

Who's the Boss?
Co-, Joint and Other Complicated Private and Public Sector
Employment Relationships¹

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I. Fair Labor Standards Act – Who Has the Duty to Pay?

Congress passed the Fair Labor Standards Act (“FLSA”) to combat “the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”² To achieve this, the FLSA broadened the common law definition of “employ,” subjecting a greater number of entities and individuals to employer liability.³ The common law of agency, for example, “generally did not hold manufacturers liable for their contractors’ torts or crimes, and distinguished employees from independent contractors based upon whether the principal controlled . . . the physical performance of the employee/contractor’s work.”⁴ Under the FLSA’s expanded definition, however, “employ” is defined as: to “suffer or permit to work.”⁵ Generally, courts have interpreted this language to mean that an entity able to prevent FLSA violations may be held liable for such violations if that entity had or should have had knowledge of their existence and

¹ Portions of this paper were adapted from a paper prepared by Rachel Bien and Sanjay B. Malhotra for a presentation entitled, “My Employee, Your Employee, Co-Employee,” presented at the New York State Bar Association’s January 2012 Labor and Employment Section meeting.

² 29 U.S.C. § 202(a).

³ See, e.g., Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 11-13 (2010).

⁴ *Id.* at 11.

⁵ 29 U.S.C. § 203(g).

did nothing to stop them, and where it would be reasonable under the circumstance to hold that entity accountable.⁶ To comport with the FLSA’s objectives, courts do not require employers to have “actual knowledge” of the purported violations; imputed knowledge is enough.⁷

The FLSA also recognizes that an employee’s work may simultaneously benefit multiple employers. In these circumstances, the “joint employers” are responsible both “individually and jointly” for compliance with the FLSA,⁸ and “all of the employee’s work for all of the joint employers during the workweek is considered as one employment for purposes of the Act.”⁹ Courts apply an economic realities test to determine whether a joint employment relationship exists. The test looks at whether the alleged 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.¹⁰

The economic realities factors are not exhaustive and courts typically go beyond the four requirements to consider the “totality of the circumstances.”¹¹ For example, courts have also considered “the extent to which the [employee’s] work is an integral part of the employer’s business,”¹² “whether the [employer’s] premises and equipment were used for the [employee’s]

⁶ See generally *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287-88 (2d Cir. 2007) (holding that an “employer’s actual or imputed knowledge that an employee is working is a necessary condition to finding the employer suffers or permits that work,” and that an employer’s “knowledge” of the employee’s work provides a “sufficient opportunity [for the employer] to comply with the Act”).

⁷ *Id.* at 287. See also *Holzappel v. Town of Newburgh, N.Y.*, 145 F.3d 516, 524 (2d Cir. 1998).

⁸ 29 C.F.R. § 791.2(a).

⁹ *Id.*

¹⁰ *Carter v. Dutchess Comm. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984) (adopting test from *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)).

¹¹ *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988).

¹² *Id.*

work,”¹³ “whether [the employee] worked exclusively or predominantly for the [employer],”¹⁴ whether the employer “screened workers for minimum qualifications”¹⁵ or “instructed workers about appropriate dress and work habits,”¹⁶ and whether the employer “determined the number of hours for which [the employees] would be paid.”¹⁷

A. The Second Circuit’s Joint Employment Standard

Despite the passage of time, some of the very same situations prompting the FLSA’s liberal joint employer standard continue to arise today. For example, in *Zheng v. Liberty Apparel Co.*,¹⁸ the Second Circuit addressed a sweat shop labor situation reminiscent of the early 1900’s. There, Liberty, a garment manufacturer, contracted out the last phase of the production of its garments to approximately 30-40 contractors.¹⁹ The contractors hired the garment workers and paid them.²⁰ Liberty periodically monitored the work done on the contractors’ premises but there was a fact dispute as to how consistently Liberty representatives were present on site.²¹ The Second Circuit reversed the district court’s grant of summary judgment to Liberty, rejecting the lower court’s narrow interpretation of “employer,” which limited the analysis to the four economic realities factors discussed above.

First, the Second Circuit clarified that an employment relationship may exist even where the employer “does not hire or fire its joint employees, directly dictate their hours, or pay

¹³ *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003).

¹⁴ *Id.*

¹⁵ *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 676 (1st Cir. 1998).

¹⁶ *Id.*

¹⁷ *Barfield v. N.Y.C. Health and Hosp. Corp.*, 537 F.3d 132, 144-45 (2d Cir. 2008).

¹⁸ 355 F.3d 61 (2d Cir. 2003).

¹⁹ *Id.* at 63-64.

