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The Contractor's Expanding Risk of Liability For Subcontractors' Wages

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I. Introduction to a New Wave of Joint Employment Analysis

Many contractors assume their liability for workers on a construction project ends at the boundary of their business, and are therefore surprised when they are served with a demand for payment from their subcontractor's employees. However, when it comes to the payment of wages, a worker can be considered to have more than one "employer," depending on how the contractor interacts with the subcontractor's employees. When an employee receives instruction, oversight, or is otherwise controlled by more than one entity at the same time, the worker may be considered to be "jointly employed" by those entities. If a general contractor is found to "jointly employ" its subcontractor's worker, the general contractor may find itself liable to the worker for wage claims, regardless of whether the contractor considers itself to be completely independent from the subcontractor.

Joint employment questions have plagued contractors in many trades for years, exposing contractors to liability for the wages of their subcontractors' workers, compliance problems, and other uncertainties. The confusion surrounding the issue has been especially compounded because courts may use differing and inconsistent legal tests when undertaking an analysis of a particular situation. Courts in some jurisdictions have compiled lists of factors in the joint employment analysis—some including as many as thirteen points of analysis—to determine whether an employee was jointly employed by more than one employer. Indeed, the Fourth Circuit Court of Appeals recently created a new test in *Salinas v. Commercial Interiors, Inc.*[1] While prior courts focused on the relationships between the employee and the two potential joint employers, the Fourth Circuit's test focuses on the relationship between the two putative joint employers. Further complicating the issue, however, the Department of Labor ("DOL") recently withdrew several of its informal guidelines on joint employment, opening the future of how to analyze joint employment to additional speculation.

II. Liability for Compliance with the FLSA has Expanded, but Factors for Evaluating Liability are Often Unclear

The Fair Labor Standards Act ("FLSA") and other state and federal regulations impose obligations on employers to pay employees minimum wages and overtime, among other requirements. While this may seem straightforward, it is not always clear which entity on a construction site is the true employer or employers. The FLSA defines "employee" as "any individual employed by an employer,"[2] and defines

"employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[3] The breadth of the definition was intentional. An individual can be an employee to multiple employers, and the object of "joint employment," if his or her employment by one employer is not completely disassociated from employment by the other employer. If entities are determined to be joint employers, they are individually and jointly responsible for compliance with all wage regulations. If a worker's time is divided between two employers deemed to be joint employers, the hours worked for both entities may be aggregated for purposes of calculating whether overtime wages are due. *Salinas* joins a number of courts who have interpreted how these rules are actually applied.

In *Salinas*, the plaintiffs were drywall installers who worked for J.I. General Contractors, Inc. ("J.I."), which was owned by Juan and Isaias Flores Ramirez. Most of J.I.'s work was with Commercial Interiors, Inc. ("Commercial"), which provided general contracting and interior finishing services, including drywall installation. Although J.I. held itself out as a subcontractor of Commercial, the only work J.I. performed for any other general contractor was on an isolated basis, and occurred only when Commercial couldn't keep J.I. busy. J.I. hired and fired its workers; however, Commercial's foreman often threatened J.I. workers with termination. In analyzing the workers' employment, the court considered that Commercial set the start time and end time for J.I.'s workers, and even directed J.I.'s workers when to work extra hours or to work on Sundays. Commercial also kept track of the workers' time, while J.I. did not. Occasionally, logistics required J.I.'s workers to work directly for and receive paychecks directly from Commercial.

While working on Commercial's projects, J.I. workers wore apparel with Commercial's logo, and were often instructed to tell others on the project that they worked for Commercial. When necessary, Commercial supervised J.I.'s workers, and required J.I. workers to attend meetings. The court further noted that J.I. did not supply its workers with any equipment, materials, or tools, but that Commercial provided nail guns, chop saws, lasers, safety goggles, ropes, gloves, earplugs, and metal storage boxes for storing tools overnight. Commercial also provided all of the materials for J.I.'s workers to use in completing J.I.'s subcontracted work.

After several years of this arrangement, J.I.'s drywallers sued both J.I. and Commercial for FLSA and Maryland state wage law violations, alleging the two were joint employers and were jointly and severally liable to the drywallers for unpaid wages. Commercial challenged the joint employer theory with a motion for summary judgment. The district court focused on the legitimacy of the subcontractor relationship between Commercial and J.I., and analyzed whether Commercial's and J.I.'s arrangement was intended to evade federal and state wage and hour laws.

