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Special Briefing

January 4, 2018

Highlights

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L&E Evolution Part I: Redefining Employment Relationships

> *"Many people would be shocked to find out that some company they've had zero contact with is also considered their employer, in addition to the employer that actually hired them."*
>
> – Rep. Byrne (R-AL), Chairman, House Education and the Workforce Committee, in support of the Save Local Business Act.

> *A "narrower definition of 'joint employer' . . . effectively eliminates accountability for the entities actually calling the shots."*
>
> – Rep. Bobby Scott (D-VA), Ranking Member, reacting to the House passing the Act.

Rapidly advancing technology, cultural changes, and a sharply divided political landscape have so changed the workplace that lawmakers are struggling to catch up and tailor labor and employment laws to reflect these changes, to establish cross-jurisdictional consistency, and to enable employers and practitioners to make decisions based on solid ground. Nowhere is this more obvious than in battles over the most basic of definitions: "employer" and "employee." This is no simple matter of black letter law, at least not anymore. For example, the proliferation of smart phones and other technology has led to online platforms for gig workers, and a simple "click" of the mouse can create a contract on which companies may rely to require arbitration or to disclaim a traditional employment relationship.

Changes are coming . . . maybe

With respect to gig workers, franchises, companies that heavily outsource (like FedEx), and other business models, the analysis for who can be considered the employer—responsible for compliance with labor and employment laws and held accountable for violations—has changed over time and varies by jurisdiction. Aptly calling this a "confusing and shifting patchwork of judge- and agency-made joint employment tests," FedEx VP Richard Heiser, in July 2017 testimony before the House Education and the Workforce Committee, championed "a two-pronged legislative solution: (1) a simple, standardized definition of joint employment under federal law and (2) a statutory safe harbor for businesses that have vendor compliance programs."

Lawmakers recently appeared to be making headway toward such a uniform standard. On November 7, the House passed the Save Local Business Act (H.R. 3441), aimed at narrowing the definition of "joint employer" under the NLRA and FLSA. The bill, which has bipartisan support, would require that businesses

The NLRB's shifting (and re-shifting) position

In a controversial 2015 decision, *Browning-Ferris,* the NLRB returned to its pre-1984 standard for determining joint-employer status under the National Labor Relations Act. The Board would no longer require that a joint employer both possess the authority to control the terms and conditions of employment, and exercise that authority. Nor would it require control to be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.

Enter the Trump administration and the winds of change: On December 1, 2017, new NLRB General Counsel Peter B. Robb issued his first GC Memorandum (GC 18-02) signaling the direction he plans to take the Board, including an "alternative analysis" on certain listed issues, including the joint employer standard. Before the dust settled on that announcement, a divided NLRB issued *Hy-Brand Industrial Contractors, Ltd.,* a December 14, 2017, decision in which the Board overruled Browning-Ferris.

Now, in all future and pending cases (at least until the political pendulum swings the other way), two or more entities will be deemed joint employers under the NLRA only if there is proof that one entity actually has exercised control over essential employment terms of another entity's employees (rather than merely having reserved the right to exercise control) and has done so directly and immediately (rather than indirectly) in a manner that is not limited and routine. Accordingly, proof of indirect control, contractually reserved control that has never been exercised, or control that is limited and routine will not be sufficient to establish a joint employer relationship.

have "actual, direct, and immediate" control over workers to be considered joint employers.

Though the bill mainly targeted the NLRB's joint-employer standard under the NLRA, which was broadened under the 2015 *Browning-Ferris* decision, the Board beat Congress to the punch, overturning that decision itself in mid-December when it decided *Hy-Brand Industrial Contractors, Ltd*. Under *Hy-Brand*, an entity is a "joint employer" only if it has *exercised* control over essential employment terms of another entity's employees, and has done so *directly and immediately*. Given this development, and the political climate in general, it is unclear whether Congressional efforts toward a more uniform test for employer status will continue. The only thing certain at this point is that the patchwork of tests continue to apply, complicating efforts by businesses to tailor their policies and practices to comply with labor and employment laws.

"Employer"—the patchwork of tests

Right to control employment versus economic realities of relationship

Right-to-control test: The common law test for "employer" status, which varies by jurisdiction, generally focuses on the right to control the means and manner in which work is done, including control over hiring, firing, training, direction, supervision, pay, discipline, and day-to-day activities of workers.

