The Law Regarding Employer and Employee Identity
As a Roadmap for More Effective Prosecution of Work-Related Claims

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INTRODUCTION

As companies continue to seek ways to minimize liabilities while maximizing profits, particularly while globalization accelerates, a prevailing business model has emerged that obscures actual employer identity. Put simply, a growing number of companies essentially attempt to outsource liability while retaining meaningful control and, thus, profits. Businesses pursue this tactic through a variety of constructs, including the creation of a parent-subsidiary, prime contractor-subcontractor, franchisor-franchisee, or other affiliated relationship. As explained below in Part I, a company that takes this approach may nonetheless still be responsible – as a joint employer under wage-and-hour, civil rights, and/or labor law – for the actions of a purportedly separate entity.

Another expanding business model, which is often the flip side of the joint employer problem, involves the misclassification of employees as somehow independent contractors. Particularly with the explosion of the "sharing" or "gig" economy, increasing numbers of people find that they are no longer employees with work-related protections long considered sacrosanct. Legitimate independent contractors certainly exist, but the approach of some companies has been to claim that they have no or almost no employees. Wage-and-hour, civil rights, and labor law provide powerful vehicles to establish employee identity despite such classification games. Legal action under these statutory regimes to challenge employee misclassification is occurring with greater frequency now, as outlined below in Part II.[1]

I. THE LAW DEFINES "EMPLOYER" BROADLY FOR ENFORCEMENT PURPOSES

For decades, the courts and enforcement agencies have recognized that the actual employer(s) of a particular employee are not necessarily limited to the entity held out as the employer. The time-honored joint employer doctrine, also known as the integrated enterprise doctrine or the single employer doctrine, exists precisely to enable enforcement agencies and aggrieved employees to establish the liability of, and obtain remedies from, all culpable parties. Although the test for establishing joint employer status varies slightly, depending on the statutory regime triggered, the central considerations are essentially the same – as explained more fully below.

A. The Standard For Establishing A Joint Employer Relationship Under Wage-And-Hour Law

Federal courts have adopted a multi-factor standard to structure the inquiry into whether more than one company is liable in a given case pursued under the Fair Labor Standards Act.[2] A recent Minnesota Court of Appeals decision articulates the standard as follows:

> (1) authority to hire and fire employees; (2) authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (3) day-to-day supervision, including employee discipline; and (4) control of employee records, including payroll, insurance, taxes, and the like.[3]

B. The Standard For Establishing A Joint Employer Relationship Under Civil Rights Law

The multi-factored test adopted in wage-and-hour cases closely resembles the standard governing employment discrimination and other civil rights cases prosecuted under Title VII[4] and similar statutes. In a high profile ruling on employer identity, Sandoval v. Am. Bldg. Maint. Indus., Inc., the generally pro-employer Eighth Circuit reaffirmed

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that "a ***liberal construction is*** . . . to be ***given to the definition of 'employer.'***"[5]

Toward that end, Sandoval reinvigorated the applicability of the broad four-factor standard as to what constitutes a joint employer:

(1) interrelation of operations;
(2) common management;
(3) centralized control of labor relations; and
(4) common ownership or financial control.[6]

Significantly, all four factors need not be present for one company to be liable for another company's conduct.[7]

Virtually every other Circuit and the Equal Employment Opportunity Commission have followed the liberal four-factor joint employer standard set forth in Sandoval to determine whether separate companies can be jointly liable.[8] Moreover, Congress has codified the broad four-factor standard set forth in Sandoval.[9]

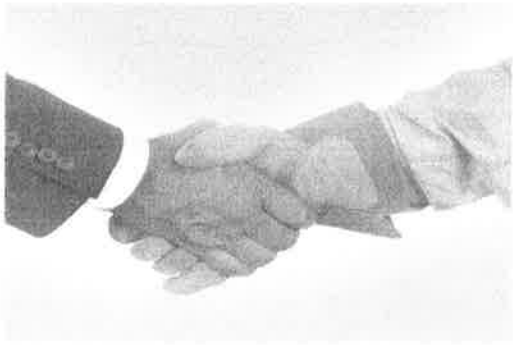
C. The Standard For Establishing A Joint Employer Relationship Under Labor Law

