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## Joint Employment Tests Are All Wrong, Says Federal Appeals Court

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Are 59 years of joint employment rulings all wrong? Yes, says a federal appeals court in a landmark Fair Labor Standards Act (FLSA) decision issued in late January.

Relying on a 1958 Department of Labor (DOL) regulation, the Fourth Circuit Court of Appeals has rewritten the test for joint employment, defining the concept so expansively that every outsourced and staffing agency relationship might be deemed joint employment under the FLSA. The decision in *Salinas v. Commercial Interiors*, issued unanimously by a three-judge panel (all Obama appointees), takes a more radical position on joint employment than even the NLRB took in its controversial 2015 *Browning-Ferris* decision.

The Court of Appeals concludes that everybody—including the DOL itself—has been misinterpreting the DOL's joint employment regulation for 59 years.

Is that possible? Can the court literally mean that? Or is this an example of the adage, "bad facts make bad law"? The facts in *Salinas* suggest there was probably a joint employment relationship under any test. It remains to be seen how this test will be applied and whether decades of court decisions and DOL guidance will truly be disregarded.

Meanwhile, employers in North Carolina, South Carolina, Maryland,



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Virginia and West Virginia are immediately and directly impacted, since these are the states that the Fourth Circuit covers.

### What Happened?

Courts frequently struggle with how to determine whether joint employment exists. The different standards and different definitions across different federal and state laws have caused confusion, resulting in courts sometimes applying the wrong standard to the wrong situation.

Further complicating the situation, no consensus has emerged among the circuit courts of appeal for how to deal with the confusion. Courts of Appeal continue to emphasize

different factors, even when applying the proper test.

In general, though, the approach for determining whether joint employment exists under the FLSA has been to use an Economic Realities Test to assess whether the individual workers are economically dependent on the putative joint employer.

In *Salinas*, however, the Fourth Circuit blew up the old test and concluded that everyone, including the DOL, has been conducting the FLSA joint employment analysis all wrong.

### Has Everyone Been Applying the Wrong Analysis for the Last 59 Years?

The Fourth Circuit's conclusion is based entirely on its interpretation of

a regulation, 29 CFR 791.2(a), that has been in place since 1958. All of the federal court decisions and DOL interpretations that the Fourth Circuit says are wrong were issued with that regulation already in place.

The point of the regulation was to recognize that joint employment may exist under the FLSA. There is no debate about that point. The text of the regulation recognizes this possibility, then provides some examples of situations where joint employment might or might not exist.

But the Fourth Circuit reads the regulation differently. The Fourth Circuit reads it as allowing only two binary possibilities when assessing whether two companies are joint employers: Either the two companies are “acting entirely independent of each other and are completely disassociated with respect to the individual’s employment,” or they are “not completely disassociated.”

In the first instance, there is no joint employment. In the second instance, there is joint employment. Period. The Fourth Circuit sees no middle ground.

The court explained: [T]he regulations distinguish “separate and distinct employment” and “joint employment.”

Separate employment exists when “all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the” individual’s employment. *Id.* (emphasis added). Separate employers may “disregard all work performed by the employee for the other employer” when determining their obligations under the FLSA.

By contrast, joint employment exists when “the facts establish ... that employment by one employer is not completely disassociated from employment by the other employer [.]”

(The emphasis is the court’s. There are no italics in the regulation.)

The Fourth Circuit argues that courts have traditionally botched the joint employment analysis by making two mistakes:

(1) They “improperly focus on the relationship between the employee and putative joint employer, rather than on the relationship between the putative joint employers,” and

(2) They “incorrectly frame the joint employment inquiry as a question of an employee’s ‘economic dependence’ on a putative joint employer.”

In other words, the court argues that the joint employment analysis must start by determining the extent to which the two companies interact with each other, not with how the individuals interact with the two companies. That is a new approach.

The court also seems to conclude, based on the regulation, that any association between two companies means they are joint employers. That is also new. Not even the NLRB in *Browning-Ferris* went that far.

With that in mind, the Fourth Circuit established a new two-part test.

### **Part One: Are the Two Companies “Completely Disassociated” From Each Other?**

Part One of the new test requires a court to decide whether the two putative employers are:

(A) “acting entirely independently of each other and are completely disassociated with respect to the” individual’s employment, in which case they are not joint employers under 29 CFR 791.2(a); or

(B) “not completely disassociated from employment by the other employer,” in which case they are joint employers under 29 CFR 791.2(a).

In other words, Part One requires a finding that the two entities are joint employers under the FLSA unless they are “completely disassociated” from one another. That has never been the law.

Further citing the regulation, 29 CFR 791.2(b), the court identifies three scenarios where joint employment typically 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.

The Fourth Circuit explains that all three scenarios speak to one fundamental question: “[W]hether two or more persons or entities are ‘not completely disassociated’ with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker’s employment.” Again, that has never been the test.

In answering this “one fundamental question,” the Fourth Circuit instructs that courts should consider six factors:

(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.

These factors are nonexhaustive. Any other factor that relates to the question can also be considered. The circumstances as a whole are what matters.

If the two entities are not "completely disassociated from each other," then they are joint employers. Period.

The next part of the test examines whether they are joint employers of any particular individual or whether the individual is an independent contractor, to whom the FLSA does not apply.

### **Part Two: Are the Individuals Employees or Independent Contractors?**

If the two putative employers are joint employers under this new test, a court should then determine whether the individual workers are employees or independent contractors. This is Part Two of the new test.

