Fourth Circuit Decision Opens the Door to Joint Employer Liability for Contractors – Could Your Company Be At Risk?

02.14.2017

On January 25, 2017, the Fourth Circuit Court of Appeals[1] dealt a significant blow to the traditional contractor-subcontractor relationship. In finding that a contractor and subcontractor could be considered "joint employers" of the subcontractor's workers for purposes of the Fair Labor Standards Act ("FLSA"), the court's decision has opened a Pandora's Box of potential wage and hour issues, including claims for overtime pay against contractors and higher tier subcontractors from the employees of lower tier subcontractors.

In *Salinas v. Commercial Interiors, Inc. and J.I. General Contractors, Inc.*, No. 15-1915 (4th Cir. Jan. 25, 2017), the Fourth Circuit held that a general contractor, Commercial Interiors, Inc. ("Commercial") and one of its subcontractors, J.I. General Contractors, Inc. ("J.I."), were "joint employers," creating possible liability on the part of Commercial to J.I.'s employees[2] for J.I.'s failure to comply with overtime requirements of the FLSA. Although the court dismissed the notion that the decision would render the independent contractor concept meaningless in the construction context, all general contractors and first tier subcontractors should take heed of the *Salinas* decision and recognize that they now are potentially exposed to liability for FLSA violations committed by their subcontractors, at least where they exercise significant influence over the subcontractor and its employees.

The court was careful to point out that a finding that two entities are "joint employers" for FLSA purposes does not automatically mean they are joint employers in other legal contexts. *Id*. at 37. For example, a finding that a general contractor and subcontractor are "joint employers" under the FLSA does not automatically lead to a conclusion that the general contractor can be held liable for the subcontractor's negligence. Nevertheless, the *Salinas* decision will have a significant impact on the structure of contractor–subcontractor relationships going forward.

The facts of the case as alleged by the J.I. employees show that J.I., a framing and drywall installation subcontractor, worked almost exclusively for Commercial, a general contractor. Although J.I. did work for one other general contractor during its existence, it did so only when Commercial had no work available for J.I. In finding that Commercial and J.I. could be joint employers for FLSA purposes, the Fourth Circuit focused on various aspects of the relationship between Commercial and J.I., many of which are typical across the construction industry between general contractors and subcontractors. In particular, the court focused on the following:

- Commercial provided the tools, materials and equipment necessary for J.I. employees' work;
- Commercial actively supervised J.I. employees' work on a daily basis by having foremen walk the jobsite and check their progress;
- Commercial required J.I. employees to attend frequent meetings regarding their assigned tasks and safety protocols;
- Commercial required J.I. employees to sign in and out with Commercial foremen upon reporting to and leaving the jobsite each day;
- Commercial foreman frequently directed J.I. employees, through the J.I. foremen, to redo deficient work;
- Commercial communicated its staffing needs to J.I., and J.I. based specific jobsite assignments on Commercial's needs; and
- When J.I. performed certain "time and materials" work for Commercial and was paid on an hourly, rather than lump sum, basis, Commercial told J.I. how many of its employees to send to the project and how many hours those employees were permitted to work.

Salinas at 41-42. To be sure, there were other, perhaps more unique, facts the court considered that were problematic for Commercial. In particular, Commercial provided J.I.'s employees with hardhats, vests and sweatshirts branded with Commercial's logo and "instructed Plaintiffs to tell anyone who asked that they worked for Commercial." *Id*.

In viewing the facts as a whole, most observers would agree that the relationship between Commercial and J.I. was close enough that it is not surprising the court concluded a jury had the basis to find the two to be "joint employers." What is surprising, however, is that many of the facts the Fourth Circuit cited in support of its ruling are commonplace circumstances that are part and parcel of relationships between contractors and subcontractors across the country, and the court made a point of indicating that no single fact was necessarily dispositive. *Id.* at 32-33.

The court's emphasis on seemingly mundane connections that are commonplace in the contractor-subcontractor relationship should be troubling to general contractors and first tier subcontractors. A contractor checking the progress of a subcontractor's work and directing subcontractor employees to correct deficient work would not normally be viewed as establishing a "joint employer" relationship between a contractor and its subcontractor. Yet that common-place practice was among the facts considered by the Fourth Circuit in concluding that Commercial and J.I. were not "completely disassociated" with respect to the employment of J.I.'s employees and were, therefore, "joint employers."