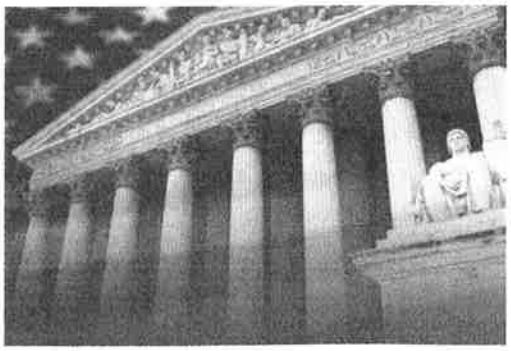
The standard emphatically embraced in civil rights cases, as exemplified by Sandoval, actually came from precedent decided under the National Labor Relations Act[10] by the Supreme Court regarding single employer status.[11] As under civil rights law, not all factors need be present under labor law because no one factor is dispositive.[12]

Importantly, a recent decision expanded in dramatic fashion the scope of the joint employer doctrine – which, under labor law, focuses on whether the labor relations of one company are controlled by another company. In that case, Browning-Ferris Indus., 362 NLRB No. 186 (2015), the National Labor Relations Board ("NLRB") ruled that a company is a joint employer even if it has unexercised or otherwise indirect control over working conditions. In reversing the NLRB Regional Director's determination in favor of the employer, the NLRB explained the governing standard as follows:

> In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers "share" control over terms and conditions of employment or "codetermine" them as the Board and the courts have done in the past. *** Essential terms indisputably include wages and hours, as reflected in the Act itself. Other examples of control . . . found probative by the Board include dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance. *** ***The right to control***, in the common-law sense, ***is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect***.[13]

The NLRB's decision in Browning-Ferris Indus. likely foreshadows a similar ruling against McDonald's in the franchisor-franchisee context. Indeed, the General Counsel of the NLRB has already taken the position that McDonald's, USA, LLC, as the franchisor, is a joint employer with individual McDonald's restaurants, as franchisees; hearings before an NLRB administrative law judge are now being scheduled regarding the joint employer issue and related unfair labor practice charges.[14]





II. THE LAW DEFINES "EMPLOYEE" IN AN INCREASINGLY BROAD WAY FOR ENFORCEMENT PURPOSES

Employee identity has become an intensely litigated issue in recent years. For example, a class of drivers in California has sued Uber for misclassifying them as independent contractors. While detailing the many ways that Uber oversees the drivers' work, a Federal court in California recently certified the case as a class action. Notably, the Federal court denied Uber's summary judgment motion earlier in the case. Similarly, a class of cleaners working for an on-demand/app-based cleaning company, Handy Technologies, recently commenced suit in Federal court in Massachusetts to challenge their classification as independent contractors. Additional employee misclassification litigation is pending or imminent in various other jurisdictions across the country as well.

A. Establishing An Employer-Employee Relationship Under Wage-And-Hour Law

The wage-and-hour statutory regime specifically defines the employer-employee relationship in broader terms than under common law.[15] Indeed, the statutory definition of "employ" includes the expansive concept of "suffer or permit to work."[16] The Supreme Court has repeatedly recognized that this standard goes far beyond ordinary agency principles.[17]

In short, the governing standard of whether a hired party is an employee or an independent contractor turns on the "economic realities" test. Although worded differently by different courts, the crux of the "economic realities" test includes consideration of the following general factors:

(1) the extent to which the work performed is an integral part of the employer's business;

(2) a hired party's opportunity for profit or loss depending on his or her managerial skill;

(3) the extent of the relative investments of the employer and a hired party;

(4) whether the work performed requires special skills and initiative;