The district court considered the following five factors in evaluating whether Commercial and J.I. were joint employers: (1) Was the relationship between J.I. and Commercial one that traditionally has been recognized in the law? (2) Was the amount paid by Commercial to J.I. pursuant to the contract between them sufficient to permit the direct employer to meet its legal obligations under the FLSA while earning a reasonable profit? (3) Did the relationship between J.I. and Commercial appear to be a "cozy" one, *i.e.* one that is virtually exclusive and shaped by things other than objective market forces? (4) Is the alleged violation of the FLSA one of which Commercial, during the ordinary course of performance of its own duties, should have been aware? (5) Are there other indicia that the relationship between J.I. and Commercial was designed to abuse the employees of the direct employer?

After consideration of these factors, the district court concluded Commercial and J.I. did not jointly employ J.I.'s workers. Commercial was dismissed from the suit and the plaintiffs' case proceeded to trial against J.I. The workers appealed to the Fourth Circuit, and argued that the district court's novel joint employment test: "(1) did not conform to the FLSA definitions of 'employ,' 'employee,' and 'employer'; (2) failed to adhere to the DOL's long-standing regulations regarding joint employment; and (3) improperly limited joint employment liability to situations in which 'a court finds evidence of subterfuge or indicia of abuse.'"

Indeed, the number of multiple-factor joint employment tests is mind boggling. The *Salinas* court cited *Bonnette v. California Health and Welfare Agency*, as the origin of much confusion around the joint employment doctrine's application. *Bonnette* established a four-factor test that looked at whether the alleged joint 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." After *Bonnette*, the Ninth Circuit developed a thirteen-factor test using language found in the Migrant Workers Act regulations and case law. Later, the Second Circuit jumped into the fold when it concluded the *Bonnette* test did not sufficiently encompass the FSLA definition of "employ" (defined as "suffer or permit to work") and added six more factors. More recently, the Eleventh Circuit applied an eight-factor test that specifically focused on whether the workers were "economically dependent" on the employers.

III. A New Focus on the Relationship between the Putative Joint Employers

Unconvinced that these tests properly addressed Congress's intended scope of the FLSA's definition of employer, the *Salinas* court summarized the deficiencies in the tests as: (1) the improper focus on the relationship between the employee

and the putative joint employer rather than the relationship between the putative joint employers; and (2) incorrect framing of the joint employment question as one of the employee's "economic dependence." In particular, *Salinas* explained how "economic dependence" distinguishes employees from independent contractors—which is often an additional consideration in joint employment cases—but continued that "economic dependency . . . does not capture key ways in which putative joint employers may be 'not completely disassociated' with respect to establishing the terms and conditions of a worker's employment[.]" Combining the two considerations, the key inquiry is the "relationship between *the employer* who uses and benefits from the services of workers and *the party that hires or assigns the workers to that employer*." Courts must still determine whether two putative joint employers are "not completely disassociated."

Having dispensed with previous tests, the Fourth Circuit focused on the general scenarios in which joint employment often exists: (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 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. These scenarios are intended to evaluate the relationship between the putative joint employers.

The Fourth Circuit created the following six-factor test to determine joint employment:

> (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.

While the court cautioned that no factor is determinative, the test makes it more difficult for employers and general contractors to gauge when they are crossing the line into "joint employer" territory.

This test expands joint employer liability under the FLSA, which was consistent with the 2015 and 2016 DOL guidelines, concluding that prior tests did not adequately account for the "striking breadth" of the FLSA definitions of employee, employer, and employ. For example, the court rejected as irrelevant Commercial's argument that it had a typical contractor-subcontractor relationship with J.I. It downplayed predictions that such a broad interpretation would serve as a "fatal blow" to "traditional" contractor-subcontractor relationships, rationalizing that the test simply assured fair wages, and further noting that there are many reasonable business purposes for entering into arrangements that result in joint employment. In justifying the new employer-centric test, the court emphasized that the relationship between the two employers uniquely mattered for joint employment because hours worked for two employers who are joint employers are aggregated when determining compliance with the FLSA.