The economic realities test: For this test, which is applied in FLSA cases, courts look at a worker's economic dependence on the putative "employer" (the "suffer or permit to work" language). Factors include: control of employment conditions; the permanence of the relationship; the skill required (little training indicates more dependence); whether the work is integral to the business; and who handles payroll, taxes, and other administrative functions. As noted in a now-withdrawn interpretation by former WHD administrator David Weil, joint employment was defined more broadly under the FLSA than under the right-to-control test.

"Hybrid" tests. Several jurisdictions use a hybrid test for Title VII, ADEA, and other statutes, considering elements of both the common law and the economic reality tests. The tests vary by jurisdiction and statute.

For example, the Fourth Circuit considers a non-exhaustive list of nine factors for Title VII and ADEA claims (six for FLSA claims), but three are most important: authority to hire and fire; day-to-day supervision and control of the putative employee; and where and how the work takes place (*Butler v. Drive Automotive Industries of America, Inc.*; *Salinas v. Commercial Interiors, Inc.*).

The Eleventh Circuit's pattern jury instruction 4.25 has 11 nonexclusive factors: (1) the degree of control over the worker; (2) the degree of supervision over the work; (3) who determines method or rate of pay; (4) who has the right, directly or indirectly, to hire, fire, or modify employment conditions; (5) who handles payroll; (6) who invested in the equipment and facilities; (7) who has the opportunity for profit and loss; (8) the permanence and exclusiveness of employment; (9) the degree of skill required; (10) the ownership of the property or facilities where work is done; and (11) whether the work is integral to the business. No factor is determinative, but the right to control the means and manner of work is most important (*Scott v. Sarasota Doctors Hospital, Inc.*).

Integrated enterprise test. Under the "integrated enterprise" or "single employer" test for determining if an employee of one entity is also the employee of another, the focus is on the relationship between the companies rather than to the worker. Tests vary, but usually consider: (1) interrelation of operations; (2) common management (directors and boards); (3) centralized control of labor relations and personnel; and (4) common ownership and financial control. Evidence can include shared office space, shared websites or email addresses, common letterhead, and the like. Courts have clarified that this test only applies in the context of combining workforces of companies to meet a statutory threshold for coverage (e.g., adding the employees of two integrated companies to reach the 15-employee threshold for coverage by Title VII's anti-discrimination provisions).

Context-specific cases: Forewarned is forearmed

As the above tests suggest, companies that do not fit within a traditional W-2 employer role may still be liable, under our constantly evolving jurisprudence, for unlawful employment practices. As shown below, examples that have made recent headlines include liability to "gig" workers (e.g., Uber drivers, cable installers, and others) under a theory that the company misclassified them as independent contractors when they were really "employees;" franchisor liability for a franchisee's unlawful employment practices with respect to franchisee employees; and successor liability for unlawful employment practices of a predecessor employer.

The "Gig Economy": Independent contractor or employee?

The "gig economy" or "sharing economy" involves the use of online platforms to connect workers to jobs in a piecemeal, freelance fashion. This business model has become the subject of class actions against Uber and other companies that classify gig workers as "independent contractors" rather than employees. The plaintiffs in these suits typically claim the companies misclassified them to avoid minimum wage and overtime pay, among other obligations.

More legalese: horizontal versus vertical employment

Some use the terms horizontal and vertical joint employment when describing the tests.

Horizontal joint employment—exists if an employee has work relationships with two or more employers that are sufficiently associated with each other so that they jointly employ the employee. It is basically the same as the integrated enterprise test.

Vertical joint employment—exists when the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, or other intermediary employer) and economic realities show he or she is economically dependent on, and thus employed by, another entity that contracts with the intermediary employer to receive the benefit of the labor. The analysis focuses on economic realities to determine if the other entity is a joint employer.

Others see the gig economy in a much more favorable light. In a September 6, 2017, hearing before the House Committee on Education and the Workforce, several speakers expressed that this business model is a boon to entrepreneurs and workers seeking flexibility, and increases competition to the benefit of consumers. Dr. Arun Sundararajan, a professor at the NYU Stern School of Business, opined that "The 'sharing economy' represents the early stages of a very significant, digitally enabled transition that will dramatically reshape the American world of work in the coming decades."

So how are courts dealing with this revolutionary business model?

In general, it appears courts are applying existing tests for employer-employee status despite the digital platform and gig nature of the work. In cases involving multiple jurisdictions, the use of existing tests could present special challenges due to variations across state lines. For this reason, the Judicial Panel on Multidistrict Litigation refused Uber's request in 2016 to consolidate seven misclassification suits under state law and, in 2017, refused to consolidate three FLSA collective actions pending in Florida, North Carolina, and Tennessee, as well as 13 potential tag-along suits.

