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LABOR & EMPLOYMENT ALERT

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The Third Circuit Expands the Test Applied to Determine a Joint Employer Under the FLSA

By Scott J. Wenner and James R. Costello, II

On June 28, 2012, in *Hickton v. Enterprise Holdings, Inc.*, the United States Court of Appeals for the Third Circuit announced a test that it will apply to determine whether a company is a joint employer under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201, et seq., an issue of first impression in the Circuit. The Third Circuit's new test modified the three-part measure used by the district court in making this determination which originally was set forth in *Lewis v. Vollmer of America*, No. 05-1632, 2008 WL 355607 (W.D. Pa. Feb. 7, 2008). The court fashioned its new standard for the Circuit after finding that the *Lewis* test was overly limited by focusing only on instances where an alleged joint employer exhibited direct control over employees. In the Third Circuit's view, a parent's indirect control over employees could, in an appropriate case, lead to its liability to employees of its subsidiaries. That proposition expands the risk to parent companies that joint employer status will be found.

Hickton, the lead plaintiff in a collective action, was an assistant branch manager employed at Enterprise-Rent-A-Car Company of Pittsburgh. Enterprise of Pittsburgh was one of a group of subsidiaries of Enterprise Holdings, Inc. ("Enterprise Holdings"), which supplied corporate and human resources services to its affiliates, charging them a fee for those services. In Hickton's lawsuit, a group of employees comprised of "assistant branch managers" unsuccessfully claimed they were owed overtime wages and penalties, arguing that they were unlawfully misclassified as exempt employees. The employees sued both their respective direct employers — the local rental agency subsidiaries like Enterprise of Pittsburgh — and Enterprise Holdings, identifying Enterprise Holdings as a joint employer along with the local rental agency that directly employed them.

The court found that Enterprise Holdings directly and indirectly provides certain supplies and administrative services to its wholly-owned local subsidiaries. These include business guidelines; employee benefit plans; rental reservation tools; a central customer contact service; insurance technology; legal services; and human resource services. Among the human resource tools and services supplied by Enterprise Holdings are job descriptions; best employment practices; training materials; a standard employee review form; and compensation guidelines. All of the services supplied by Enterprise Holdings to its subsidiaries are in the form of "recommendations," which the subsidiaries may reject in favor of their own solutions. In exchange for the services made available by Enterprise Holdings, each subsidiary pays it corporate dividends and management fees.

The Court of Appeals found that Enterprise Holdings was not a joint employer of the local agency employees under the FLSA. In reaching that conclusion the Third Circuit applied a new four factor test to examine whether a purported joint employer exerts sufficient direct control to be potentially liable as an employer of workers more directly employed by another entity. The new *Enterprise* test asks "does the alleged employer have: (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, insur-

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ance, taxes, and the like." *Hickton v. Enterprise Holdings, Inc.*, No. 11-2883, slip op. at 16 (3d Cir. June 28, 2012). The Court cautioned, however, that "this list is not exhaustive, and cannot be 'blindly applied' as the sole considerations necessary to determine joint employment." *Id.* at 17. Instead, it noted that "[a] determination as to whether a defendant is a joint employer 'must be based on a consideration of the total employment situation and the economic realities of the work relationship.'" *Id.*

In applying its newly minted test to the facts before it the Court of Appeals found that because the human resource services supplied by Enterprise Holdings were found not to be "mandatory directions", but instead were "mere recommendations" that the local subsidiaries were not obligated to follow, Enterprise Holdings was not a joint employer of the plaintiffs. However, the court's language and reasoning suggest that if Enterprise Holdings instead had mandated the adoption of its employment practices, manuals, and guidelines it supplied to its subsidiaries, the outcome of this case likely would have been different.

Parent companies, particularly those with operations in Pennsylvania, New Jersey, and Delaware, should be aware of the Third Circuit's new test of joint employer status under the FLSA, and especially its language regarding indirect control of a subsidiary's employees. Companies that participate indirectly in human resource administration at businesses they own should consult with counsel if they wish to minimize their risk of potential liability to their subsidiaries' employees. ◆

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