



BY TODD A. JONES

# Joint Employment: A Growing Legal Trend & How to Manage It

During a labor shortage, many subcontractors and GCs seek out workers from third parties to fill positions from general laborers to specialty tradesmen. Joint employment typically occurs when a contractor arranges – or contracts – with an intermediary employer to provide labor, and the contractor and intermediary are both treated as “employers” of the same worker.

This means that a contractor could legally employ someone who is not on their normal payroll. Examples of this include the contractor-subcontractor relationship or the contractor-staffing company relationship. This type of relationship could extend to instances where a contractor or subcontractor engages, or contracts, with a staffing company to obtain laborers for a certain project or carry out certain employer functions, such as administering payroll and benefits.

This article will explore how the U.S. Department of Labor (DOL) and recent federal case law has been clarifying this joint employer relationship as well as the rights and obligations of all construction employers.

## Recent Case Law

It is important to determine who has responsibility for construction employees and their obligations, rights, and benefits.

In 2017, the Federal Fourth Circuit, which includes North Carolina, South Carolina, Virginia, West Virginia, and Maryland, applied a six-factor test to determine if an employer is “completely disassociated” from the intermediary employer.<sup>1</sup> In this case, former employees of a framing and drywall installation subcontractor brought an action against the subcontractor, its owners, and the project GC, alleging violations of the *Fair Labor Standards Act* (FLSA).<sup>2</sup>

The case originated in Maryland but had sweeping impacts on all states in the Fourth Circuit. The lower federal court allowed the GC out of the case, holding that the GC did *not* jointly employ the plaintiffs because the subcontractor and the GC entered into a “traditionally...recognized” legitimate

contractor-subcontractor relationship, and they did not intend to avoid compliance with the FLSA.<sup>3</sup> The subcontractor was a bankrupt entity, and the employees appealed the court ruling because the GC was the only viable entity in existence.<sup>4</sup>

The Fourth Circuit Court of Appeals reversed the lower court ruling using a six-factor test and found that the plaintiffs were employees of the GC under the premise of the joint employer doctrine.<sup>5</sup>

The standard test adopted by the court is very relaxed, loose, and has the potential to hold many GCs to the standard of an employer. Factors to be considered include:

- 1) Whether, formally or as a matter of practice, the possible 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 premise 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’ comp insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.<sup>6</sup>

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Federal court decisions over the past few years have been all over the map. The First, Third, Fifth, and Seventh Appeals courts currently apply a four-part test established in the *Bonnette v. California Health & Welfare Agency* case.<sup>7</sup>

The factors determinative in the test are “whether the alleged employer:

- 1) Had the power to hire and fire the employees;
- 2) Supervised and controlled employee work schedules or conditions of employment;
- 3) Determined the rate and method of payment; and
- 4) Maintained employment records.”<sup>8</sup>

As noted earlier, the Fourth Circuit has rejected the four-part test and adopted an entirely different approach. The Fourth Circuit’s ruling rejected the decisions of the other court jurisdictions adopting the four-part test and focused more on the relationship between the two alleged joint employers.<sup>9</sup>

Finally, the Second Circuit rejected the four-part test and adopted a broader, six-part test that was used in *Zheng v. Liberty Apparel Co.*<sup>10</sup> This test permits a court to find joint employment when an entity has functional control over workers, even in the absence of formal controls.<sup>11</sup>

### Current State

On April 1, 2019, the U.S. DOL issued a proposed standard four-part test for determining whether a person or entity may be held liable as a joint employer for violations of the wage and hour provisions of the FLSA because of the inconsistent rulings and interpretations by federal agencies.<sup>12</sup> This rule was finalized on January 16, 2020 and is effective March 16, 2020.<sup>13</sup>

The new DOL standard used to determine the existence of the joint employer relationship is a balancing test to decide which company:

- Hires or fires the employee;
- Supervises and controls the employee’s work schedule or conditions of employment;
- Determines the employee’s rate of pay and method of payment; and
- Maintains the employee’s employment records.

No one factor is more important and each should be considered when making a determination. This change is the DOL’s first notable modification of the rule in more than 60 years.

This DOL rule makes it more difficult for contractors to be established as joint employers, happening only if an employer possesses and exercises *substantial, direct, and immediate control* over the essential terms and conditions of employment and has done so in a manner that is not limited and routine.

Indirect influence and contractual reservations of authority are no longer sufficient to establish a joint employer relationship. Furthermore, a worker’s financial dependence on a company is not relevant in making a determination.

### How Does Joint Employment Affect Your Company?

Companies that are found to be joint employers are effectively held to all the standards of an employer. This means that the following employment laws can, and most likely will, apply to employers of those who are deemed employees:

- Wage and hour laws
- The *Family and Medical Leave Act* (FMLA)
- The *Americans with Disabilities Act* (ADA)
- Title VII and employment discrimination laws
- Workers’ comp laws

The joint employer relationship opens a whole layer of regulation and responsibility to employers for nonemployees that are, in fact, deemed employees.

### Can Your Company Avoid Joint Employment Liability?

First, a good, well-written contract can help. While it is legal under the current law to contract and delegate away certain employer duties, particularly administrative and payroll ones, some other employment duties and liabilities can be delegated or contracted to the intermediary (subcontractor or staffer).

Also, make a specific effort to read and amend, if necessary, staffing agency contracts. If you are acquiring labor or skilled tradesmen from a third-party, know your contractual duties. Important clauses that should be within contract agreements include indemnification, duty to defend clauses, and hold harmless clauses.

Indemnification and duty to defend language in your contract establishes a contractual duty on one party or the other to indemnify, defend, and represent that party in any legal action, administrative board action, or litigation.



Indemnification language is usually one-sided. For example, if a GC has a duty to defend clause in its contract with a subcontractor, then that subcontractor is contractually obligated to take on the defense of the GC and the GC's position in any claim brought by any party, including a possible joint employee. If a fine or sanction is levied, then the subcontractor would be required to handle that before the GC has responsibility.

A hold harmless agreement is where one or both parties agree not to *hold* the other party responsible for any loss, damage, or legal liability. Using the same example, if an employee of a subcontractor claims that the subcontractor owes the employee money for back wages or other employment violations, under this clause, the subcontractor would be estopped from looking to the GC for possible help, contribution, or responsibility. A contract provision, like a hold harmless clause, does not protect the GC and subcontractor if the employee claiming joint employment makes a claim against all parties, whether they are a subcontractor or a GC.

These contract provisions need to be carefully drafted and constructed to sustain a joint employer claim and the efforts of enterprising legal counsel. Additionally, stating in the contract that no employment relationship is established, without more, will not take precedence over DOL rules or precedential case law.

Related companies can take several steps to structure and operate relationships with a subsidiary or closely related company to avoid joint employer liability.

Specifically, a parent company should:

- Include affirmative statements in materials provided to a subsidiary or affiliated company clearly setting forth that it has no control over employment matters including personnel decisions, direction of the workforce, or terms and conditions of employment.
- Direct that the affiliated/subsidiary company is solely responsible for training its own workforce.
- Include an indemnity provision in an agreement with each company doing business explicitly setting forth that the affiliated/subsidiary company assumes all responsibilities with respect to employment liabilities.
- Eliminate any dual roles for officers and directors at each company.
- Reduce and limit as much control as possible over the day-to-day operations of an affiliated/subsidiary company.

- Formalize any relationships between the parent company and affiliated/subsidiary company, including leases for office space rental, equipment rental, or supplies to an affiliated/subsidiary company, and make sure that everything is at fair market value rates.
- Document in writing if the parent company offers a loan to the affiliated/subsidiary company.
- Represent to the public – and in all publications and social media – that the parent company and the affiliated/subsidiary company are separate entities, and display awareness of public perception.

Finally, always obtain an adequate certificate of insurance from your subcontractor or staffing company, and check the certificates to ensure that your company has been added as an additional insured. Make sure all coverages are up to date and include all employment liability insurances including workers' comp insurance.

## Actions to Take if Investigated

First and foremost, do not share management responsibilities between companies for the same or similar employees. Do not share employee handbooks, and ensure each company has its own employment policies and documents. If handbooks are similar in two closely affiliated companies, a disclaimer should be added to each that indicates that one company does not exercise control over the employees or the terms and conditions of the other company's employees. Also, it's critical to avoid including one company's name and/or logo on the other company's marketing materials, employee pay stubs, social media sites, or any other publications.

None of these strategies are a silver bullet of certainty to avoid joint employer liability, but they can help the situation.

## Conclusion

As it stands, the DOL's new test is the standard to follow. Contractors that are diligent and try to follow employment rules and regulations should be fine. As time goes on, federal and state courts will continue to issue decisions and rulings that interpret and possibly amend the way the rules are implemented. Furthermore, some states may have higher standards or employment rules that exceed the federal regulations.

Know your state's employment standards and regulations, and always consult an attorney in your area if you have questions about these issues. ■

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## Endnotes

1. *Salinas v. Commercial Interiors, Inc.* (848 F3rd. 125) 2017 4th Circuit.
2. *Ibid.*
3. *Ibid.*
4. *Ibid.*
5. *Ibid.*
6. *Ibid.*
7. "DOL Proposes New Joint-Employer Rule." Sullivan & Cromwell. April 26, 2019. [www.sullcrom.com/blogs-dol-proposes-new-joint-employer-rule](http://www.sullcrom.com/blogs-dol-proposes-new-joint-employer-rule).
8. Miller, Ronald. "Joint employer status of grocery store chain and janitorial service contractor reconsidered." Wolters Kluwer. [www.employmentlawdaily.com/index.php/news/joint-employer-status-of-grocery-store-chain-and-janitorial-service-contractor-reconsidered](http://www.employmentlawdaily.com/index.php/news/joint-employer-status-of-grocery-store-chain-and-janitorial-service-contractor-reconsidered).
9. "DOL Proposes New Joint-Employer Rule." Sullivan & Cromwell. April 26, 2019. [www.sullcrom.com/blogs-dol-proposes-new-joint-employer-rule](http://www.sullcrom.com/blogs-dol-proposes-new-joint-employer-rule).
10. "The Second Circuit's New Test of Joint Employer Status Under the FLSA." FindLaw. [corporate.findlaw.com/human-resources/the-second-circuit-s-new-test-of-joint-employer-status-under-the.html](http://corporate.findlaw.com/human-resources/the-second-circuit-s-new-test-of-joint-employer-status-under-the.html).
11. *Ibid.*
12. "Notice of Proposed Rulemaking: Joint Employer Status." U.S. Department of Labor. [www.dol.gov/agencies/whd/flsa/2019-joint-employment](http://www.dol.gov/agencies/whd/flsa/2019-joint-employment).
13. "Joint Employer Status Under the Fair Labor Standards Act." Wage and Hour Division, Department of Labor. January 16, 2020. [www.federalregister.gov/documents/2020/01/16/2019-28343/joint-employer-status-under-the-fair-labor-standards-act](http://www.federalregister.gov/documents/2020/01/16/2019-28343/joint-employer-status-under-the-fair-labor-standards-act).

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