Applying its new test to the relationship between Commercial and J.I., the Fourth Circuit concluded that nearly all of the factors supported a conclusion that Commercial and J.I. were "not completely disassociated" and were joint employers. It noted that Commercial and J.I. jointly exercised authority over the terms and conditions of the workers' employment, Commercial and J.I. worked nearly exclusively with each other, and Commercial and J.I. determined the work premises and functions of employment in conjunction with one another. The court summed up its analysis by noting that a general contractor can avoid the joint employer label so long as it either: "(1) disassociates itself from the subcontractor with regard to the key terms and conditions of the workers' employment, or (2) ensures that the contractor 'cover[s] the workers' legal entitlements' under the FLSA."

IV. The Future of Expanded Joint Employment Analysis Remains Unclear

While the *Salinas* decision appears to expand considerations of joint employment, recent changes in policy at the DOL may alter how joint employment is viewed and interpreted going forward. In 2015 and 2016, the DOL Wage and Hour Division issued informal guidance on joint employment which expanded the situations where an employer could be liable to another company's employees as a joint employer. *Salinas* is certainly consistent with these guidelines. But on June 7, 2017, the U.S. Secretary of Labor announced the withdrawal of the 2015 and 2016 informal guidance. The official announcement affirmed that employers' legal responsibilities did not change, and that the DOL would continue to enforce FLSA and other labor laws. Nevertheless, the rollback of DOL guidance on joint employment may simply be the first step in further reigning in joint employer liability.

Since *Salinas,* several courts in other circuits which have considered joint employment issues. In *Sutton v. Cmty. Health Sys., Inc.*, the Western District of Tennessee acknowledged the new Fourth Circuit test, but ultimately followed the existing tests employed in the Sixth Circuit which evaluate the relationship between the worker and the putative joint employer. Similarly, in *Sanchez v. Simply Right, Inc.*, from the District of Colorado, the court explained in a footnote that, if it were writing on a clean slate, it would adopt the *Salinas* six-factor test, as it agreed with the Fourth Circuit's analysis of the relationship between the putative joint employers. However, the court noted that the issue was not before it, as the parties argued different factors, and the Magistrate Judge made findings based on differing factors. Where there has historically been so much confusion and so many varying multi-factor tests, it is possible other courts could be drawn to the *Salinas* test which offers to reconcile and put to rest previous tests.

Regardless, until the DOL issues further guidelines, general contractors and employers should monitor their relationships with subcontractors, independent contractors, and others with whom they may share workers for any amount of time.

Endnotes

1 *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017).
2 29 U.S.C.S. § 203(e) (PL 115-90, approved 12/8/17).
3 29 U.S.C.S. § 203(d)(1).
4 29 C.F.R. 791.2(a) (2017).
5 29 C.F.R. 791.2(a) (2017).
6 29 C.F.R. 791.2(a) (2017).
7 *Salinas*, 848 F.3d at 129.
8 *Id.*
9 *Id.* at 129-30.
10 *Id.* at 130.
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*

15 *Id.*
16 *Salinas*, 848 F.3d at 131
17 *Id.*
18 *Id.*
19 *Id.* at 132.
20 *Id.*
21 *Id.*
22 *Salinas*, 848 F.3d at 132.
23 *Id.*
24 *Id.*
25 *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469-70 (9th Cir. 1983).
26 *Salinas*, 848 F.3d at 135.
27 *Id.*
28 *Torres-Lopez v. May*, 111 F.3d 633, 639-41 (9th Cir. 1997).
29 29 U.S.C.S. § 203(g) (PL 115-90, approved 12/8/17).
30 *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 70 (2d Cir. 2003).
31 *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1176-77 (11th Cir. 2012).
32 *Salinas*, 848 F.3d at 137.
33 *Id.* at 139.
34 *Id.* at 137. (emphasis in original)(internal citations omitted).
35 *Id.*; *see also* 29 C.F.R. § 791.2(a).
36 *Salinas*, 848 F.3d at 141 (quoting 29 C.F.R. § 791.2(b)).
37 *See id.*
38 *Id.* at 141-142.
39 *Id.* at 142.
40 *Salinas*, 848 F.3d at 143.
41 *Id.* at 147.
42 *Id.* at 144.
43 *Id.*
44 *Id.* at 145-47.
45 *Id.* at 146-47.
46 *Id.* at 149.