legally within the company and undocumented workers.78

State Employment Laws

The previous discussion has centered on the federal courts. Many joint employer cases either include or exclusively involve state employment claims.79 The state laws may be substantially different from the FLSA and state courts may not apply the federal tests. In California, for instance, the supreme court has explicitly instructed states courts not to rely on interpretations of the FLSA because of the differences between the two statutes.80 Other states, however, have laws modeled after the FLSA and find cases interpreting the federal cases to be persuasive authority.81 Because the federal interpretations are either not applicable or persuasive, there is even more ambiguity as to how each state would rule on a joint employer issue.

DISCOVERY ISSUES RELATING TO IMMIGRATION STATUS

While not all joint employment cases involve immigration issues, in some cases, the plaintiffs may be undocumented workers.82 In litigating joint employer cases, attorneys defending a joint employment action may need to inquire into a plaintiffs' employment history. For example, a defendant may need to establish that a plaintiff was working for one or more other employers at the same time as the alleged employment by the defendant; or, a defendant may want to determine if a plaintiff has listed the alleged joint employer as an employer on subsequent job applications. The courts frequently apply a balancing test between a defendant's right to conduct legitimate and necessary discovery against the plaintiffs' right to avoid retaliation based on immigration status. Such a test seems to assume a retaliatory intent on the part of the defendant employer.

80 See Morillion v. Royal Packing Co., 22 Cal. 4th 575, 588-90, 995 P.2d 139, 94 Cal.Rptr.2d 3 (Cal. 2000) (finding the state law interpreting the term "hours worked" to be a "differing body of law" from the FLSA).
Is Immigration Information Discoverable?

Several courts have denied discovery requests for immigration status as violations of the plaintiffs' rights and as being contrary to public policy. In *Rivera*, the Ninth Circuit rejected the defendant's contention that immigration status information was essential to its defense that an undocumented immigrant is not entitled to backpay because no backpay award had been authorized in the case. The court, however, stated that it would have to make a factual determination as to the defendants' interests in seeking discovery but never explained what would constitute a legitimate interest in obtaining immigration information.

In *Brady Farms*, a Michigan district court denied a defendant's discovery request to obtain plaintiffs' immigration status, finding that determining standing and damages and evaluating the witness' credibility were unpersuasive reasons to allow discovery. The court in *Brady Farms* explained that the defendants were entitled to discover information about the employees' work history but found that the plaintiffs' assertion that they would provide affidavits containing information on all of their employers during the relevant time period was sufficient. *Brady Farms* and *Rivera* indicate that there is no clear test for balancing the plaintiffs' and defendants' respective rights; yet, the topic is one that has potentially serious consequences for both parties.

In a recent immigration case, a California appellate court upheld a grant of summary judgment in favor of a chemical manufacturer against one of its former seasonal workers who reapplied for employment. The plaintiff sued the manufacturer alleging employment discrimination under the Fair Employment and Housing Act. When the defendant discovered that the plaintiff had used another person's social security number on the plaintiff's job application, the defendant moved for summary judgment. The court held that the "after-acquired evidence" doctrine applied because the plaintiff's misrepresentation of a federal job qualification rendered the plaintiff lawfully unqualified for the job in the first place. This case highlights the risks undocumented workers and their attorneys face in bringing employment

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83 See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064-66 (9th Cir. 2004).
85 Id. at 1066.
87 Id. at 503.
89 Id. at p. 4-5.
90 See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361-62, 115 S. Ct. 879, 130 L. ed. 2d 852 (1995) (establishing the rule that backpay is calculated from the time of discharge to the time the "after-acquired evidence" is discovered).
91 *Salas*, 269-74.
actions, as *Brady Farms* and *Rivera* sought to protect, because the plaintiff lost on summary judgment and had to pay the defendant's costs of the appeal.92

**Potential Retaliation Claims Brought Against Attorneys**

A defendant's attorney engaged in a joint employer case, or any other case involving potentially undocumented workers, may face personal sanctions for discussing immigration issues. In a recent Florida case, plaintiffs undocumented workers brought FLSA retaliation claims against the attorney who defended the plaintiff's previous employer in prior FLSA actions.93 The court held that the attorney was not given immunity from being sued under the "litigation privilege."94 The court held that when the attorney alerted the judge that the plaintiffs were undocumented workers, this constituted adverse and retaliatory action under the FLSA; however, the attorney's query to the plaintiffs during depositions regarding their immigration status was not adverse because it would not dissuade a reasonable person from bringing an FLSA claim.95 The attorney explained his non-retaliatory reasons for making the statement to the judge; that the ethics rules required him to report the plaintiffs' immigration status, that he believed he had a legal duty to report to avoid misprision of a felony, and that he was concerned with courthouse safety.96 The court found evidence of pretext because the attorney made no effort to discover if he really had a legal or ethical duty to disclose the plaintiffs' immigration status; however, it also found that the plaintiffs never submitted evidence that the courthouse safety concern was pretextual and thus, the court granted the attorney's motion for summary judgment.97 While the court in *Suchite* ruled in favor of the attorney, the reasoning in the opinion indicates the court's willingness to entertain retaliation claims against attorneys who discuss immigration issues with the court.

**CONCLUSION**

Hiring subcontractors who then hire other workers is often an efficient and economical business strategy. But businesses using these arrangements face lawsuits and potential liability as joint employers for any employment violation committed by their subcontractors, even without their knowing of the violations. The risk of liability is compounded by the discrepancies in the state and federal courts in defining a "joint employer" under the FLSA. Employers who are aware of the potential liability and the factors that indicate a joint employment relationship will better avoid committing employment violations as a joint employer. An employer facing joint employment allegations may have an even more difficult time defending against litigation if its alleged employees are undocumented workers, and object to legitimate discovery requests because of immigration information. It is unclear how courts will continue to rule on

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92 *Id.* at p. 278.
94 *Id.* at *6.
95 *Id.* at *7.
96 *Id.* at *8.
97 *Id.* at *8-9.
immigration discovery requests and whether courts will subject attorneys to personal liability for addressing the topic.