New Jersey Law Journal

VOL. 209 - NO 8 AUGUST 27, 2012 ESTABLISHED 1878

IN PRACTICE

EMPLOYMENT LAW

Third Circuit Establishes a New 'Joint Employment' Test

What is the impact of the "*Enterprise* test" on employment law practitioners?

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On June 28, in a case of first impression before the Third Circuit Court of Appeals, the court established the "*Enterprise* test" in order to determine whether or not employers are "joint employers" for purposes of the applicability of the Fair Labor Standards Act (FLSA). See *In Re: Enterprise Rent-A-Car Wage & Hour Practices Litigation*, 683 F.3d 462 (3d Cir. 2012).

In the *Enterprise* matter, the plaintiffs (who were assistant branch managers at various Enterprise locations) filed a nationwide FLSA class action. The suit was brought in the Western District of Pennsylvania against both subsidiary Enterprise Rent-A-Car Company of Pittsburgh (Enterprise Rent-A-Car) and its parent company, Enterprise Holdings Inc. (EHI). The plaintiffs alleged that they should have been classified as "nonexempt" employees and entitled to overtime pay for hours worked over 40 hours in a workweek. The plaintiffs argued that not only should the subsidiary employer be liable, but so should EHI as a "joint employer." The District Court below had determined that EHI was *not* a joint employer, and, therefore, granted its summary judgment motion and refused to certify the class. The Third Circuit upheld the District Court's decision and established a new joint employment test, dubbed the *Enterprise* test.

Some of the facts presented by the plaintiffs to support their allegations that EHI was a joint employer with Enterprise Rent-A-Car are summarized below. EHI is the sole shareholder of 38 subsidiaries, including Enterprise Rent-A-Car, which rents and sells vehicles and conducts other business under the name of "Enterprise." EHI directly and indirectly supplies administrative services, provides support to its subsidiaries, including business guidelines, employee benefit plans, rental reservation tools, a central customer contact service, insurance, technology and legal services. The business guidelines provided by EHI were distributed to the employees of the subsidiaries in a manual. The human resources (HR) department of EHI provided to its subsidiaries services such as job descriptions, best practices, compensation guides, recommended salaries, training materials and standard performance review materials, negotiated and managed health plans and assisted employees with relocation between subsidiaries. The District Court found that both the HR services and other guidelines/services provided by EHI were not *mandatory,* and each subsidiary could choose to use any or none of the services at its discretion. In exchange for the above services, the subsidiary would pay fees and corporate dividends to EHI. It is worth noting that the plaintiffs had argued that these services and guidelines were mandatory.

The District Court also determined that EHI, during a meeting with its subsidiaries, actually *recommended* that the subsidiaries *not pay* overtime wages to assistant managers and assistant branch managers.

Not only was EHI the sole shareholder of the 38 subsidiaries, but there was an interlocking directorate of the board of directors of each of the Enterprise subsidiaries, consisting of the same three individuals, who also comprised the board of directors of EHI. The Enterprise website also did not make any distinction between the parent and the 38 subsidiary companies of EHI and represented that Enterprise Rent-A-Car has a fleet of nearly 900,000 rental vehicles, 64,000 employees and 6,900 offices throughout the world. EHI does not directly rent or sell vehicles, rather such services are carried out by its 38

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subsidiaries. The plaintiffs argued that the very nature of the type of business of renting vehicles, which involves both the parent and the subsidiary, was a compelling indication of joint employment.

Despite the above facts, the Third Circuit affirmed the District Court's finding that EHI was *not* a joint employer as a matter of law. In so doing, the court not only considered the definition of "employee" under the FLSA and pertinent regulations, but it also examined prior case law within the Third Circuit regarding employee-employer status in related contexts, as well as tests established by other circuits.

The FLSA defines an employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The corresponding regulations define the employer-employee relationship as:

> [w]here the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, *directly or indirectly*, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

20 C.F.R. § 791.2(b) (emphasis added). Further, a "single individual may stand in the relation of an employee to two or more employers at the same time under the [FLSA]." 29 C.F.R. § 791.2(a). Finally, the regulations state that "[a] determination of whether the employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case." 29 C.F.R. § 791.2(a)

In examining the case law, the court looked to previously articulated "significant control" tests in which the focus was on "where two or more employers exert significant control over the same employees" and where it can be shown that they "share or co-determine those matters governing essential terms and condition of employment," thereby creating a "joint employment" relationship under the FLSA. Consistent with that view, the court explained that "ultimate" control would not be necessary in determining a joint employer relationship. It referred to the FLSA language itself which includes not only *direct* evidence of the relationship, but even *indirect* evidence of such a relationship. Bearing in mind these concepts, it refined some of the tests utilized when it established the "*Enterprise* test."

The Third Circuit court concluded that an examination of the following four factors would be necessary under the new "*Enterprise* test." Does the alleged employer have: (1) authority to hire and fire employees; (2) authority to promulgate work rules and assignments, and set conditions of employment such as compensation, benefits and work schedules, including the rate and method of payment; (3) involvement in day-to-day supervision, including employee discipline; and (4) actual control of employee records, such as payroll, insurance and taxes.

The court cautioned, however, that the factors *do not* constitute an "exhaustive list of all potentially relevant facts" and should not be "blindly applied." The court instructed that, if other indicia of "significant control" are present to suggest that a given employer was a joint employer, such a determination may be persuasive, when incorporated with other above factors. Indeed, the court held that the *Enterprise* test was a melding of prior tests and consistent with those "considerations of the real world where such additional economic concerns are prominent." In fact, the court agreed that, in addition to the factors it enunciated in the *Enterprise* test, *all* factors including the interlocking directorates and the nature of business being conducted should be considered and weighed in deciding joint employment status.

Despite the showing of overlap in management and involvement by EHI with its subsidiaries, the court here opined that EHI was *not* a joint employer with its subsidiaries because EHI: had no authority to hire or fire assistant or branch managers; had no authority to promulgate work rules or assignments, or set compensation, benefits, schedules, or rates or methods of payment; did not supervise or discipline employees; and did not exercise or maintain any control over employee records. The court emphasized that the services and guidelines provided by EHI were mere recommendations that the subsidiaries could elect at their discretion. In short, the court was convinced that there was no "significant control" of parent over subsidiary in any of the factors articulated under the *Enterprise* test and, as such, found that the plaintiffs failed to demonstrate that EHI was a joint employer for purposes of the applicability of the FLSA. Finally, the court noted that even if one of the factors under the *Enterprise* test would lead to a finding of a joint employer, it would not be enough to support the reversal of summary judgment.

In applying the *Enterprise* test in FLSA matters, employment practitioners will look to situations where the parent has more control over the subsidiary in order to establish joint employment. For example, if the guidelines and services provided by EHI were mandatory, this factor would have weighed in favor of joint employment. Similarly, if it was shown that EHI had exerted day-to-day supervision, this too would have weighed in favor of joint employment. Employment practitioners may argue that the *Enterprise* test should be extended to other federal employment laws. Some may also attempt to apply the *Enterprise* test to New Jersey's state employment laws. However, such an argument will be countered with legitimate and persuasive resistance. Not only are New Jersey's employment laws much more expansive than their federal counterparts, but the joint employment tests articulated by the New Jersey courts are likewise broader than the *Enterprise* test. ■