United States House Education and the Workforce Committee

"Joint Employment"
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July 12, 2017

Chairwoman Foxx, Ranking Member Scott, and members of the Committee, thank you for giving FedEx the opportunity to share its views on joint employment standards. We commend this Committee for recognizing the need to bring clarity and certainty to the many federal statutes under which joint employment issues arise. This very important topic can affect job creation and how businesses compete in today's marketplace.

Congress could not have anticipated the current confusing and shifting patchwork of judge- and agency-made joint employment tests when it enacted the existing federal employment laws. This patchwork results in distracting and unproductive litigation that burdens commerce and courts, and limits innovation, investment, and job creation.

As described in more detail below, we urge Congress to address this problem by moving forward with 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.

FedEx Operations

FedEx is an engine for job and economic growth. Through our group of transportation and logistics companies with more than 400,000 team members worldwide, FedEx utilizes all major modes of transportation to serve our customers.

- Our FedEx Express air-ground system is a global network, offering time-definite air express, ground and freight shipping within the U.S. as well as linking the American economy to 99 percent of the world's GDP.

- Our FedEx Freight and FedEx Ground networks use both road and rail for our business-to-business as well as business-to-consumer services, which are essential for electronic commerce.

FedEx has a vested interest in this important topic because its operating companies contract with a multitude of national, regional, and local vendors.

We are committed to ensuring that FedEx and its vendors comply with applicable legal standards, including federal employment laws.

Our relationships with these businesses create opportunities for job and business growth in local communities. Unfortunately, the ever-shifting and growing patchwork of joint employment tests threatens these opportunities.

Current Joint Employment Tests

On a broader basis, it is important to consider how joint employment can affect all businesses—small and large. It is difficult to identify a business that does not contract in some fashion with another company as a supplier or as a customer. Under today's joint employment tests, many businesses are at risk of being embroiled in protracted litigation because of another company's alleged actions.

While the concept of joint employment liability serves an important role in worker protection, federal employment statutes do not provide a specific and certain joint employment definition to which companies can adhere.[1] Rather, companies are caught in a web of ever-changing enforcement agency determinations and judge-made common law that seeks to fill the statutory void. Over 75 years of regulation and litigation has produced a complicated and shifting hodgepodge of joint employment tests.

For example, the attached exhibit provides a pictorial representation of certain joint employment tests under federal law. Looking at the U.S. Court of Appeals for the Third Circuit you will see that the Fair Labor Standards Act (FLSA) test requires an analysis of 4 factors, but for Title VII of the Civil Rights Act of 1964 (Title VII), a 12-factor analysis is required.

By our count, and just looking at 3 federal laws—the National Labor Relations Act (NLRA), FLSA, and Title VII—there are at least 15 different joint employment tests when you count the circuit courts, regulations, and agency interpretations.[2] And, they change from time to time.

Making the situation even more complicated, particularly for the many multi-jurisdictional employers, is that, in addition to federal statutes, states and municipalities apply different tests for joint employment.

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[1] Some regulations generally discuss the topic, but they do not set forth a workable test. *See, e.g.*, 29 C.F.R. §791.2, 29 C.F.R. § 825.106.

[2] Additional joint employment tests may apply under other federal laws not addressed in this testimony, such as the Employee Retirement Income Security Act of 1974 (ERISA).

Fair Labor Standards Act

Congress enacted the FLSA nearly 80 years ago to protect workers by providing a minimum wage and overtime pay. Joint employment was not directly contemplated in the FLSA.

Federal courts and agencies have filled this statutory gap with a myriad of non-exhaustive, multi-factor balancing tests under which varying factors might be weighed equally or differently. When implementing important employment laws, it is unlikely that lawmakers envisioned the current overly-complicated, changing patchwork of court decisions and agency actions that result in uncertainty, confusion, and protracted litigation.

Under the FLSA, there are at least 5 different multi-factor tests applied by the various circuit courts and a related DOL regulation. In addition, some circuit courts may apply different tests on a case-by-case basis. If a business wants to operate on the east coast and wants to meet its FLSA obligations, it must comply with one test in Massachusetts, a different test in Virginia and yet another test in Florida—encompassing at least 18 factors—all interpreting the same federal statute. It is easy to see how the same set of facts could lead to a different outcome in each circuit or district court, preventing any sense of commercial stability for multi-jurisdictional businesses. This increases the cost of compliance and the risk of significant litigation expenses.

Joint employment-related litigation is on the rise. This is clearly shown by the number of reported joint employment decisions in the federal courts in the past several years. For example, in the past 12 months, there have been 174 federal joint employment decisions, compared to 161 in the preceding 12 months, and 134 in the year before that.

An additional illustration of joint employment complexity can be found in the U.S. Court of Appeals for the Fourth Circuit's recent decision in *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017). The Fourth Circuit ruled that, for FLSA purposes, Commercial Interiors jointly employed the plaintiffs. In reaching its conclusion, the court spent considerable time tracing the complicated history of joint employment law, ultimately concluding:

> "courts have *failed to develop a coherent test* for determining whether entities constitute joint employers."[3]

Ironically, the Fourth Circuit addressed the issue by creating yet another multi-factor test—6 factors and a two-pronged analysis, which includes an examination of the association of the businesses.

[3] *Salinas*, 848 F3d at 139 (emphasis added).