²⁰ *Id.*

²¹ *Id.* at 65.

them.”²² Second, the Court identified several non-exclusive factors that the district court should consider on remand:

- (1) whether Liberty’s premises and equipment were used for the plaintiffs’ work;
- (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another;
- (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty’s process of production;
- (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes;
- (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs’ work; and
- (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants.²³

The Court held that these factors weighed in the plaintiffs’ favor even if there was no showing of formal control because “they indicate that an entity has functional control over workers[.]”²⁴

Similarly, in *Herman v. RSR Securities Services Ltd.*, the Second Circuit affirmed that liability as an employer:

does not require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control of one’s employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control “do[] not diminish the significance of its existence.”²⁵

In affirming the district court’s decision holding the defendant, the Chairman of the Board, individually liable for wage and hour violations, the Court relied on evidence of the defendant’s financial control over the company and his supervision over the management of the company (but not the plaintiffs themselves), in addition to evidence meeting three of the four economic realities factors.²⁶

²² *Id.* at 70.

²³ *Id.* at 72.

²⁴ *Id.*

²⁵ *Id.* at 139 (quoting *Donavan v. Janitorial Servs., Inc.*, 672 F.2d 528, 531 (5th Cir. 1982).

²⁶ *Id.* at 141.

B. Employees of Temporary Staffing Agencies

The issue of joint employment also frequently arises with respect to temporary employment agencies and job-referral programs. Are temporary employment agencies held liable for FLSA violations committed, in whole or in part, by the employee's employer? The answer to this question is context-specific and depends largely on the factual circumstances of the particular case.

In *Brock v. Superior Care, Inc.*,²⁷ a group of nurses sued Superior Care ("Superior"), a temporary referral agency, for unpaid overtime. Superior had conducted the initial interviews for all of the nurses, placed them on a roster, and assigned the nurses to job sites as work became available.²⁸ The nurses were free to decline a proposed referral.²⁹ Patients needing nursing care contacted Superior directly, and the nurses were "prohibited from entering into private pay arrangements with the patients."³⁰ "[O]nce or twice a month," Superior visited the job sites to ensure that the nurses were carrying out their duties.³¹ Usually, Superior set the hourly wage that nurses were paid, but occasionally nurses were able to negotiate a pay rate for a particular job.³² Superior also allowed all of the nurses to simultaneously hold other jobs, or be employed by different nursing-care providers or referral agencies.³³

In response to the suit, Superior argued that the nurses were not employees but independent contractors.³⁴ The court found that the nurses were employees, placing great weight on the following: (1) "that the services rendered by the nurses constituted the most integral part

²⁷ 840 F.2d 1054, 1059 (2d Cir. 1988).

²⁸ *Id.* at 1057.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1058.

of Superior Care’s business, [which is] to provide health care upon request,”³⁵ (2) that Superior monitored the nurses by visiting the job sites,³⁶ (3) that the nurses “depended entirely on referrals [by Superior] to find job assignments,”³⁷ and (4) that the nurses did not have “any independent investment in the business.”³⁸ The fact that the nurses were “a transient work force” who usually worked for Superior “only a small percentage of the time, earned “relatively little from Superior,” and did not usually “maintain continuing relationships with Superior,” did not persuade the court that the nurses were independent contractors.³⁹

Brock is instructive in several ways. First, the fact that the nurses worked for the referral agency for a short period of time did not undermine the claim that the referral agency was their employer. Second, even though the nurses worked for multiple employers, each could be considered their employer for purposes of liability under the FLSA.⁴⁰ Third, although the nurses did not draw their primary income the referral agency, it could still be held liable as their employer.⁴¹

In *Baystate Alt. Staffing, Inc., v. Herman*,⁴² Baystate, a temporary employment agency, “advertised its services to companies in need of temporary workers to perform unskilled labor,” such as factory work, heavy labor, and packing.⁴³ When a company needed workers, it contacted

³⁵ *Id.* at 1059.

³⁶ *Id.* The fact that Superior’s visits were infrequent did not persuade the court to find that the nurses were independent contractors. “An employer does not need to look over his workers’ shoulders every day in order to exercise control,” the court held. *Id.* at 1060.

³⁷ *Id.*

³⁸ *Id.* at 1061. In addition, the court also commented on the fact that Superior employed other nurses who were treated like full-time employees, but the job duties of those other nurses did not differ in any respect from the job duties of plaintiffs. *Id.* at 1059.

³⁹ *Id.* at 1060.

⁴⁰ *Id.* (citing *Walling v. Twyeffort, Inc.*, 158 F.2d 944, 947 (2d Cir. 1947)).

⁴¹ *Id.* (citing *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985)).

⁴² *Baystate Alt. Staffing, Inc., v. Herman*, 163 F.3d 668 (1st Cir. 1998).

⁴³ *Id.* at 671.

Baystate with a “job order” specifying the number of workers it needed.⁴⁴ Baystate then assigned a worker to that company, which paid Baystate a flat rate for each hour the worker worked.⁴⁵ Baystate then deducted its own fee and paid the workers the minimum wage.⁴⁶ All paychecks came from Baystate. Baystate also instructed “workers about appropriate clothing and behavior at job sites,” and sometimes transported workers to their work assignments.⁴⁷ It advertised that it “handle[d] all the burdensome paperwork, bookkeeping, record keeping, payroll costs, and government reporting,”⁴⁸ so that the contracting companies would not have to.

Baystate also required “all job applicants seeking temporary work to sign a ‘Contractor Agreement,’ which stated that the worker was an independent contractor and not an employee of Baystate.” A memorandum attached to the contract stated that “if a worker contacted a client company on his or her own initiative about potential job opportunities, without the involvement of Baystate, the worker would not be placed with a client company in the future.” At no point did Bayside ever provide on-the-job supervision.⁴⁹

In response to a lawsuit for unpaid overtime, Bayside argued that the workers were independent contractors.⁵⁰ Considering the “economic reality” of the situation, the First Circuit noted that Baystate was “solely responsible for hiring the temporary workers, and that it had the power to refuse to send a worker back to a job site where he or she had performed unsatisfactorily.”⁵¹ This showed that Baystate exercised control over the workers, which is an aspect of the traditional employer/employee relationship. “[T]he absence of direct supervisory

44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.* at 676.
50 *Id.* at 671.
51 *Id.* at 676.

oversight of the workers' day-to-day activities" was not determinative because "Baystate exercised indirect supervisory oversight of the workers through its communications with client companies," and also "retained the authority to intervene if problems arose with a worker's job performance."⁵² The First Circuit placed little weight on the fact that the workers had signed independent contractor agreements.

Courts have also considered the question of employer liability where an employee is referred to the same employer by multiple temporary employment agencies. In *Barfield v. NYC Health and Hosp. Corp.*,⁵³ the plaintiff worked at Bellevue Hospital through three separate referral agencies. As a result, she occasionally worked more than 40 hours a week, but never "at the behest of a single referral agency."⁵⁴ The district court assumed without explanation that the referral agencies were the plaintiff's employer. The question was whether Bellevue could be held liable as a joint employer for the unpaid overtime.

In upholding the district court's determination that Bellevue was a joint employer, the Second Circuit noted that "Bellevue maintained employment records . . . of the hours worked at the hospital by temporary workers," but had failed to "organize these records in a way that readily alerted it to when an employee referred by multiple agencies . . . worked more than 40 hours in a given week."⁵⁵ The fact that Bellevue may have been unaware that certain temporary employees worked more than 40 hours a week was not decisive if Bellevue *should* have been aware of it.⁵⁶

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Id.

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Barfield v. NYC Health and Hosp. Corp., 537 F.3d 132, 135 (2d Cir. 2008).

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Id.

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Id. at 144.

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Id.

II. Title VII – Who Is Liable for Discriminatory Conduct?

The most important fact to remember about the scope of the principal federal discrimination law, Title VII of the Civil Rights Act of 1964, is that, in creating legal remedies for aggrieved employees, Title VII does not care much who their employer is. The Act does contain a definition of “employer” that starts at 15 employees,⁵⁷ but that definition is there only for jurisdictional purposes, not to limit the potential universe of violators. In other words, if you are an employer of any 15 employees and you commit the prohibited discrimination against anyone’s employees, you may be liable. Even an employer that directly employs fewer than 15 people might trigger Title VII jurisdiction if, under a theory of joint employment, the temporary employees are included in its headcount.

One of the best sources of guidance on the law of discrimination in co-employment relationships is the EEOC’s 1997 enforcement guidance on claims of discrimination by contingent workers.⁵⁸ According to this guidance, liability for discriminatory conduct generally will depend on which co-employer knew about the facts, which was responsible for them, and what actions they took to deal with them.

Under Title VII, “[t]wo doctrines are relevant in cases where two or more entities are involved in an individual’s employment.”⁵⁹ The first is known as the “single employer” doctrine, which is applicable “when two nominally separate entities are actually part of a single integrated enterprise.”⁶⁰ In these circumstances, “both entities are subject to joint liability for

⁵⁷ 42 U.S.C. § 2000e(b).

⁵⁸ See EEOC, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, available at: <http://www.eeoc.gov/policy/docs/conting.html> (Dec. 3, 1997).

⁵⁹ *Lima v. Adecco*, 634 F. Supp. 2d 394, 399 (S.D.N.Y. 2009).

