When Are Your Subcontractor's Employees Your Employees?

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In January, the Fourth Circuit Court of Appeals entered its decision in *Salinas v. Commercial Interiors, Inc.,* ruling that a contractor and its subcontractor can be the ?joint employers? of the subcontractor?s worker for Fair Labor Standards Act purposes, Case No. 15-1915, thereby opening the door for potential direct employee type claims against the general contractor by workers downstream in the construction chain and putting independent contractor status in jeopardy (4th Cir, Jan. 25, 2017).

In *Salinas,* the subcontractor had a close relationship with the general contractor, working mostly for this one general contractor. Day to day, the general contractor provided tools, materials and equipment; had its foreman supervise the subcontractor?s employees? work; required those employees to attend its safety meetings; required the subcontractor?s employees to sign in and out with its foreman; and had its foreman direct work to be redone.

Further, work was based on job site needs, and payment was on a time and materials basis or hourly versus a lump sum. Interestingly, the general contractor also provided the subcontractor?s employees with logoed hard hats, vests and sweatshirts and even instructed them to say, if asked, that they worked for the general contractor. On these facts, the court found that a jury could find the general contractor and subcontractor were joint employers, with no single fact being dispositive.

In doing so the Court articulated a new standard, and joint employment exists when: two or more entities share, agree to allocate responsibility for, or otherwise co-determine, formally or informally, directly or indirectly, the essential terms and conditions of a worker?s employment; and the two or more entities combined influence over the essential terms and conditions render the worker an employee as opposed to an independent contractor. Six factors are to be considered:

1. Whether formally or as a matter of practice, the putative joint employers determine, share or allocate the power to direct, control or supervise the work, whether by direct or indirect means;
2. Whether formally or as a matter of practice, the putative joint employers determine, share or

allocate the power, directly or indirectly, to hire or fire the worker or modify the terms and conditions of the worker?s employment;
3. The degree of permanency and duration of the relationship between the putative employers;
4. 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;
5. Whether the work is performed on premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another;
6. Whether formally or as a matter of practice, the putative joint employers jointly determine, share or allocate responsibility for functions ordinarily carried out by an employee, such as handling payroll, providing workers compensation insurance, paying payroll taxes or providing the facilities, equipment, tolls or material necessary to complete the work.

Applying these tests to the facts, one can readily see where common practices in the construction industry, particularly when combined on one job site, can lead to joint employer liability. Also relevant is the fact that these same practices could be construed to make a subcontractor that is providing primarily labor, particularly an individual laborer, an employee. Care should be taken, especially where the same subcontractors are used with regularity and the work is paid hourly. The more control that is exerted and the more the contracted labors looks like an employee, the greater the risk.

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