Labor and Employment Alert: The Fourth Circuit Creates a New Test for Determining Joint Employment

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In January 2017, the Fourth Circuit Court of Appeals (which covers Maryland, Virginia, West Virginia, and North and South Carolina) created a new test for determining whether separate employers are deemed joint employers under the Fair Labor Standards Act (FLSA). Courts across the country have struggled to distinguish separate employment from joint employment. To determine whether joint employment exists, those courts apply a hodgepodge of multi-factor tests: the Second Circuit uses 10, non-exclusive factors; the Ninth Circuit uses 13; and the Eleventh Circuit uses eight. And those tests are aimed at the relationship between the employee and the putative joint employer. Now, the Fourth Circuit has crafted its own six-factor test that instead focuses on the relationship between the two employers.

The case of *Salinas v. Commercial Interiors* illustrates how bad facts can change the law. Commercial Interiors was a general contractor that subcontracted with J.I. for drywall installation. J.I. worked almost exclusively for Commercial Interiors. Commercial Interiors required J.I.'s employees to wear Commercial Interior clothing, provided their tools and equipment, required them to sign Commercial Interior's timesheets, continually supervised their work, required them to attend work and safety meetings, and even told them to say they worked for Commercial Interiors. J.I.'s employees sued both Commercial Interiors and J.I. for unpaid overtime under a joint employment theory. The companies denied they were joint employers. The Fourth Circuit disagreed

At the outset, the Court rejected the tests used by other federal circuits and informed its district courts they should no longer use those tests when determining whether two or more entities are joint employers under the FLSA. The Court then developed "a two-step framework for analyzing FLSA joint employment claims, under which courts must first determine whether two entities should be treated as joint employers and then analyze whether the worker constitutes an employee or independent contractor of the combined entity." The proper focus is the relationship ***between the two employers*** – not the relationship between the employee and the putative joint employer (as in other

circuits).

Thus, according to the Court, "joint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine – formally or in-formally, directly or indirectly – the essential terms and conditions of a worker's employment and (2) the two entities' combined influence over the essential terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor." The courts should consider six non-exclusive factors in making this analysis:

1. Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
2. Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;
3. The degree of permanency and duration of the relationship between the putative joint employers;
4. Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
5. Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
6. Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

This is not an exhaustive list. "To the extent that facts not captured by these factors speak to the fundamental threshold question that must be resolved in every joint employment case—whether a purported joint employer shares or codetermines the essential terms and conditions of a worker's employment—courts must consider those facts as well."

In justifying its own multi-factor test, the Fourth Circuit said the "universe of nebulous factor tests has yielded unpredictable and at times arbitrary results." It remains to be seen whether the results of the Fourth Circuit's new test will be just as unpredictable. One thing is certain – employers in Maryland, Virginia, West Virginia, and North and South Carolina must look at their employment relationships through a new lens. Contact your Vorys lawyer if you have questions about how the *Salinas* decision may impact your operations or about joint employment in general.