NELP Publications:

Contingent Workers and Coverage Under the Fair Labor Standards Act

Catherine K. Ruckelshaus, National Employment Law Project, September 16, 1999

The Growth of the Contingent Workforce

United States industries and business owners are fashioning newer and more complex business arrangements in order to compete in the global economy, where increased movement of capital and labor across borders brings new pressure on U.S. businesses to survive at any cost. Tactics such as subcontracting, out-sourcing, using temporary and other staffing firms, and other forms of reconfiguring their workforce have allowed some firms to enjoy short-term competitive advantages. Examples abound.[1] The recent strike by the United Parcel Service (UPS) workers around their treatment as "permanent" temporary employees, the landmark case brought by the misclassified "independent contractor" computer programmers at Microsoft, and the walk-out and strike at Bell Atlantic and General Motors where the companies out-sourced to non-union subsidiaries and threatened to contract-out the work at the strike-bound parts plants, respectively, are but four high-profile examples. Other examples, while receiving less media attention, are no less compelling in the stories they evoke, and include chicken catchers working for a national chicken processing company on the Eastern shore of Maryland that claims the workers are not its employees; home care workers employed by large state and local-funded agencies across the country that fail to pay the workers overtime, and so-called "independent contractor" taxi drivers working for fleet

owners in New York City for less than the minimum wage.

This restructuring is not without costs, and in the long term will most likely have unintended results for the U.S. economy and its workforce, such as an erosion of wages for all workers, and a decrease in the number of skilled workers as resource-rich firms decline to invest in their workers' skills. A recent report by the General Accounting Office found that three factors in particular contributed to the persistence of sweatshop conditions in industries: an undocumented immigrant workforce; labor-intensiveness and low capital investment requirements, and an increase in subcontracting out of core production functions.[2] Long-term sub-contracting in the garment and agricultural industries has resulted in a severe exploitation of garment and farm workers, creating an entrenched tier of underpaid workers that persists despite concerted efforts by advocates and workers. So too for the more recent sub-contracting converts B the costs, which have manifested themselves in the short-term already, fall primarily on the workers, who are left with a direct worksite employer with no capital and no means to pay wages or benefits, and unable to provide job security. Misclassified independent contractors are being denied unemployment insurance, health benefits, and other basic labor and employment protections.

The U.S. Commission on the Future of Worker-Management Relations (the Dunlop Commission) concluded in its final report that,

> [C]ontingent [work] arrangements may be introduced simply to reduce the amount of compensation paid by the firm for the same amount and value of work, which raises serious social questions. This is particularly true because contingent workers are drawn disproportionately from the most vulnerable sectors of the workforce... . The expansion of contingent work has contributed to the increasing gap between high and low wage workers and to the increasing sense of insecurity among workers...[3]

Thus, contingent workers are not getting paid minimum wage and overtime in many instances, because of their employers' ability to avoid liability and responsibility for their workers by passing responsibility on to the smaller, less capitalized nominal entities designated the workers' (sole) employer. By creating or encouraging intermediate employers and so-called self-employment, business owners are shielded from workers' claims of unpaid overtime or benefits, and have avoided paying.

This gerrymandering of corporate structures has not resulted in a lack of control on the part of the business, for the end product (be it a blouse, a cucumber, a pork roast, or a clean office) is still very much controlled by and closely monitored by the business "owner," whose business depends on the product's quality. Holding business owners accountable for the total costs of production, and not allowing impecunious middlemen to shield the owners from labor costs and liabilities, is key to eliminating sweatshop conditions. As described below, business owners can be held accountable through the straight-forward application of the Fair Labor Standards Act (and other employment laws with the same broad definition of employment).

Coverage of Contingent Workers Under the FLSA

Imposition of the Fair Labor Standards Act (FLSA), 29 U.S.C. ' 201 *et seq,* which requires the payment of a federally-established minimum wage (currently $5.15 an hour) and overtime pay of time and a half one=s regular hourly rate after 40 hours in a week, necessitates a finding of an employment relationship. Where violations are found, employers must pay unpaid minimum wage and overtime, an additional amount as liquidated damages (if the violation is wilful), and attorneys fees. The FLSA=s requirements are designed to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general

well-being of workers." 29 U.S.C. ' 202(a). It is also aimed at eliminating unfair advantage gained by unscrupulous employers producing goods in substandard working conditions. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 299 (1985).