⁶⁰ *Id.* at 399-400 (quoting *Arculeo v. On-Site Sales & Mktg., LLC*, 425 F.3d 193, 198 (2d Cir. 2005)).

employment-related acts.”⁶¹ In deciding whether two entities actually constitute a single integrated enterprise, four factors are considered: “(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.”⁶² The second doctrine “applies when separate legal entities have chosen to handle certain aspects of their employer-employee relationships jointly.”⁶³ Here, courts consider whether the entities make joint hiring and firing decisions, share supervisory duties, and are jointly responsible for paying the employees in question, disciplining them, and maintaining employee records.⁶⁴

In *Lima v. Adecco*,⁶⁵ the plaintiff was employed as an after-school tutor at various New York City schools.⁶⁶ Platform Learning, Inc. (“Platform”) administered the tutoring program.⁶⁷ The plaintiff was placed with Platform through Adecco, “a placement agency that provides temporary and full-time” workers to clients.⁶⁸ Adecco had a “business relationship with Platform, providing payroll and related administrative services for Platform’s” tutoring program.⁶⁹

The plaintiff “completed his new hire paperwork” for the after-school tutoring program through Adecco, Adecco signed his “federal I-9 and W-4 forms as his employer,” and the plaintiff also signed a form which stated that he “acknowledge[d] and agree[d] that he [was] an employee of Adecco and not an employee of any Client of Adecco.”⁷⁰ Adecco also “administered payroll for Platform,” but it “did not supervise or assess plaintiff or other . . . [tutors’] work; nor did it have any

⁶¹ *Id.* at 400 (quoting *Laurin v. Pokoik*, 2004 WL 513999, *4 (S.D.N.Y. March 15, 2004)).

⁶² *Cook v. Arrowsmith Shelburne Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995).

⁶³ *Lima*, 634 F. Supp. 2d at 400 (quoting *Gore v. RBA Group, Inc.*, 2008 WL 857530, at *3 (S.D.N.Y. Mar. 31, 2008)).

⁶⁴ *Id.* (citing *N.L.R.B. v. Solid Waste Servs., Inc.*, 38 F.3d 93, 94 (2d Cir. 1994)).

⁶⁵ 634 F. Supp. 2d 394 (S.D.N.Y. 2009).

⁶⁶ *Id.* at 396

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 396-97 (internal quotation marks omitted).

⁷⁰ *Id.* at 397.

role in designing” a curriculum.⁷¹ Adecco also did not control which schools tutors were assigned to, and it did not participate in employee discipline.⁷²

The plaintiff sued Adecco, claiming that certain Platform employees at his work site had discriminated against him.⁷³ The court held that Adecco could not be held liable because: (1) Platform “controlled the terms and conditions” of plaintiff’s employment,⁷⁴ (2) “only Platform employees were involved” in the alleged discrimination,⁷⁵ and (3) there is no evidence that Adecco knew, or should have known, about the unlawful discriminatory conduct by Platform employees.⁷⁶ In short, the court held, the plaintiff presented no “evidence linking Adecco . . . with the adverse employment decision.”⁷⁷

The EEOC’s guidance recognizes that staffing firms have obligations to the individuals they place, even if they do not have complete control over the terms and conditions of their employment. For example, the guidance states that a staffing firm that suspects discrimination by its client must keep rejected employees whole (specifically by reassigning them immediately at equal or greater wages), must proactively investigate the client’s environment and awareness of discrimination law, must counsel the client on the law, and must refrain from assigning other temporary employees to that client until the staffing firm is satisfied that there are no ongoing discriminatory conditions.⁷⁸

⁷¹ *Id.*
⁷² *Id.*
⁷³ *Id.* at 398, 401.
⁷⁴ *Id.*
⁷⁵ *Id.*
⁷⁶ *Id.*
⁷⁷ *Id.* at 402.
⁷⁸ *Supra* note 58 at Question 8.

III. Co-Employment Under the Family Medical Leave Act and Americans With Disabilities Act.

Responsibility for compliance with the federal Family and Medical Leave Act (“FMLA”) is shared by staffing firms and their customers. U.S. Department of Labor regulations address the potential co-employer obligations.⁷⁹ Staffing firms are responsible for providing notices and other administrative aspects of the benefits to workers, but customers must also cooperate to honor the law’s scheduling and return to work benefits. In addition, both a customer’s direct workforce and its temporary workforce count toward the FMLA jurisdictional threshold of 50 employees.⁸⁰

The EEOC has also published policy guidance regarding its approach to contingent workplace claims under the Americans With Disabilities Act.⁸¹ As with the FMLA, staffing firms and their customers are required to cooperate in order to fulfill the purposes of the law. For example, accommodations that involve changes to the workplace itself are likely to be the customer’s responsibility, while other accommodations (such as scheduling) may be shared responsibilities, and yet others (such as initial screening and hiring) may be the staffing firm’s responsibility alone.

⁷⁹ 29 C.F.R. § 825.106

⁸⁰ 29 C.F.R. § 825.106(d).

⁸¹ EEOC Enforcement Guidance on the Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms, *available at*: <http://www.eeoc.gov/policy/docs/guidance-contingent.html> (Dec. 22, 2000).