

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

December 15, 2021

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.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our [legal notices](#).

Key Contacts

| | |
|--------------------------------|--|
| Frederick Baron Palo Alto | fbaron@cooley.com +1 650 843 5020 |
| Ann Bevitt London | abevitt@cooley.com +44 (0) 20 7556 4264 |
| Wendy Brenner Palo Alto | brennerwj@cooley.com +1 650 843 5371 |
| Leslie Cancel San Francisco | lcancel@cooley.com +1 415 693 2175 |
| Helennane Connolly Reston | hconnolly@cooley.com +1 703 456 8685 |
| Charlotte Drew Boston | cdrew@cooley.com +1 617 937 1388 |
| Joshua Mates San Francisco | jmates@cooley.com +1 415 693 2084 |

| | |
|------------------------------|---|
| Gerard O'Shea New York | goshea@cooley.com +1 212 479 6704 |
| Miriam Petrillo Chicago | mpetrillo@cooley.com +1 312 881 6612 |
| Bronwyn L. Roberts Boston | broberts@cooley.com +1 617 937 2434 |
| Ryan Vann Chicago | rhvann@cooley.com +1 312 881 6640 |
| Lois Voelz Palo Alto | lvoelz@cooley.com +1 650 843 5058 |
| Summer Wynn San Diego | swynn@cooley.com +1 858 550 6030 |

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.