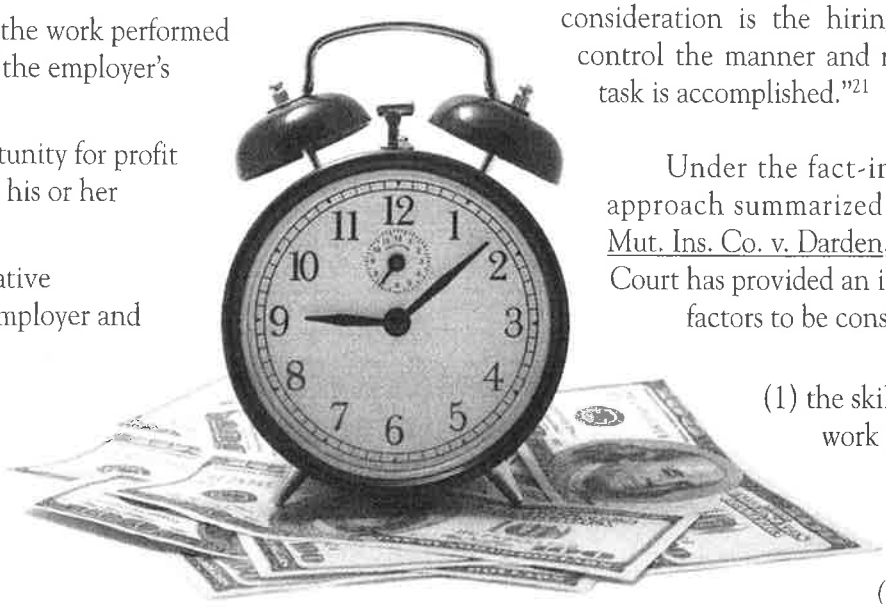
(5) the permanency of the relationship; and

(6) the degree of control exercised or retained by the employer.[18]

As to the first factor, work is integral to the employer's business if it is a part of the employer's production process or service provided; regarding the second factor, the analysis focuses on the extent to which the exercise of managerial skills affects a hired party's opportunity to make and lose money; for the third factor, the central inquiry is whether a hired party's investment is so great that he or she is actually sharing the risk of loss with the employer; as to the fourth factor, the key is whether a hired party exercises independent business judgment and competes in the open market for business; the fifth factor is similarly context sensitive because an impermanent relationship could be due to industry-specific factors or the employer's use of staffing agencies rather than an independent contractor relationship; the sixth factor, although perhaps the most complex, does not hold any greater weight than the other factors, and the essence of consideration is whether a hired party lacks overall control of the working relationship even if a hired party has significant day-to-day autonomy.[19]

B. Establishing An Employer-Employee Relationship Under Civil Rights Law

To determine whether a plaintiff in a civil rights case is an employee or an independent contractor, the courts generally follow a blending of common law agency principles with the concept of "economic realities" akin to what has been established under wage-and-hour law.[20] As to the agency principles portion of this analysis, the Eighth Circuit has long recognized that "[a] primary consideration is the hiring party's right to control the manner and means by which a task is accomplished."[21]



Under the fact-intensive approach summarized in Nationwide Mut. Ins. Co. v. Darden, the Supreme Court has provided an illustrative list of factors to be considered:

(1) the skill required for the work performed;

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(2) the source of the instrumentalities and tools to do the work;

(3) the location of the work;

(4) the duration of the relationship between the parties;

(5) whether the hiring party has the right to assign additional work to a hired party;

(6) the extent of a hired party's discretion over when and how long to work;

(7) the method of payment for work performed;

(8) a hired party's role in hiring and paying assistants;

(9) whether the work is part of the regular business of the hiring party;

(10) whether the hiring party is in business himself or herself;

(11) the provision of employee benefits; and

(12) the tax treatment of a hired party.[22]

Importantly, the list of factors set forth in Darden "is ***nonexhaustive***, and [courts] also weigh the 'economic realities' of the worker's situation, including factors such as how the work relationship may be terminated and whether the worker receives yearly leave."[23]

C. Establishing An Employer-Employee Relationship Under Labor Law

The standard under labor law closely tracks the methodology under civil rights law for determining whether a hired party is an employee or an independent contractor – that is, a hybrid common law/"economic realities" approach prevails.[24] Consequently, the NLRB considers the factors set forth in Restatement (Second) of Agency § 220, which the Supreme Court effectively adopted in cases like Darden, as well as "whether putative contractors have 'significant entrepreneurial opportunity for gain or loss'" and "whether purported contractors have the ability to work for other companies, can hire their own employees, and have a proprietary interest in their work."[25]