Perhaps to avoid a similar quagmire, food delivery service Postmates agreed to pay $8.75 million to settle claims that it misclassified drivers as independent contractors in California, Massachusetts, D.C., and New York.

Lessons from Uber

- Courts are reluctant to consolidate cases across jurisdictions due in part to variations in legal tests for finding an employment relationship.
- Having a driver-rating system, requiring training for low ratings, forwarding ride requests, and controlling fares was not enough for one court to find an employment relationship.
- Traditional FLSA "on call" principles may apply to drivers who are online searching for a gig.

Uber, which has been sued in several jurisdictions over alleged misclassification and denial of minimum wage, overtime, and work-related expenses, could be considered a test case for how traditional legal principles apply to the gig business model. For example, one driver fell short of plausibly claiming he was an Uber "employee" after a federal court in California concluded that it was not enough to allege that Uber controlled when and how drivers earn fares, forwarded ride requests, and terminated or required training from low-rated drivers. A rating system may be evidence of Uber's control over day-to-day work, explained the court, but he had to "allege more factual detail about how this rating system regulates drivers' activities to make the existence of an employment relationship plausible and not merely possible" (*Carter v. Rasier-CA, LLC*).

"On call" while on app waiting for gig?

While the debate continues over the alleged "employee" status of gig workers, others are having to ponder new legal questions that will crop up if an employment relationship is found. For example, in a case out of Pennsylvania, a federal court assumed for purposes of a pending motion for partial summary judgment that Uber drivers were "employees." Calling Uber a "disruptive business model in search of a legal theory," the court held that the FLSA's on-call principles may extend to gig workers and allowed a putative class of drivers to proceed with claims for compensation for "on-call" time spent online using Uber's app (*Razak v. Uber Technologies, Inc.*).

Since the gig economy is relatively new, companies are well advised to stay current with both legislative and judicial actions in this rapidly evolving area of labor and employment law.

Franchisor liability for franchisee violations of L&E laws

When it comes to franchisor liability for a franchisee's violations of employment laws, the same patchwork of tests apply, with the focus generally on economic realities and control over a worker's day-to-day actions, as evidenced by mandatory policies, among other factors. While franchisors should focus on cases from their own jurisdictions to learn more, there is also much to learn from other courts, given the overlap in tests:

Functional control is key for finding franchisor is "employer." A federal court in New York refused to dismiss an FLSA collective action by servers, housekeepers, and other hotel staff who plausibly claimed the franchisor asserted "functional control" over them and so was a joint employer. The franchisor: (1) imposed mandatory training and recordkeeping; (2) had specifications for "operation, appearance, and service;" (3) required certain software be used to track operations; (4) had the right to change how the hotel operated; (5) inspected for compliance; (6) maintained the right to terminate the franchise (and thus staff); and (7) allegedly knew the plaintiffs were not paid gratuities but did not stop the unlawful practice (*Ocampo v. 455 Hospitality LLC*).

Logos, uniforms, training not enough. In a case out of Virginia, though, a landscaping franchisor's control over logos, uniforms, letterhead, and vehicle colors involved control over the franchisee, not over franchisee workers' employment, so the franchisor was not liable under Title VII as a "joint employer" (*Wright v. Mountain View Lawn Care, LLC*). Likewise, a federal court in Alabama rejected an FLSA plaintiff's argument that Church's Chicken franchisors should be liable as employers, finding their managerial role in restaurant operations insufficient. Though the franchise agreement required that franchisee employees attend "manager training" conducted by franchisors, that training program wasn't enough for joint employer status absent the power to hire or fire, supervise schedules, determine pay, or maintain employment records (*Rodriguez v. America's Favorite Chicken Co. dba Church's Chicken*).

Recommending policies, performing "ministerial functions" not enough. Along the same lines, a window cleaning franchisor did not become a joint employer of franchisee employees merely by recommending personnel policies and providing a manual, held a federal court in Wisconsin, because the franchisee was not required to follow the manual and the franchisor did not have the power to hire or fire (*Pope v. Espeseth, Inc.*) In another case, a federal court in Oregon found that Jack in the Box was not a "joint employer" even though it required franchisees use its payroll system, because it did not have the power to hire or fire franchisee workers and was not involved in their schedules, salaries, or benefits. "Ministerial functions" such as the payroll system did not show sufficient control (*Gessele v. Jack in the Box, Inc.*).

