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Massachusetts High Court Eases Burden on Business, Confirms FLSA Test Governs Joint Employer Inquiry

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On December 13, 2021, the Massachusetts Supreme Judicial Court (SJC) held that the multifactor standard of the Fair Labor Standards Act (FLSA), and not the Massachusetts Independent Contractor Law's "ABC test," determines joint employer status under Massachusetts law. This decision brings welcome relief for businesses that now have meaningful guidance for structuring their relationships with contractors, service providers and vendors, and limiting their exposure to employment laws.

In *Jinks v. Credico USA LLC*, Case No. SJC-13106 (Dec. 13, 2021), Credico USA contracted with DFW Consultants to provide sales services for Credico's clients. DFW in turn hired the plaintiffs as salespeople. DFW classified the plaintiffs as independent contractors, without any input from Credico. The plaintiffs sought to hold Credico liable, under a joint employer theory, for their alleged misclassification as contractors and related violations of Massachusetts wage and hour laws.

The SJC held that:

1. Massachusetts wage and hour laws include the concept of joint employment.
2. The standard for determining joint employer status is the multifactor, totality of the circumstances test applied under the FLSA (and not the ABC test).

First, the SJC explained that, ordinarily, only the employing entity is liable for misclassification under the wage laws. An exception exists, however, when an entity that does not directly employ the workers is nonetheless a joint employer because it retains sufficient control over the terms and conditions of employment of the employees at issue. The SJC held that the Massachusetts wage laws, "which neither define 'employer' nor expressly provide for 'joint employers,' include this long-standing concept of joint employment."

Second, the SJC held that the appropriate test to determine whether an entity is a joint employer is the multifactor test used to determine joint employer status under the FLSA. Under that test, courts consider the totality of circumstances of the relationship between the employee and the entity, "guided by a framework of four factors: whether the entity (1) had the power to hire and fire the individual, (2) supervised and controlled the individual's work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."

The SJC explained that the joint employer inquiry "focuses on whether an individual, whose work is controlled by one entity, is also subject to the control of another entity." In contrast, the ABC test asks, "who, if anyone, controls the work other than the worker herself." Thus, the FLSA test is better tailored to answer the question presented by the joint employer inquiry.

The SJC went on to hold that the plaintiffs could not establish that Credico exercised sufficient control over the terms of employment to qualify as a joint employer. Importantly, the service agreements between Credico and DFW provided that, while DFW employees would comply with Credico's "Code of Business Ethics and Conduct," DFW otherwise retained sole discretion with respect to carrying out assignments, labor and employee relations policies, policies relating to wages, hours, and working conditions, and all personnel decisions. Additionally, there was no evidence that Credico had any involvement in DFW's policies regarding compensation paid to DFW salespersons.

The decision provides helpful guidance to businesses seeking to maintain service contracts with corporate vendors and should assist these businesses in reducing their exposure to claims from the vendors' employees. Massachusetts businesses should continue to evaluate their contractor and service agreements to ensure compliance with this ruling, and reach out to a member of the Cooley employment team with any questions.

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