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Client Alert Employment & Labor

Parents and Subsidiaries: Not Necessarily Joint Employers

The Court of Appeals for the Third Circuit recently issued an important decision relating to joint employer status under the Fair Labor Standards Act ("FLSA") in the context of a holding company providing shared services to its subsidiaries. *In Re: Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 2012 U.S. App. LEXIS 13229 (3d Cir. June 28, 2012). This decision is favorable to employers and potentially has broader implications beyond the FLSA.

Enterprise Holdings, Inc. ("Enterprise Holdings"), the sole stockholder of 38 domestic subsidiaries, including Enterprise-Rent-a-Car Company of Pittsburgh, directly and indirectly supplied administrative services and support to each subsidiary. These services included business guidelines, employee benefit plans, rental reservation tools, a central customer contact service, insurance, technology, and legal services. Enterprise Holdings had a human resources department that also provided certain services to the subsidiaries. The lower court found that Enterprise Holdings had recommended that the subsidiaries not pay overtime wages to assistant managers and assistant branch managers who were employed at subsidiaries (other than in California), and this decision was at the heart of the lawsuit.

Enterprise Holdings moved for summary judgment with respect to the FLSA class action suit that was filed against both it and Enterprise-Rent-A-Car, on the grounds

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that it was not a joint employer and therefore was not liable under the FLSA. The Third Circuit, in affirming the lower court's finding that Enterprise Holdings was not a joint employer, set forth a new test for the determination of joint employer status under the FLSA. The test assesses whether the alleged employer has the (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; and (3) authority to implement day-to-day supervision, including discipline; and (4) control of employee records, including payroll, insurance and taxes. The Court referred to this test as the *Enterprise* test and emphasized that this list is not an exhaustive list of all potentially relevant factors and should not be "blindly applied."

As applied to the facts of this case, the Court held that Enterprise Holdings had no authority to hire or fire, no authority to promulgate work assignments, no authority to set compensation, was not involved in employee supervision or discipline, and did not exercise or maintain control over employee records. Further, the Court found that the adoption of Enterprise Holding's suggested policies and practices was discretionary on the part of the subsidiaries. Indeed, the Court stated that Enterprise Holdings had no more control over the assistant manager's employment than would a third-party consultant who made suggestions for improvements to the subsidiaries' business practices.

Lessons for Employers

Plaintiffs frequently argue that parent companies are joint employers of their subsidiaries' employees, especially in an attempt to certify a nationwide class action. The new test set forth in the *Enterprise* case provides insight and guidance in the context of a parent/subsidiary relationship within the Third Circuit that governs Pennsylvania, New Jersey, Delaware and the Virgin Islands. A parent company within the Third Circuit will be better positioned to avoid a determination of joint employer liability if its policies ensure a measure of distance between the parent and subsidiary, including lack of day-to-day control over operations and employment decisions, and where the policies ensure that the advice given by the parent to the subsidiary in the employment area can be rejected by the subsidiary.

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