Minimizing liability

These cases suggest that franchisors can take steps to reduce the chance of liability as an "employer" of franchisee workers:

- **Make your intent clear.** Put it in the franchisor agreement that the franchisor is not the employer, does not have the power to hire or fire franchisee employees, and does not make pay or promotion decisions.
- **Stay true to the franchise model.** Stick to controlling product and service standards on a general level, not controlling day-to-day activities of workers. It is okay to require the use of certain templates or the taking of actions necessary to protect or maintain the brand (e.g., logos, uniforms, letterhead), but don't micromanage.
- **Leave HR functions to franchisees.** Leave to franchisees the typical human resources and employer functions like: hiring/firing, wages, scheduling, assignments, evaluations, workers' compensation, taxes, and recordkeeping. Make template personnel policies optional.
- **Train judiciously.** Train franchisee owners and managers on policies and provide resources, but otherwise leave to the franchisee the training of employees and enforcement of the rules.

What kind of control supports liability?

Evidence that franchisor is "joint employer:"

- Power to hire or fire
- Control over daily assignments, staffing
- Micromanaging day-to-day manner in which work is done
- Inspecting worksite to ensure compliance with mandatory policies

Not enough to show franchisor was "joint employer:"

- Control over logos, letterhead, and uniforms
- Offering a training program conducted by franchisor
- Recommending (optional) personnel policies
- Performing ministerial payroll functions

Successor liability for predecessor's L&E violations

No matter how cleverly a purchase agreement is drafted to avoid the assumption of liabilities, successor companies that have purchased another company may find themselves liable for the predecessor's labor and employment law violations.

Generally, courts consider three things in deciding whether to hold a successor company liable: (1) Continuity in operations and work force of successor and predecessor employers; (same staff, office space, equipment, or working conditions); (2) notice (including constructive notice) to the successor-employer of the predecessor's legal obligation; and (3) the ability of the predecessor to provide adequate relief (e.g., predecessor can't pay because it is defunct).

So how does this play out? In one example, the Third Circuit vacated the dismissal of an underwriter's FLSA claims against a successor mortgage company, finding it enough that she alleged that all facets of the business, such as operations, staffing, offices, email addresses, and work conditions, remained the same after the transition; that the successor had pre-transfer notice of the overtime obligations (the same managers controlled payroll and scheduling); and the predecessor was "defunct," so could not pay (*Thompson v. Real Estate Mortgage Network*).

No notice, no liability. In some cases, the determining factor is notice. In one case, the successor owner of a New York restaurant won summary judgment against alleged FLSA violations that occurred before it was the plaintiff's employer. The purchase agreement stated that the purchase was "free and clear" of debts or encumbrances, and there was no assumption of liabilities. Also, a rider represented that "the business sold herein is being operated in accordance with all laws, ordinances and rules affecting said business." Still, a delivery worker for both predecessor and successor claimed both should be liable.

Successor bar doctrine – let purchase dust settle before challenging union's majority status

In an April 2017 opinion authored by retired Supreme Court Justice Souter, the First Circuit found that the NLRB properly applied its successor bar doctrine, under which an incumbent union is entitled to represent a successor employer's employees for a reasonable period of time (not less than six months) before its majority status may be questioned.

In the case at issue, *Lily Transportation* took over part of a bankrupt employer's business that distributed parts for Toyota, and the incumbent union soon demanded to be recognized as the drivers' bargaining rep. Refusing, Lily produced signed statements it claimed were from a majority of drivers saying that they no longer wished to be represented by the union. A law judge found that the company was a "successor employer" because it made a "conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor." Applying the successor bar, the Board found that Lily unlawfully refused to bargain with the union (*NLRB v. Lily Transportation Corp.*).

Disagreeing, the court found no evidence the new owner had notice of the lawsuit or alleged violations. It rejected the employee's expansive view of constructive notice, which would impute notice of a predecessor's violations on an innocent purchaser whenever violations could have been discovered through diligence. That would "create a duty of due diligence, which in the Court's view should be imposed by Congress, or at least the Second Circuit, in the first instance" (*Wang v. Abumi Sushi Inc. dba Abumi Sushi*).

But playing ostrich won't preclude notice. In another case, a debt collection law firm bought a failing firm for a mere $15,000. The successor admitted discussing some of the failing firm's litigation but denied knowing of an employee's sexual harassment claim until it was named as a defendant in her Title VII suit. Denying the successor's motion for summary judgment, a federal court in New Hampshire explained that the main reason for requiring notice is to ensure fairness by giving a successor "the opportunity to protect against potential liability" in negotiations. That purpose is not served if prospective liabilities could be shed simply by "playing ostrich."

