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WASHINGTON CASE UPDATE

case in point...

Why Your Subcontractor's Employee May Be Your Employee and What To Do About It

From the desk of John Kreutzer: What liability do you have for a subcontractor's employee under Washington's Minimum Wage Act ("MWA")? You may be surprised by the answer in this precedential opinion issued by Washington's Supreme Court, which adopts the "economic factors" framework for determining whether a "joint employer" relationship exists for purposes of the MWA.

Claims Pointer: For claims involving a violation of the MWA, employees of subcontractors will now argue that they are jointly employed by both the subcontractor and the business receiving the subcontractor's services. If a "joint employer" relationship is found, the business will be liable for applicable MWA violations.

Becerra v. Expert Janitorial, LLC, 332 P.3d 415, 23 Wage & Hour Cas.2d (BNA) 624 (Wash., 2014)

Janitorial workers filed suit against Fred Meyer and Expert Janitorial, LLC ("Expert"), alleging that, despite routinely working over 40 hours a week, the workers were paid neither minimum wage nor overtime, in violation of Washington's Minimum Wage Act (MWA). The janitorial workers had been employed by subcontractors who contracted with Expert and, in turn, provided janitorial services to Fred Meyer. Evidence suggested that both Expert and Fred Meyer were aware of the MWA violations. At trial, Fred Meyer and Expert moved for summary judgment on the grounds that they were not "joint employers" for purposes of the MWA. The trial court granted summary judgment in favor of Fred Meyer and Expert. The appellate court reversed and the Washington Supreme Court granted review.

In interpreting the MWA, we look to the federal Fair Labor Standards Act of 1938 (FLSA), upon which the MWA is based. The FLSA has been interpreted as extending liability under minimum wage laws to "joint employers," even in the absence of a formal employment relationship. So too then, the "joint employer" doctrine is a viable theory of liability under the MWA.

The FLSA and the MWA recognize and encompass a broad array of employment relationships beyond those defined as employer-employee at common law. In the context of the two acts, "employee" includes all individuals permitted to work by an employer. Numerous federal courts have enunciated factors relevant to determining whether an entity is a "joint employer" under the FLSA. For purposes of determining whether a joint employment relationship exists under Washington's MWA, however, the Washington Supreme Court now adopts the "economic factors" framework articulated by the Ninth Circuit in *Torres-Lopez v. May.* The "economic factors" framework includes 13 nonexclusive factors: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates or the methods of payment of the workers' (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; (5) preparation of payroll and the payment of wages; (6) whether the work was a specialty job on the production line; (7) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes; (8) whether the premises and equipment of the employer are used for the work; (9) whether the employees had a business organization that could or did shift as a unit from one worksite to another; (10) whether the work was piecework and not work that required initiative, judgment or foresight; (11) whether the employee had an opportunity for profit or loss depending upon the alleged employee's managerial skill; (12) whether there was permanence in the working relationship; and (13) whether the service rendered is an integral part of the alleged employer's business. These factors are not exclusive. Rather, whether or not a "joint employer" relationship exists depends on the totality of the circumstances.

Here, the trial court erred when it dismissed the worker's claims against Expert and Fred Meyer without considering the "economic factors" framework. The Court of Appeals was affirmed and the case remanded for further proceedings to determine whether or not Expert and Fred Meyer were joint employers of the janitorial workers under the MWA. The Supreme Court also noted that it believed it was unlikely that summary judgment should have been granted on the record.

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