

# **Construction Firm Feels the Burn of the "Joint Employer" Theory In Federal Appeals Court Case Articulating New Test For Holding Firm Jointly Liable for Wage and Hour Violations**

**By Kevin J. O'Connor**

As labor shortages become a real concern in the United States construction industry, a continuing risk looms large for construction firms that are not careful in how they structure their relationship with subcontractors: threats of wage and hour suits under the "joint employer" theory.

A new case from the Fourth Circuit Court of Appeals in Salinas v. Commercial Interiors, Inc., No. 15-1915 (4<sup>th</sup> Cir. Jan. 25, 2017), offers a prime example of the threat. There, the Court adopted a detailed, two-step framework for determining whether two construction companies can be held jointly responsible for wage and hour violations for a group of employees. The Court reversed a lower court order that had determined no liability in a suit by a class of drywall installers who sued their direct employer as well as the construction contractor with which their employer contracted almost exclusively.

## **Attorneys for Workers Are Increasingly Using the Joint Employer Theory to Look for Deep Pockets**

According to the Bureau of Labor Statistics and the National Association of Home Builders ("NAHB") there are currently 143,000 vacant construction positions nationwide. One recent NAHB survey revealed that sixty-nine percent of its members were experiencing delays in completing projects on time due to a shortage of qualified workers. A new survey by the Associated General Contractors of America ("AGC") revealed that fifty-two percent of contractors said they were worried about worker shortages. According to the survey nearly eighty percent of construction businesses are having a hard time finding qualified skilled labor. In its most recent Employment Outlook Survey, Manpower Group cited skilled construction laborers as the hardest jobs to fill in the United States. (Manpower Group Q1 2017 Survey, at 12).

This shortage comes at the precise time that attorneys for construction workers are increasingly using the joint employer theory to drag more and more contractors into court in wage and hour class or collective actions.

### **Case Study: Salinas**

The drywall installers in Salinas filed a putative class and collective action under the Fair Labor Standards Act ("FLSA") and Maryland wage statutes

claiming that they were jointly employed by a drywall contractor and subcontractor and that, as such, their work hours had to be aggregated to determine whether they worked over forty hours in a given week. They also asserted that the companies were jointly and severally liable for those wage violations.

The theory was important because the plaintiffs' direct employer (JJ Contractors, Inc.) was defunct, and they needed to impose liability on the general contractor (Commercial Interiors) if they had any hope of recovery. The record below showed that JJ relied almost exclusively on Commercial for work; that Commercial had, at times, hired some of JJ's employees directly when JJ ran into problems with insurance; and that, at times, Commercial assisted JJ by making direct payments to its employees.

Further, the record showed that Commercial had played a role in determining the plaintiffs' daily and weekly schedule. Commercial's foreman would direct the employees when they would need to work additional hours, or weekend work. Commercial's superintendent also communicated "site-specific staffing needs" to JJ's owners. Plaintiffs were given hardhats and vests with Commercial's logos, to wear. They were also allegedly told to tell anyone who asked that they worked for Commercial. Plaintiffs signed in each day on timesheets provided by Commercial which bore its logo. Commercial also required plaintiffs

to attend various meetings, such as weekly safety meetings. Lastly, JJ's employees used tools provided by Commercial. Even though the contract required JJ to supply tools for its own workers, Commercial supplied the tools.

At the district court level, it was held that the defendants had entered into a legitimate "traditional" subcontracting relationship and that there was no evidence the business relationship was intended to evade the wage and hour laws.

On appeal, the appeals court observed that "the legitimacy of a business relationship between **putative joint employers and the putative joint employers' good faith** are not dispositive of whether entities constitute joint employers for purposes of the FLSA" (emphasis added), and reversed the lower court. The opinion highlights the uncertainty in the various courts around the country on how to determine this "joint employer" status. The Court observed that it preferred a standard that focused on not just the relationship between the employee and each of the putative employers, but also the relationship between the two defendants. The Court observed that this failure resulted in a test that failed to properly analyze whether the two entities are "entirely independent" or "not completely disassociated" from each other when it comes to the essential terms and conditions of a worker's employment. Additionally, the Court eschewed those decisions which "incorrectly frame the joint employment inquiry as a question of an

employee's 'economic dependence' on a putative joint employer" as a matter of economic reality.

The Court in Salinas adopted a new, six-factor test of joint employer status for FLSA purposes, all geared toward determining whether two or more entities "are 'not completely disassociated' with respect to a worker's employment." The factors are:

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.

The Court went on to hold that "[t]o the extent that facts not captured by these factors speak to the fundamental threshold question that must be resolved in every joint employment case—whether a purported joint employer shares or codetermines the essential terms and conditions of a worker's employment—courts must consider those facts as well." It held that the determination must consider "the circumstances of the whole activity."

Applying its new test, the Court found that the contractor and subcontractor shared authority over and co-determined the terms and conditions of the plaintiffs' employment and were joint employers. It dismissed the contractor's slippery slope argument that this would be the death knell of the traditional contractor-subcontractor relationship. The Court observed that, to avoid liability, a contractor should dissociate itself from the other entity when it comes to setting the terms of the workers' terms and conditions of employment, and avoid contracting with "fly-by-night" operators.

The net result of the decision was to find that the employees were employees of both entities, and allow for the aggregation of their time spent for both entities when considering whether overtime was due and owing.

The joint employer theory continues to pose a grave threat to construction firms in the U.S. The shortage of skilled workers has the potential to cause general

contractors to cut corners and lend support to struggling subcontractors where it might not have been provided before. While Salinas is an extreme example, it does offer a prime example of the danger that lurks in blurring the lines of responsibility on a construction site.

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