Noting that precedent is unsettled on whether constructive notice is enough to establish liability, the court nonetheless applied that standard in denying summary judgment. The purchasers were sophisticated attorneys, there was substantial "business continuity" (same office, most of the same employees and clients), and the successor had hired someone who was involved in prior mediation of the sexual harassment claim. Moreover, the modest $15,000 price suggested a de facto merger rather than a purchase (*Kratz v. Boudreau & Associates, LLC*).

Cases where continuity is key. In other cases, the determining factor for successor liability is continuity of operations (office space, equipment, business model, customers, etc.). For example, a trucking company that bought a troubled business as a going concern could not avoid WARN Act liability through clever contract language. The purchase agreement stated that non-hired drivers "shall not be deemed . . . employees" of Celadon, and that it would not be responsible for the predecessor's "liabilities or obligations," including under the WARN Act, but the Eighth Circuit affirmed that because the company was purchased as a "going concern," the laid-off individuals were

Celadon's "employees," and it was liable for failing to give 60 days' notice of a mass layoff (*Day v. Celadon Trucking Services, Inc.*).

Cherry-picking workforce. Continuity of operations is also key in cases where a purchaser tries to avoid liability under employment laws by cherry-picking which individuals to retain after the purchase. For example, purchasers have been held liable as successor employers under the ADA for refusing to hire disabled workers. In one case, a federal court in Florida upheld punitive damages against a successor after a jury found it acted with malice in refusing to retain a predecessor's employee who had just taken FMLA leave due to cerebral meningitis. The successor claimed she didn't fill out application materials but she testified that one of the successor's employees told her she was rejected due to excessive medical leave. This and other evidence raised and inference that the successor "used the transition . . . as a ruse to rid itself of certain employees under the guise of declining to offer employment" (*Noel v. Terrace of St. Cloud, LLC*).

Others who might be "employers"

In addition to successors, franchisors, and companies who operate with a gig platform, courts have used right-to-control, economic realities, and hybrid tests to find other entities and individuals liable as "employer" for employment law violations, even though they were not the traditional W-2 employer, including parent and affiliated companies, individual company owners, staffing agency customers, and more.

Client of temp agency. For example, a temp who was placed by her staffing agency employer to work as a "Civil Designer" for an engineering company raised jury questions on whether the engineering company could be liable for alleged Title VII and Pennsylvania law claims of sex discrimination and a hostile work environment. Her employment agreement provided that the staffing company was her employer, paid her, and that it billed the other company for her services. However, she worked at the engineering company's facility, used its computer, and was interviewed, supervised, and disciplined by that company's employees. Also, it was the engineering company that made the decision to terminate her after she learned of alleged sex-based pay disparities and asked for a raise (*Novielli v. Trec Group*).

Client of a client of a staffing company. Proctor & Gamble (P&G) contracted with a facilities management service company, which in turn contracted with Securitas to provide security personnel at P&G facilities. Refusing to dismiss P&G from an ADA suit by a security officer who was removed from her assignment because she needed to use a walker due to rheumatoid arthritis, a federal court in Ohio found it plausible that P&G had sufficient control over the terms and conditions of her employment to have acted as a joint employer with JLL and Securitas. She was allegedly informed that she was terminated under P&G's policy because she could not respond to emergent situations within four minutes (*McKinney v. Securitas Security Services USA, Inc.*).

> *"Individuals such as corporate officers 'acting in the interest of an employer' are individually liable for any violations of the requirements of FMLA. Accordingly, 'an individual supervisor working for an employer may be liable as an employer under the FMLA.'"*
>
> *—Judge Eduardo C. Robreno (E.D. Pa. July 18, 2017)*

HR manager or supervisor. A federal court in Pennsylvania recently explained that the FMLA contemplates individual liability, defining an "employer" to include "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." FMLA regulations and Third Circuit precedent also indicate an individual supervisor could be liable. Consequently, the court refused to dismiss FMLA retaliation claims against an HR director who was the plaintiff's supervisor, controlled her schedule and when she could return from leave, and was responsible in part for the claimed violations because the director fired the employee (*Edelman v. Source Healthcare Analytics, LLC*).

