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Fifth Circuit Limits "Employer" Status Under the FLSA

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On February 29, 2012, the United States Fifth Circuit Court of Appeals affirmed summary judgment in favor of a part-owner of a Houston nightclub company in a bartender's putative class action seeking back wages under the Fair Labor Standards Act (FLSA). The Fifth Circuit found that individual members of limited liability companies are not themselves "employers" under the FLSA. This was the first time in roughly 16 years the court addressed this issue in a published opinion.

Nicholas Gray, a bartender at Pasha Lounge, sued both Pasha Entertainment Group LLC and LLC member Michael Warren Powers in 2008, alleging that he and other bartenders were only paid tips and no wages in violation of the FLSA. The district court in Texas granted summary judgment in Powers' favor, ruling he was not an "employer" as the term is used for purposes of the FLSA.

The FLSA requires, generally, that employees receive a minimum wage and receive compensation at one and one-half times their regular rate for all hours worked over 40 in a week. Unlike the typical doctrines of employment found in Title VII, the ADA or the FMLA, the FLSA generally takes an expansive view of the employer/employee relationship. Under the FLSA, an employee can make a claim against someone other than his employer based on a showing that the person exercised sufficient control over the employee's work. That doctrine is often called "joint employment."

On appeal, the Fifth Circuit agreed Powers was not an "employer" by applying the "economic reality" test to evaluate the employer/employee relationship under the FLSA. This four-part test requires consideration of the power to (1) hire and fire, (2) supervise and control work schedules and conditions of employment, (3) determine the rate and method of payment, and (4) maintain employment records.

The Fifth Circuit emphasized that the "economic reality" test must be applied to each individual or entity alleged to be an employer and each must satisfy the four-part test, and a status-based inference without actual operational control is not enough.

The court noted that Powers visited the club on five or six occasions total during the 17 months the club was open for business. On one occasion he told Gray he was doing a "great job," and on two other occasions he asked Gray to serve specific people while Powers was a patron at the club. Beyond these instances, Gray could not point to any other occasions where Powers "directed" him as a bartender.

Further, while the evidence showed that Powers occasionally signed several pages of pre-printed checks and bartenders casually told him how much they made in tips during his rare trips to the club, it was insufficient to indicate Powers determined employees' rate or method of pay. Finally, there was no evidence that Powers maintained employment records.

With this decision, the Fifth Circuit addressed employer status under the FLSA for the first time in 16 years and, in doing so, made clear that the joint employer doctrine is not without boundaries. Given this ruling, companies with related entities (such as parents and subsidiaries) should take care to structure their operations in a way so as to mitigate any potential exposure under the FLSA.

If you have questions about this case and how the Fifth Circuit's decision may affect your business, please contact the authors of this alert, or any of our nearly 90 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.