To refine the application of the multi-factor considerations when evaluating whether a hired party is an employee or an independent contractor, the NLRB has adopted the following interpretive principles:

> all factors must be assessed and weighed; (2) ***no one factor is decisive***; (3) ***other relevant factors may be considered***, depending on the circumstances; and (4) ***the weight*** to be ***given a particular factor*** or group of factors ***depends on the factual circumstances*** of each case.[26]

The NLRB has adhered strictly to this analytical approach for two decades, continuing up to the present.[27]

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CONCLUSION

Employer and employee identity have become among the most hotly contested issues in work-related litigation. Employers face great risk under various statutory regimes to the extent they attempt to evade legal responsibilities through manipulation of the corporate form. The time-honored joint employer doctrine and the long-standing employee misclassification standards provide robust and expanding mechanisms for holding all culpable parties accountable for violations.

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1 This article draws on material prepared by the author for the 2015 Labor & Employment Law Institute manual.

2 29 U.S.C. §§ 201, et seq.

3 In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation, 683 F.3d 462, 469 (3d Cir. 2012) ("These factors are not materially different than those used by our sister circuits, and reflect the facts that will generally be most relevant in a joint employment context.").

4 42 U.S.C. §§ 2000e, et seq.

5 578 F.3d 787, 793, rhrg. and rhrg. en banc denied 578 F.3d 787 (8th Cir. 2009) (quoting Baker v. Stuart Broad. Co., 560 F.2d 389, 392 (8th Cir. 1977)) (emphasis added).

6 Id.

7 See, e.g., id.

8 See, e.g., Torres-Negron v. Merck & Co., Inc., 488 F.3d 34, 42 (1st Cir. 2007); Kang v. U. Lim Am., Inc., 296 F.3d 810, 815 (9th Cir. 2002); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999); Schweitzer v. Advanced Telemarketing Corp., 104 F.3d 761, 763-64 (5th Cir. 1997); Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1241 (2d Cir. 1995); Johnson v. Flowers Indus., Inc., 814 F.2d 978, 981-82, n. 1 (4th Cir. 1987); Armbruster v. Quinn, 711 F.2d 1332, 1338 (6th Cir. 1983), abrogated on other grounds 546 U.S. 500 (2006); EEOC COMPLIANCE MANUAL, SECTION 2-III, 2009 WL 2966755, n. 107; see also Lyes v. City of Riviera Beach, 166 F.3d 1332, 1342 (11th Cir. 1999); EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 625-26 (D.C. Cir. 1997).

9 See, e.g., 42 U.S.C. § 2000e-1(c)(1), (3) (reiterating that the liberal four-factor standard dictates whether a domestic company is liable for alleged Title VII violations by a foreign subsidiary).

10 29 U.S.C. §§ 151, et seq.

11 Radio & Television Broad. Techs. Local Union 1264 v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965) (establishing the governing standard for single employer status as "interrelation of operations, common management, centralized control of labor relations and common ownership.") (citations omitted).

12 See, e.g., Mercy Hospital of Buffalo, 336 NLRB 1282, 1284 (2001).

13 Browning-Ferris Indus., 362 NLRB No. 186,*15-16 (citations omitted) (emphasis added).

14 See https://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet.

15 29 U.S.C. § 203(d), (e)(1).

16 29 U.S.C. § 203(g).

17 See, e.g., Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296 (1985) (affirming the Eighth Circuit's liberal interpretation of employee and employer).

18 See U.S. DEP'T OF LABOR, ADMINISTRATOR INTERPRETATION NO. 2015-1 (July 15, 2015), p. 4.

19 See generally id., pp. 5-15 (surveying applicable precedent and providing illustrative examples); U.S. DEP'T OF LABOR, FACT SHEET NO. 13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (May 2014).

20 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

21 Schwieger v. Farm Bureau Ins. Co. of NE, 207 F.3d 480, 484 (8th Cir. 2000) (citing Supreme Court precedent).

22 Darden, 503 U.S. at 323-24.

23 Schwieger, 207 F.3d at 484 (citing Eighth Circuit precedent) (emphasis added).

24 FedEx Home Delivery, 361 NLRB No. 55, *2-3 (2014).

25 Id.

26 Id. at *3 (emphasis added).

27 Id.