Company owner. As another example, a recruiting company employee's FLSA and Connecticut law claims for unpaid overtime survived her employer's motion for summary judgment on several issues, including whether the company's owner could be liable as an "employer" along with the company. While the defendants argued that his significant medical issues made it "unlikely" he was "as involved in the running of a business" as the employee claimed, the court found a jury question based on evidence that the owner interviewed the employee, that he was seen in the office and at staff meetings, that he directed the employee as to how she should perform her job duties, and that he was consulted by the COO (who also was his spouse) in employment-related decisions, including hiring calculating commissions. This raised questions on whether he was the "ultimate responsible authority" to set hours and wages, and whether he was the cause of the wage violation (*Sierra v. New England Personnel of Hartford, LLC*).

Subcontractor. In a case from the construction context, laborers on a hotel renovation raised triable questions on whether a subcontractor on the project was their employer under the "economic reality" test. Denying summary judgment against their FLSA claims, a federal court in Louisiana pointed to evidence that the subcontractor exercised considerable control and power over their work situations, assignments, supervision, approval of overtime pay, and employment generally (*Murillo v. Coryell County Tradesmen, LLC*).

Parent company. The right-to-control and economic realities tests have also been applied in cases against parent companies. In one case a Mapco employee in Tennessee failed to convince a federal court to hold his employer's parent company liable for alleged age discrimination, because the companies had different presidents, separate bank accounts, capital structures, financial records, and employee payrolls. And while they shared headquarters, Mapco owned and controlled all of its own real estate, equipment, and supplies (*Passmore v. Mapco Express, Inc.*).

Careful with your corporate branding

Larger companies often engage in corporate branding across subsidiaries and other related companies as a strategy to promote name recognition. Examples include using a logo, specific letterhead or stationery, common website, or packaging. Although corporate branding is a valuable marketing tool, the practice can come at a cost when an employee for a subsidiary or other related company alleges that it engaged in an unlawful employment practice and argues that the larger corporation was so interrelated with the employer (as evidenced by the subsidiary using the parent logo) that the two companies were a single, joint, or integrated employer. If a court agrees, then both could be subject to liability under federal and state employment laws.

Who benefits from the work, and how, matters

Interns, students, and trainees

The above examples focused on potential employers, but sometimes the main dispute revolves around the worker and whether he or she can be considered an "employee." For example, the last several years have seen a rise in cases filed by unpaid interns who claimed they were improperly designated "trainees" (and thus exempt from minimum wage and overtime protections), when, in fact, they should have been treated as paid employees under the FLSA and applicable state laws. The stakes in such cases can be substantial. Indeed, Media giant NBCUniversal agreed to pay $6.4 million to settle a high-profile case by interns, and Conde Nast signed off on a deal to pay up to $5.85 million to resolve a suit by interns who worked at *The New Yorker* and *W* magazine.

To decide whether interns, students, and trainees qualify as "employees" for the purpose of wage and hour requirements, courts typically rely on multifactor tests which vary by jurisdiction but which focus on whether the nature of the relationship is educational, the economic reality of the relationship, and who primarily benefits from the work.

Similarity to academic environment. The DOL has laid out a six-factor test focused on whether the work relationship is like an academic environment, with the intern receiving training under the supervision of employees. This test also considers whether the arrangement benefits the intern (who typically receives course credit or certification) but not the employer (the DOL noted the employer's "operations may actually be impeded" by the intern's work). Note that the DOL uses the same test to determine trainee/student status but the keywords are changed ("training" instead of "internship" and "trainees or students" instead of "intern").

Significantly, recent significant court decisions have moved away from the DOL test, favoring the "primary beneficiary" test instead. Even in those jurisdictions, though, the question of whether the relationship between the intern/student/trainee and the employer is analogous to an academic environment is still relevant.

"Primary beneficiary" test and *Glatt*. The DOL test was rejected by the Second Circuit in a class action by production and publicist interns for Fox Searchlight Pictures, who claimed they should have been compensated for their work on the Oscar-winning movie Black Swan (*Glatt v. Fox Searchlight Pictures, Inc.*). The appeals court took a "primary beneficiary" approach under both the FLSA and New York Labor Law, considering a list of seven non-exhaustive factor to determine which party benefits the most from the intern relationship. Because the question is a highly individualized, it couldn't be answered with generalized proof, and the appeals court vacated the order conditionally certifying the interns' FLSA collective and certifying a Rule 23 class under the New York Labor Law. As the Second Circuit saw it, this approach is more in line with the economic realities of the internship, focusing on the relationship to the intern's formal education and "what the intern receives in exchange for his work."