This analysis is done using the traditional Economic Realities Test. Although different courts recite slightly different versions, there is general consistency across the circuits in

how to apply the Economic Realities Test to the question of whether someone is an employee or an independent contractor. The Fourth Circuit applies that test using six factors:

(1) the degree of control that the putative employer has over the manner in which the work is performed;

(2) the worker's opportunities for profit or loss dependent on his managerial skill;

(3) the worker's investment in equipment or material, or his employment of other workers;

(4) the degree of skill required for the work;

(5) the permanence of the working relationship; and

(6) the degree to which the services rendered are an integral part of the putative employer's business.

If the individual is a true independent contractor and is not economically reliant on either joint employer, then the FLSA does not apply. If the individual is an employee, then both joint employers are jointly and severally liable for any FLSA violation.

### **Summary of the Test**

Summarizing its newly-created test, the Fourth Circuit held that, under the FLSA, "joint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker's employment and (2) the two or more persons' or entities' combined influence over the terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor."

### **Analysis: Is This Test Correct? Is It Workable? Will Other Circuits Follow Along?**

The Fourth Circuit misinterprets the regulation. Plain and simple. The

court's analysis is neither the correct reading of the DOL's regulation, nor is it a workable test.

The common sense reading of the regulation is that the DOL was recognizing the possibility of joint employment under the FLSA and explaining that there is a continuum of possible relationships. On one end of the continuum, companies are "entirely independent of each other and are completely disassociated," in which case there is no joint employment. At the other extreme, the companies are so intertwined as to be jointly employing the workers. The determination of where a particular relationship falls along the continuum is based on a balancing test.

The Fourth Circuit's reading of the regulation, however, is binary. Either the companies are completely disassociated from each other or they are joint employers. Not even the DOL interprets its own regulation in this manner.

In 2016, the DOL's wage and hour Administrator, David Weil, issued an administrator's interpretation addressing joint employment under the FLSA. In it, the DOL warns that joint employment relationships are more frequent than companies perhaps realized. The interpretation then explains how the DOL determines whether joint employment exists.

The DOL does not interpret its own regulation in the binary manner that the Fourth Circuit now does. The DOL concludes that "the possibility of joint employment should be ... considered in FLSA ... cases" when the two companies "are associated or related in some way" or where one serves as "an intermediary" for the other. (Emphasis added.) The DOL does not say that joint employment is automatic when there is some association (i.e., when the entities are "not completely disassociated") but merely advises that the

possibility of joint employment should be considered when that is the case.

The interpretation concludes that the way the analysis “must” be performed is to determine whether the individual is economically dependent on the putative joint employer. This is the test that has been applied for decades but which the Fourth Circuit now rejects. The Fourth Circuit concludes that the DOL (and hundreds of court decisions across the nation) have been misinterpreting this regulation for 59 years.

The Fourth Circuit not only misinterprets the regulation but seems to create a standard that is unworkable. The court’s reading creates such a low bar to finding joint employment that it is hard, perhaps impossible, to imagine a scenario in which one company outsources labor to another company but the two companies are “completely disassociated from each other.”

If the Fourth Circuit’s new test is read literally, every outsourced relationship would resemble joint employment, because the very fact of outsourcing, which is presumably accompanied by a master services agreement or similar contract, requires some association. To put it another way, the entire purpose of two companies associating with each other is to have some association.

The Fourth Circuit leaves some room in its opinion, however, for the conclusion that its new test should not be read quite so literally. In discussing the workability of its new standard, the court backs off from that strict interpretation. The opinion considers—but rejects—the conclusion that every outsourced relationship would result in joint employment under its new test.

The inconsistency between that statement and the language of new test raises serious questions as to whether the new test will be applied literally, with such harsh results. It cannot be the law that every agreement

to supply non-employee labor is joint employment, and the Fourth Circuit admits as much. How harshly will the new test be applied? Time will tell.

### Conclusion

The Fourth Circuit’s new test is based entirely on a misinterpretation of a 59-year-old DOL regulation, interpreting it in a way that the DOL never has.

The new test, if applied literally, would make it virtually impossible to outsource work without creating joint employment under the FLSA. But at the same time, the court warns that joint employment is not automatic and sets forth six factors to consider when making that determination.

For now, this decision applies only in the Fourth Circuit, which covers five East Coast states.

It remains to be seen whether other Courts of Appeal will adopt similar joint employment tests or will take the position that the DOL does not understand its own regulations. It seems a sure bet that the new wage and hour administrator, whomever that may be, will not adopt the Fourth Circuit’s radical new approach, especially since the more liberal Obama-led DOL never took that extreme a position.

There are three ways this decision can be undone. First, the full Fourth Circuit can rehear the decision en banc and can overturn the decision of the three-judge panel. The Fourth Circuit as a whole is regarded as one of the more conservative circuits, and the random assignment of three Obama appointees to hear this case likely led to an outcome that a more representative Fourth Circuit panel would not have reached. A rehearing by the full Fourth Circuit seemed like a reasonable possibility, but on Feb. 22, the petition for rehearing en banc was denied.

Second, the Supreme Court can decide to hear the matter and can overturn the decision.

Third, the DOL can amend the regulation. Since the Fourth Circuit’s decision was based entirely on the text of the regulation, a change in the text—or a clarifying addition to the text—should render the decision obsolete.

Unless the second or third possibility happens, however, the *Salinas* decision is now the law in the Fourth Circuit and should be watched carefully by employers throughout the country, especially employers with facilities in North Carolina, South Carolina, Maryland, Virginia or West Virginia.

Companies in these states that outsource or subcontract labor should look closely at their existing relationships in light of this new standard.

They should take steps to ensure that their vendors are complying with their obligations to pay minimum wage and overtime. Simply being deemed a joint employer under the FLSA does not, by itself, carry consequences. But where staffing agencies or subcontractors commit violations of wage and hour law, joint employers are held jointly and severally liable for these violations.

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