Liability for violations of the FLSA extend to those who are "employers" within the meaning of the Act. An "employer" is defined to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. ' 203 (d). An "employee" is "any individual employed by an employer." 29 U.S.C. ' 203 (e)(1). The word "employ" includes "to suffer or permit to work." 29 U.S.C. ' 203 (g). The Supreme Court has repeatedly recognized the "striking breadth" of the definition of Aemploy". *Nationwide Mut. Ins . v. Darden*, 503 U.S. 381, 326 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947)("[t]his Act [FLSA] contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category"). Definitions under the Act are to be construed broadly, to effectuate the broad policies and intentions of Congress.

In applying these definitions, courts look to the economic reality of the employment relationship. *Goldberg v. Whitaker House Corp.*, 366 U.S. 28, 33 (1961); *Danneskjod v. Hausrath*, 82 F.3d 37, 39 (2d Cir. 1996). The economic reality test under the FLSA is not the common-law agency test for employment. *Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2d Cir. 1993). In assessing whether an entity employs an individual, courts look to see whether, as a matter of economic reality, the individual is dependent on the entity. *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). More than one entity can employ a worker. *See. e.g., Falk v. Brennan*, 414 U.S. 190, 195 (1973)(apartment building owners and maintenance company were joint employers of maintenance workers, notwithstanding contractual provision designating workers as employees of building owners); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)(slaughterhouse meat de-boners employed by slaughterhouse and de-boning contractor). Under this so-called joint employer theory, workers may be employed by several different businesses. *See e.g, Antenor v. D&S Farms, Inc.*, 88 F.3d 925 (11th Cir. 1996); *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S.D.N.Y. 1998); Department of Labor regulations.[4] Employers found to have jointly employed a worker are jointly and severally liable for any FLSA violations.

The FLSA directs that the question of who is an employer and an employee under the Act requires "[a] full inquiry into the true economic reality" of the employment relationship based on a "particularized inquiry into the facts of each case." *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)(employee status under FLSA depends not on isolated factors but on the circumstances of the whole activity). No one factor is dispositive and a totality of the circumstances must be considered.

The Second Circuit has derived a series of factors to be considered in determining whether an employment relationship exists, but cautions that the factors depend on the facts of the case. While control over hiring, firing, payroll, and daily working conditions is one factor to be considered, the following factors have also been found to be equally important in assessing the economic reality of an employment relationship by shedding light on the extent of economic dependence in an employment relationship: (1) the extent to which the work was a part of an integrated production process, *see, e.g., Rutherford*, 331 U.S. at 729-730; *Superior Care*, 840 F.2d at 1060; (2) the degree of skill required to perform the work, *see Rutherford*, 331 U.S. at 730; (3) the permanence of the working relationship, *Superior Care,* 840 F.2d at 1060; (4) the degree to which the contractor invested in the business, see *Rutherford*, 331 U.S. at 730; and (5) whether the putative employer owned the premises and equipment where the work was performed. *See Rutherford*, 331 U.S. at 730; *see also Herman v. RSR Security Services, Ltd.*, 172 F.3d 132 (2d Cir. 1999)(court adopts a four-factor economic reality test).

Practical Considerations and Some Conclusions

Applying these broad definitions is not easy, and nor is it predictable. Since the factors are manipulable and can often be read to help either side in a dispute, parties find it difficult to analyze borderline cases. Given the fact-based analysis required, it is sometimes helpful to compare the various tests for coverage under labor and employment laws when determining questions of employment relationships. The common law test, which is based on concepts of right to control the means and manner of work and on agency principles, is the narrowest test. Thus, if one can find an employment relationship under common law, a worker is automatically covered under the broader definition of the FLSA (as well as under the Family & Medical Leave Act and the Agricultural Worker Protection Act, which share the same broad definitions of employment). The National Employment Law Project has developed a series of checklists to assist in determining whether an employment relationship exists under the various tests for labor and employment statutes. *See* Checklist attached.

A reading of FLSA cases applying the statutory employment definitions leads to some conclusions that may help in analyzing contingent workers= coverage under the statute. First, because the courts have had so little guidance from the Supreme Court and because the statutory definitions of employment are so broad, courts tend to veer in one of two directions in applying the Act to contingent work situations. In one direction, the courts fashion their own set of factors from among the factors used in other cases, based on what they deem to be the most relevant factors for the particular factual situation (*see* e.g *Lopez v. Silverman*, 14 F.Supp.2d 405 (S.D.N.Y. 1998); *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997). These types of opinions are unpredictable in that the actual factors chosen are anybody=s guess prior to the opinion. Witness the court=s struggle to fashion an appropriate test in the recent Southern District of New York case, where the court noted:

> The difficulty with the tests advanced by the parties is that they are so obviously skewed, for purposes of this case, either for or against a finding that the defendants were the plaintiffs= joint employers. .. . The court=s task, therefore, is to identify factors that better distinguish whether workers are employed solely by one employer, or jointly by another as well. *Lopez v. Silverman*, 14 F.Supp.2d at 415.

In a second direction, courts undertake very little analysis of the statutory language and legal test required, cite to the "totality of the circumstances" language in the Supreme Court cases, and perform their version of a "gestalt" analysis by merely deeming the relationship one of "employment" or not. (*See e.g., Johns v. Stewart*, 57 F.3d 1544, 1557 (10th Cir. 1995)(court fails to apply FLSA=s admittedly broad definition of employee to workfare workers, with no analysis). Analogous to an "I-know-it-when-I-see-it" approach, this latter direction is the least helpful and predictable, and illustrates the need for a clarification of how to apply the definitions of employment under the FLSA, and indeed under labor and employment laws generally.

As a co-author of an article examining the history of FLSA=s suffer or permit to work standard, we suggested that the FLSA=s definitions can be applied directly, using the approach of child labor statutes from which the standard comes, especially in subcontracting situations. Bruce Goldstein, Marc Linder, Laurence Norton, and Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983 (1999)*; see also Rutherford Food v. McComb*, 331 U.S. 722, 728 n.7 (1947); *Antenor v. D&S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996). Under this approach, a court would first determine if the plaintiffs= work is encompassed within the overall business of the putative employer. Under this approach, the work is suffered or permitted by the employer unless it is so highly skilled and capital-intensive that it forms a completely separate business. When capital is supplied by the employer and not the "contractor," or other

labor intermediary, and the work is unskilled, under this more direct and less factor-intensive approach, a business would be determined to have suffered or permitted the work of the plaintiffs within the meaning of FLSA.

Endnotes

1. Examples of literature describing the growth of organizational subcontracting and reconfiguration, in the legal and political and economic press, also abound. *See, e.g.*, Françoise Carré, *Temporary and Contracted Work: Policy Issues and Innovative Responses*, Prepared for the MIT Task Force on Reconstructing America's Labor Market Institutions (June 1998); Craig Becker, *Symposium: The Changing Workplace: Labor Law Outside the Employment Relation*, 74 Tex. L. Rev. 1527 (June 1996); *Symposium on the Regulatory Future of Contingent Employment*, 52 Wash. & Lee L. Rev. 725 (1995); Bennett Harrison, Lean and Mean: The Changing Landscape of Corporate Power in the Age of Flexibility 198 (1994).

2. U.S. Gen. Accounting Office, Pub. No. GAO/HRD-88-130BR, "Sweatshops" in the U.S.: Opinions on Their Extent and Possible Enforcement Options 16 (1988).

3. U.S. DOL, Commission on the Future of Worker-Management Relations, Final Report, http://www.dol.gov/dol/_sec/public/media/reports/dunlop/dunlop.htm, at p. 3.

4. DOL regulations on joint employment state that "[a] single individual may stand in the relation of employee to two or more employers at the same time . . ." 29 C.F.R. ' 791.2 (1996). They also state in part, "a joint employment relationship generally will be considered to exist in situations . . . [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." 29 C.F.R. ' 791.2(b)(3). All joint employers are individually responsible for compliance with the FLSA. 29 C.F.R. ' 791.2(a). Department of Labor Regulations are not binding on the courts but "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946).

NELP National Employment Law Project

55 John Street, 7th Floor • New York, NY 10038 • Phone: (212) 285-3025 • Fax: (212) 285-3044

Email: nelp@nelp.org • Please send questions or comments about this site to Allison Palmer

Last modified: March 15, 2000