The Eleventh Circuit in *Schumann v. Collier Anesthesia* agreed with the Second Circuit's approach, finding it appropriate to "focus on the benefits to the student while still considering whether the manner in which the employer implements the internship program takes an unfair advantage of or is otherwise abusive towards the student." The Ninth Circuit also recently addressed the issue for the first time, and adopted the Second Circuit's "primary beneficiary" analysis. Eschewing the DOL's standard the Ninth Circuit concluded that "the primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context and that it is therefore the most appropriate test for deciding whether students should be regarded as employees under the FLSA." Under this approach, cosmetology and hair design students at beauty schools in California and Nevada were not statutory employees, ruled the appeals court affirming summary judgment against their FLSA claims (*Benjamin v. B & H Education, Inc.*).

The *Glatt* "primary beneficiary" factors for determining 'employee' status

In determining whether an intern/trainee is an "employee," the "non-exhaustive" factors considered under the *Glatt* test include:

(1) whether it is clearly understood there is no expectation of pay;
(2) whether the internship provides formal training similar to that provided in an educational environment;
(3) whether it is tied to a formal educational program or earns academic credit;
(4) whether the internship corresponds to the academic calendar, accommodates academic commitments;
(5) whether it is limited in duration to the period it provides beneficial learning;
(6) whether the intern's work complements, rather than displaces, work by paid employees and simultaneously provides a significant educational benefit to the intern; and
(7) whether it is clearly understood that the intern is not entitled to a paid position after the internship. Courts are to take a "totality of the circumstances" approach.

No factor is dispositive. The Second Circuit recently explained in *Wang v. The Hearst Corp.* that the *Glatt* factors intentionally omitted the DOL test's requirement that an employer "derive no immediate advantage from the activities of the intern." For an employer, "[i]t is no longer a problem that an intern was useful or productive."

Economic realities and practical training. Focusing on the economic realities of the relationship between a cosmetology school and students who were required by state law to complete 1,500 hours of a combination of classroom and "hands-on" work, the Seventh Circuit held that a student was not an employee entitled to pay for time spent working in a beauty salon operated by the school. The fact that students pay for practical training as well as classroom instruction was fundamentally inconsistent with the notion that they were "employees" during their time on the "performance floor."

Moreover, the school was required by an accrediting commission to use "practical learning methods," showing that the incidental tasks that students had to perform—acting as receptionists, cleaning and sanitizing the floor, selling beauty products, and restocking—were not enough to make them "employees." Rather, salon safety and sanitation was heavily tested on their licensing exam. Summary judgment for the defendant was therefore affirmed (*Hollins v. Regency Corp.*).

Training was also at the heart of a December 2017 Second Circuit decision affirming that Hearst magazine interns were not "employees" under the FLSA. The interns (and amici) claimed the lower court misapplied *Glatt* by broadening the meaning of "training" to include practical skills. For example, the court had noted that one intern sat in on marketing meetings, but the interns argued he was simply assigned to take minutes. Another intern was said to have "learned about photo shoots," but the interns argued that she already knew how to use a camera.

Agreeing with the lower court, the Second Circuit explained that the interns would restrain the meaning of training "to education that resembles university pedagogy to the exclusion of tasks that apply specific skills to the professional environment." Tacit in that analysis was the assumption that professions or trades should be just like school, but "many useful internships are designed to correct that impression," said the court. Also, while the interns complained that after a few weeks their tasks were repetitive, "practical skill may entail practice, and an intern gains familiarity with an industry by day to day professional experience," said the appeals court (*Wang v. The Hearst Corp.*).

Making the grade.

Lisa Milam-Perez, a senior employment law analyst at Wolters Kluwer, suggests that employers consider the following pointers if interns are a regular fixture in their organization:

- Create a formal internship program, working in close conjunction with a local college or university, so that interns earn college credit for their efforts pursuant to an academic program. Set a clear start and end date, perhaps tied to a school semester or break.
- Ensure the university plays a meaningful oversight role; such scrutiny helps to show that the intern's duties are educational, not merely operational, and that the internship is primarily academic in nature.
- Structure tasks around the intern's academic goals, not the employer's operations. "Grunt work" should only rarely be assigned.
- Provide the intern with opportunities to develop skills that are readily transferable to other employers within the industry, rather than know-how on procedures that are unique to your organization.
- Establish the duration before the internship begins, and don't schedule it around the organization's busy season or an employee downsizing.
- Don't schedule your interns based on your busy season or your productivity needs, but in accordance with their academic goals. (As a practical matter, if you're reliant on interns to get the work done, then they are probably employees.)
- Heed federal tests for "trainee" status under the FLSA, but note that state wage and hour laws apply too.