In reaching its decision, the Fourth Circuit rejected a long standing test applied by many appellate and lower courts across the country, including lower courts in the Fourth Circuit, first set out by the Ninth Circuit Court of Appeals in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). Instead of applying the four factors set forth in the *Bonnette* case with respect to the "joint employment" portion of its new two-step test,4 the Fourth Circuit in *Salinas* directed courts to "consider six factors to determine whether two or more persons or entities 'are not completely dissociated' with respect to the workers such that the persons or entities share, agree to allocate responsibility for, or otherwise co-determine – formally or informally, directly or indirectly – the essential terms and conditions of the worker's employment," and therefore potentially render the persons or entities joint employers under the FLSA. *Salinas* at 31-32. Those six factors are as follows:

- 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;
- 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 and conditions of the worker's employment;
- The degree of permanency and duration of the relationship between the putative joint employer;
- 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;
- 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 another; and
- Whether formally or as a matter of practice, the putative joint employer may 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. *Id.*

The Fourth Circuit noted that the facts pleaded in *Salinas* demonstrated that Commercial and J.I. satisfied all six factors; the court also declared that it was not necessary to find that a majority of the six factors had been satisfied in order to conclude that a joint employment relationship exists. Indeed, the court specifically stated that one factor could be sufficient for such a finding "if the

facts supporting that factor demonstrate that the person or entity has a substantial role in determining the essential terms and conditions of a worker's employment." *Id*. at 33.

Most significant for contractors and subcontractors in the Fourth Circuit's new test is that the Fourth Circuit equates a contractor's providing "facilities, equipment, tools or materials necessary to complete the work," with handling payroll or providing workers' compensation insurance for subcontractors. While most general contractors would recognize that to maintain an independent contractor relationship, subcontractors should handle their own payroll functions for their own employees, it is commonplace for general contractors to provide "facilities, equipment, tools or materials" to subcontractors for the performance of their work.

A determination of whether two entities are "joint employers" is actually a two part test. In addition to a finding that the two entities are "not completely disassociated," there also must be a finding that the claimant in question is actually an "employee" as defined by the FLSA. *Id*. at 50-51. Because the parties in *Salinas* did not dispute that the Plaintiffs were "employees," however, the court provided little discussion of this part of the two-part inquiry. That portion of the inquiry, however, is no less important to contractors, particularly given the frequency with which independent contractors are used in construction.

General contractors and higher tiered subcontractors should take note of the *Salinas* decision, and carefully examine their relationships with all of their subcontractors, particularly those with whom they work closely on a regular basis. If a subcontractor is potentially violating the FLSA, based on the *Salinas* decision, there is now a significant risk of exposure for the general contractor or higher tiered subcontractor on the project if they exercised too much influence or control over the subcontractor's work. The Fourth Circuit explicitly recognized that some measure of oversight and quality control was necessary in construction, and that a contractor "does not become a joint employer by engaging in the oversight necessary to ensure that a contractor's services meet contractual standards of quality and timeliness." *Id.* at 46. At the same time, however, the court deemed Commercial's daily oversight and feedback regarding the pace and quality of J.I.'s employees work crossed the line. *Id.* How much supervision is too much? The Fourth Circuit seems to have left the lower courts with, essentially, a "you know it when you see it" standard where even one factor may tip the scales to determining that a contractor is a joint employer for purposes of the FLSA.

What should general contractors and subcontractors do to minimize the risk of liability? The Fourth Circuit in the *Salinas* opinion cautions general contractors against hiring a "fly by night operator" or one who plans to violate the FLSA. In more formal terms, the Fourth Circuit gives contractors this guidance: "either deal only with other substantial businesses or hold back enough on the contract to ensure that workers have been paid in full." *Id.* at 50. All of this, of course, is

easier said than done.

For more information about the *Salinas* decision, or to discuss any particular fact pattern that may give rise to joint employer liability, please contact Arty Bolick, John Ormand, or Tricia Goodson, linked below.

---

[1] The Fourth Circuit Court of Appeals hears appeals from federal courts in Maryland, North Carolina, South Carolina, Virginia and West Virginia.

[2] The parties did not contest that the Plaintiffs in *Salinas* were "employees" as opposed to "independent contractors" for purposes of the FLSA, and therefore the court provided little discussion of this part of a two part inquiry in the opinion, as discussed *infra*. However, the Fourth Circuit discussed the distinction between "employees" and "independent contractors" at length in *Hall v. DirectTV, LLC*, No. 15-1857 (4th Cir. January 25, 2017), a case decided by the Fourth Circuit the same day as *Salinas.* Look out for future legal alerts from Brooks Pierce regarding the important *Hall v. DirectTV* decision.

[3] The case came before the Fourth Circuit as an appeal from a lower court decision dismissing the case for failure to state a claim for which relief could be granted. Therefore, in reviewing the lower court decision, the Fourth Circuit was obliged to treat the facts as asserted by Plaintiffs in their Complaint as true in order to determine whether the Plaintiffs' case would be allowed to move forward. At trial, Plaintiffs will bear the burden of proving these facts.

[4]The two steps consist of: 1) a determination of whether the alleged employers jointly employed a worker, and 2) a determination of whether the worker was an employee or a general contractor.

PEOPLE

H. Arthur Bolick II

Patricia Goodson

John W. Ormand III

SERVICES

Labor & Employment

Union & Labor Issues