Tips on How to Avoid a Finding of Joint Employer Status under MSPA

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As employers, most of us appreciate the obligations we have to our employees and work hard to ensure that we comply with all applicable federal and state employment laws. However, some employers may be surprised to learn that under the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA), they could be liable for the actions of other employers in certain cases. 29 U.S.C. § 1801, et. seq.

Under the MSPA, an employer could be held responsible for an independent contractor's violations of the MSPA, if the employer is considered a "joint employer" of the contractor's workers. Therefore, the stakes are very high when evaluating whether or not you are a joint employer of a group of workers.

In this article, we review the circumstances in which one agricultural employer may be viewed as the "joint employer" of certain workers and therefore liable to those workers for violations of the MSPA. We will also highlight some steps that employers can and should take to avoid a finding of joint employer status.

Under the MSPA, more than one organization may be considered the employer of a worker. Therefore, when evaluating joint employer status, the determination is not made simply by making a comparison of two employers and deciding which one should be considered the employer. Instead, each organization is evaluated individually to determine if they are an employer under the MSPA. This approach to employer status was adopted intentionally to hold agricultural employers accountable under the MSPA, even when the workers in question are hired by an independent contractor. Antenor Osnel v. D&S Farms, 88 F.3d 925, 929 (11th Cir. 1996). The intent of the MSPA is to hold an employer accountable, whenever such liability is "fair" based on the facts of the case. Id. (citing Maldonado v. Lucca, 629 F. Supp. 483, 489 (D.N.J. 1986). Therefore, if it is a close call, the Department of Labor (DOL) and the courts will very likely err on the side of finding joint employer status under the MSPA.

The MSPA uses two different tests to determine whether an employer is a joint employer of a worker or group of workers. First, an independent contractor, typically a farm labor contractor (FLC), may be found to be an employee rather than an true independent contractor. If such a finding is made, any employees of the contractor would be considered employees of the agricultural employer. 29 C.F.R. § 500.20(h)(4). In order to determine whether

the contractor is a true independent contractor or an employee, the DOL and the courts will apply the "economic reality test." The economic reality test examines whether the contractor is economically dependent upon the employer. When applying the economic reality test, all of the facts and circumstances of the relationship will be examined. There will be, however, a significant focus on the following factors: who controls the work performed; the contractor's opportunity for profit or loss; the contractor's investment in equipment, materials and employment of other workers; the contractor's specialized skills, if any; the degree of permanency and duration of the relationship; and the extent to which the services rendered are an integral part of the employer's business. 29 C.F.R. § 500.20(h)(4)(i)-(vi).

If the contractor is not an employee, the employer may still face liability under the alternative joint employer test. The second test of joint employer liability examines whether the employer acted in such a way towards the contractor's workers, that the employer, in effect, became the true employer of the workers. The MSPA regulations provide five factors to be considered when determining whether the employer is the true employer of contractor's workers. As with the first analysis, this evaluation examines the economic reality of the circumstances to determine whether the workers are economically dependent on the employer. 29 C.F.R. § 500.20(h)(5)(iii). The factors provided by the regulations are summarized as follows:

1: Whether the employer has the power, either alone or through control of the contractor to direct, control or supervise the worker(s) or the work performed

2: Whether the agricultural employer has the power, either alone or in addition to another employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of payment for the worker(s)

3: The degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue

4: The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training

5: Whether the activities performed by the workers are an integral part of the overall business operation of the employer

6: Whether the work is performed on the employer's premises

7: Whether the employer undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job. 29 C.F.R. § 500.20(h)(5)(iv)(A)-(G).

Tips on How to Avoid...*continued*

The regulations provide that even though this list of factors is provided, the list does not preclude a finding of joint employer status even where none of the factors are present, because the "special aspects" of agricultural work are to be considered in the joint employer analysis. 29 C.F.R. § 500.20(h)(5)(ii). Some other factors that may be considered include: who decides how many workers will perform the job; who determines when the workers start and end the work day; who directs the work and ensures quality control; and the exclusivity of employment relationship.

There is significant liability associated with a finding of joint employer, and there is a significant degree of overlap in the different tests outlined above. Therefore, an employer can, and should, take steps to avoid joint employer status. An employer cannot, by contract, completely eliminate its potential to be considered a joint employer under the MSPA. However, employers should nonetheless seriously consider entering into a written contract with each independent contractor and FLC. The contract should clearly outline the relationships of the various parties. Employers should seek legal counsel when drafting and implementing such contracts.

In addition, because the contract alone will not determine the joint employer question, the employer must interact with the contractor and the contractor's workers in such a manner as to ensure that the workers are economically dependent on the contractor, rather than the employer. For example, utilization of a contractor or FLC that provides services/workers to other agricultural employers will be helpful because the lack of permanency and exclusivity of the relationship between the contractor and the employer and/or the employer and the workers will help avoid a finding of joint employer status. Contractors who provide their own tools and equipment are also more likely to be considered true independent contractors. Employers, in contract and in practice, should not retain the authority to hire, fire or discipline any of the contractor's workers, and the employer should not evaluate the workers' performance. The employer should provide no supervision. There are many other practical steps that an employer can and should take, but in summary, the employer should make it clear that the contractor, and not the employer, exercises absolute control over the workers.

In conclusion, all of the facts and circumstances of the relationship will be examined to determine whether an employer is a "joint employer" under the MSPA, and the DOL will err on the side of finding such a relationship. However, there are certain steps that employers can take, including developing a written contract and taking a hands off approach with the workers, that will help avoid a finding of joint employer status. **mn**