In the end, concludes Milam-Perez, "it might just pay to pay."

Shadowing dad at work could create employment relationship

In one case that made the rounds on blogs, a plaintiff shadowed his father to learn the wholesaler role at an auto dealership, with the chance of taking over when his father retired. A manager agreed to the training, but the plaintiff was not paid during his 15 months there. When his father was terminated, the plaintiff also left.

In trying to discern the primary beneficiary of the plaintiff's work for purposes of his FLSA claims, the Eleventh Circuit found three *Glatt* factors inapplicable because the training was not part of an academic program. As to the other factors, the lack of payment indicated he was not an employee, but the duration appeared excessive for training. The sixth factor, displacement of work, indicated he was a trainee at times and an employee at others—he purchased inventory, helped certify vehicles, and assisted sales staff. Much of his workday was defined by his father, but he also worked under the direction of others. There was no indication he was entitled to a paid job at the end of training. In total, the *Glatt* analysis was inconclusive, so the appeals court reversed the grant of summary judgment for the employer (*Axel v. Fields Motorcars of Florida, Inc.*).

Volunteers and athletes

A comprehensive look at the employment relationship as it has evolved over the years warrants a brief look volunteers and athletes who have claimed “employee” status for purposes of wage and hour laws.

Volunteers work out of the goodness of their heart, not for pay or trade. True volunteers are generally not considered employees, but there are caveats. As explained on the DOL’s website, “Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious, or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable or similar non-profit organizations that receive their service.” The agency also notes that under the FLSA, employees may not volunteer services to for-profit private employers. Also, individuals can volunteer for public employers but not doing the same work for which they are employed.

Whether volunteers were “employees” was at issue in one case involving a company that held consignment sales events for which consigners volunteered five-hour shifts in exchange for early shopping privileges. A federal court in the District of Columbia rejected the for-profit company’s assertion that the DOL acted arbitrarily in finding that the consigners, who helped prepare the event, worked the cash register, set up displays, and assisted customers, were employees entitled to back wages. The court found that the agency properly applied a multi-factor, totality of the circumstances test focused on the economic reality of the relationship.

The court distinguished volunteers who work “without promise or expectation of compensation” from those who, as in this case, “expect to receive ‘in-kind benefits’ in exchange for their services—the latter are employees and entitled to statutorily-mandated wages, regardless of whether they view themselves as volunteers.” Here, there were many statements from “volunteers” that they worked to obtain early access to merchandise and not simply “out of the goodness of their hearts.” As such, they were “employees” (*Rhea Lana, Inc. v. DOL*).

Athletes — “play” is not “work.” When it comes to college athletes, most courts hold that they are not “employees” under the FLSA. For example, the Seventh Circuit recently made clear that the multi-factor “primary beneficiary” test used by the Second Circuit for interns and trainees did not capture the true nature of the relationship between student athletes and their schools. Applying the economic realities test, and taking into account the tradition of amateurism in college sports and eligibility rules defining what it means to be a student athlete, the appeals court concluded that student athletes participate in their sports for reasons wholly unrelated to immediate compensation. Student-athletic “play” is not “work,” as that term is used in the FLSA, concluded the court (*Berger v. NCAA*).

Stay tuned . . .

Given the ongoing evolution of the employment relationship and efforts by courts and lawmakers to address the changing realities of the workplace, employers are well-advised to stay informed of recent developments. In addition to the typical online resources available from the EEOC, the DOL, and other agencies, be sure to look at *Employment Law Daily* for both in-depth articles and daily coverage of labor and employment news. For example, recent articles covering some of the above topics have included:

- BLOG: Successor liability for labor and employment violations depends on continuity and notice, By Lorene D. Park (Sep. 29, 2017)
- BLOG: Reality check: When is a franchisor a joint employer of franchisee employees? By Lorene Park, J.D. (Aug. 3, 2017)
- Polsinelli maps out staffing for growing companies while avoiding pitfalls, By Pamela Wolf, J.D. (May 23, 2017)
- Independent contractor pitfalls: Misclassification, immigration status, trade secrets, By Pamela Wolf, J.D. (August 31, 2016)
- BLOG: Getting a grip on the gig economy via Uber By Joy P. Waltemath, J.D. (May 10, 2016) ■