The DOL issued an Administrator's Interpretation (AI) in 2016 that further complicated the landscape by shifting the focus of joint employment standards to economic dependence. The AI would permit a finding of joint employment where a person is "economically dependent" on both employers for his or her sole source of income. The DOL laid out two separate multi-factor tests—one for "horizontal" joint employment and a second for "vertical" joint employment. While the DOL recently withdrew its joint employment AI, the AI and its subsequent withdrawal is another example of the complex and shifting sands of the joint employment landscape.

The multiple variations of joint employment tests under the FLSA make it difficult, if not impossible, for companies to predict with reasonable certainty how to structure business relationships without exposing themselves to the risks of joint employment.[4]

National Labor Relations Act

Adding to the mix of joint employment tests, the National Labor Relations Board's (NLRB) decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015), reversed long-standing precedent and created a significant expansion of joint employment under labor law. For decades, the NLRB standard for joint employment was based on direct and immediate control of certain working terms and conditions. In the *Browning-Ferris* decision, the NLRB upended years of stability and clarity by expanding the scope of joint employment to include the more nebulous concepts of indirect control and influence.

Rather than provide greater clarity or practical certainty to business relationships, the actions of the NLRB flipped the situation on its head.

Economic Dependence and Association Tests

It is particularly problematic when enforcement agencies (or courts) apply an economic dependence or association test for joint employment. Under the economic dependence test, if a vendor decides to rely solely on its contractual relationship with one business for its revenue, then it is deemed economically dependent on that business, and its employees are deemed to be jointly employed by the vendor and the business. Economic dependence tests illogically and inappropriately shift the evidentiary focus from the putative joint employer's control over the working terms and conditions of its vendor's employees to whether that vendor has decided to provide service to others. The choice of a

[4] Title VII similarly has numerous variations of multi-factor tests in addition to the EEOC's own joint employment guidance. For example, the Third Circuit follows a 12-factor test, the Fourth Circuit follows a 9-factor test and the Seventh Circuit follows a 5-factor test.

vendor to provide service to only one customer should not determine the employment obligations of the company contracting with that vendor.

The Fourth Circuit's recently-issued association test goes even further. This test focuses on the association between a company and its vendor. Only if the two are "completely disassociated" will the business avoid joint employment liability. Under these standards, as noted in a recent petition to the Supreme Court seeking review of the application of the Fourth Circuit's test in another case, "even the federal government, which relies heavily on outside contractors, may well be deemed the joint employer of a contractor's employees under the Fourth Circuit's test."[5]

Practical Considerations

Most entrepreneurs start companies because they want the flexibility and autonomy inherent in owning their business. They expect to make their own decisions without interference. Today's expansion of joint employment risk threatens that autonomy. If businesses are going to be held liable for the actions of their vendors, then they are more likely to exercise greater control over the business relationship, thereby diminishing the role and investment of the entrepreneur.

In summary, the ever-shifting patchwork of complicated joint employment standards results in:

- Too many different joint employment tests that are overly complex and based on so many factors that any claim can be raised and any outcome defended;

- Outcomes that vary depending on where a company does business and where it is sued. For example, under the same set of facts, a business could be deemed a joint employer for FLSA purposes in one jurisdiction and not in a second—and the results could be altogether different under the NLRA or Title VII; and

- Too much distracting and unproductive litigation that burdens commerce and courts; limits innovation, investment, and job creation; and threatens the autonomy of small businesses.

[5] Petition for Certiorari at 35, *DirecTV, LLC v. Hall*, No. 16-1449 ((U.S. June 5, 2017) ("*See* 29 U.S.C. § 203(d) (defining 'employer' to 'include[] a public agency'); *cf. Murphy v. Volt Info. Scis., Inc.*, 2013 WL 5372787, at *2 (D. Or. Sept. 24, 2013) (holding that federal government's waiver of sovereign immunity in Family Medical Leave Act extends to joint employment).").

Joint Employment Legislative Solutions

We respectfully submit that now is the time to bring clarity, consistency, and a reasonable level of commercial predictability to joint employment under federal law. We believe the most effective way to achieve this is through federal legislation. A single joint employment standard would reduce regulatory burdens, litigation costs, and ensure consistency between federal enforcement agency standards.

Ideally, a federal standard should be objective, simple to interpret, and easy to apply. Joint employment should be triggered only when two employers *directly* determine certain statutorily identified terms and conditions of employment. We need to move away from amorphous tests that take into account subjective assessments of indirect actions, reserved authority, association and disassociation, or economic dependence—all criteria that lend themselves to different and uncertain outcomes depending on the judge or administrative agency involved.

In addition to a federal joint employment standard, and to incent businesses to promote and ensure legal compliance, a statutory safe harbor from joint employment liability should be created for businesses that proactively implement vendor compliance programs. Businesses that have vendor compliance programs should not pay a negative price by having those good faith programs used as evidence of joint employment.

Vendor compliance programs should be encouraged because they relieve the increasing burdens on both agencies and the judicial branch caused by unproductive and misdirected litigation. Most importantly, vendor compliance programs make practical sense because they ensure that vendors have a greater motivation and business reason to comply with various federal employment laws.

Conclusion

To address the present amorphous and confusing state of the law, we urge Congress to address this problem by moving forward with 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.