2nd Circ. Title VII Ruling Guides On Joint Employer Doctrine

By **William Manuel and Anne Yuengert** (March 25, 2022)

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The joint employer rule has been a hot topic in the last several years, mostly in the context of the Fair Labor Standards Act.

Recall the drama of the Trump administration's narrower definition of a joint employer for wage purposes, followed by the Biden administration's almost immediate rescission of that rule.

Gig economy workers have battled about overtime and their entitlement to it under the FLSA's definitions. But does the joint employer doctrine also apply to other employment laws?

Most certainly — but how it does is not all that clear.

The U.S. Court of Appeals for the Second Circuit recently handed down a decision that brings the joint employer analysis into the world of claims involving Title VII of the Civil Rights Act.

We all know that the FLSA focuses on the proper payment of wages to employees, while Title VII prohibits discrimination against employees on the basis of protected statuses such as race, sex and national origin.

Title VII also protects employees from being retaliated against for claiming discrimination.

In Felder v. United States Tennis Association,[1] a guard who worked for a security company providing services to the USTA filed a retaliation claim against the association claiming that it should be held as a joint employer.

Sean Felder alleged that the USTA improperly affected his work environment by denying him credentials to work at the U.S. Open.

While the Second Circuit ultimately held on March 7 that he did not meet his burden of showing that the USTA was a joint employer with AJ Squared Security, the court engaged in a lengthy evaluation of how courts should determine whether two entities could be held jointly liable under Title VII.

The court initially looked at the terms of Title VII itself and how that statute defined "employer."

The court found the statutory text was unhelpful in the context of possible joint employment, so it turned to case law.

In the FLSA realm, most cases focus on the alleged joint employer's actual or constructive control of the employee. However, with regard to Title VII, many circuit courts instead looked to the law of agency.

In its inquiry, the Second Circuit looked at independent contractor cases. The court concluded that a plaintiff seeking to hold an entity liable as a joint employer under Title VII

would have to show that his or her relationship with the entity looked more like a traditional employee instead of like an independent contractor.

Specifically, a plaintiff would have to show that the alleged employer exerted control over the terms and conditions of the employment by, for example, training, supervising and disciplining the employee.

Some of the factors the Second Circuit specifically examined were whether the USTA exerted any control over AJ Squared Security's hiring process, or if the USTA would be involved in training him, supervising him, issuing his paychecks or providing him a uniform.

Since none of those conditions existed, the court found that the U.S. District Court for the Southern District of New York properly dismissed his case.

The U.S. Equal Employment Opportunity Commission also has specific guidance[2] on when an employee can claim he or she is jointly employed.

The EEOC guidance focuses on staffing firms and temp agencies. Like the Second Circuit, the EEOC guidance also uses the independent contractor model for analysis.

The guidance provides a list of 15 factors that may indicate that an employee has joint employers. The EEOC noted that the list is not exhaustive and that no one factor is decisive.

The EEOC's factors include:

- The firm "has the right to control when, where, and how the worker performs the job";
- The firm (not the worker) provides the tools, materials and equipment;
- The firm "has the right to assign additional projects to the worker";
- The firm "sets the hours of work and the duration of the job";
- The firm "provides the worker with benefits such as insurance, leave, or workers' compensation"; and
- The firm can fire or discipline the worker.

These are the types of control issues that the EEOC may examine when trying to determine

if a worker being lent to another firm may be in a joint employer situation.

Most other circuits have joint employer status tests similar to the Second Circuit's. The primary focus is on how much control a company may have over a worker.

Some circuits also consider the "economic realities" test found under FLSA case law.

Interestingly, the Title VII cases look more to the control available to the potential joint employer instead of proof of actual substantive control in the specific case circumstances. This seems to follow more of the broad scope now seen in wage and hour cases.

Many circuits also turn to the general principles of agency law to examine the factors of control.

For employers that use staffing companies or contract workers, what can you do to limit your liability as a joint employer?

As with most aspects of employment law, an important first step is good documentation.

Although there are no magic words that you can put in a staffing contract that will keep you out of joint employer status, it certainly will help to show that the two companies did not intend to establish joint control over an employee.

If you are using a staffing agency or a contractor for employees, you need to allow them to be in full control over the hiring and firing of those employees.

The staffing company should also have all the power to determine those workers' pay and should also be responsible for the paperwork that goes along with any benefits or payroll.

If an employee files suit under Title VII against the staffing agency and your firm as joint employers, one of the first lines of defense will be the stacks of paperwork showing how much control the staffing company had over the basic operations of that employee's workplace.

But what about supervision and disciplining of staffing agency workers on the job? Does the joint employer doctrine tie the hands of contracting entities with regard to temp workers?

Not necessarily. A company using contract workers or temp workers will likely have to direct or correct those workers' activities.

Where an employer can get into trouble, however, is if its discipline of a temporary worker is used independently to affect that temporary worker's employment status.

One of the terms seen consistently in the EEOC guidance and the case law is that a company may be considered a joint employer if they have the power to fire an employee. Companies engaged in the lending of workers need to have a clear understanding of which entity has that power.

One of the other sticky situations may be the scheduling and location of temporary employees. Again, both the EEOC and the case law consider these types of directions to be possible control of what would otherwise be an independent contractor.

Companies should establish how employees are scheduled and how their work is assigned.

If there is documentation showing that the temp agency is providing 10 workers for a day shift of 7 a.m. to 5 p.m., and the workers get paid for that time period, that will go a long way to help show that the temp agency had control over scheduling.

Overall, avoiding being a joint employer mostly comes down to good advance communication between the two entities.

If you will be using someone else's employees to do work, you need to establish the parameters on how those employees will be hired, paid, scheduled, disciplined and, if necessary, fired.

You should do this before work begins, and you should memorialize the arrangement in writing.

In addition, those parameters need to be communicated not only to the employees doing the work, but to managers and others in both entities that have some oversight of the workers' duties and relationship to the job.

The worst situation is to try to backtrack and overcome ambiguities in the working relationship after a Title VII claim for discrimination has been filed. Although it may take some additional time upfront, it will pay off by not resulting in an unwanted finding of joint employer status.

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[1] https://law.justia.com/cases/federal/appellate-courts/ca2/19-1094/19-1094-2022-03-07.html.

[2] https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary.