MODRALL SPERLING

LAWYERS

Employment Law Alert

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Employment Law at Modrall Sperling

New Mexico presents unique challenges in employment law, and for more than 75 years, the experience of Modrall Sperling has spoken directly to the needs of private and public sector employers across our state. We represent them in a wide variety of matters before federal and state courts, administrative bodies, and the courts of the Navajo Nation.

While we are prepared to litigate as necessary, we use our experience to guide clients in developing stronger policies, trainings and employee handbooks that help prevent litigation in the first place.

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Joint Employment and Overtime Obligations

Generally, an employee is not entitled to overtime pay unless she/he works more than 40 hours a week for a single employer. It is not uncommon, however, for a company which has a subsidiary company to employ some staff to work for both companies. In the course of such an employment arrangement, questions often arise regarding the company's obligation to pay overtime for the hours worked across both companies. For example, if an employee works 40 hours one week for the main company, and during that same week, also works an 8-hour shift for the subsidiary, is that employee entitled to overtime pay for the 8-hour shift worked at the subsidiary? Or since they are two separate businesses, is the employee simply entitled to pay for 8 hours at the regular hourly rate?

To answer that question, it should first be determined whether the employment arrangement is considered "joint employment." CFR section 791.2 provides the following three criteria to determine if a joint employment relationship exists:

- The employers share the services of the employee; or
- One employer acts directly or indirectly in the interest of the other employer in relation to the employee; or
- The employers share control of the employee because one employer controls, or is controlled by, the other employer, or all of the employee's employers are controlled by another company.

The arrangement for sharing services or control of the employee need not be formal to be considered "joint employment." Other factors that are relevant in finding joint employment include, for example, whether there are common officers or directors of the companies; the nature of the common management support provided; whether employees have priority for vacancies at the other companies; whether there are any common insurance, pension or payroll systems; and whether there are any common hiring seniority, recordkeeping or billing systems. *See Chao v. A-One Medical Services, Inc.*, 346 F.3d 908 (9th Cir. 2003). If the arrangement is "joint employment," both employers are responsible, both individually and jointly, with the applicable provisions of the FLSA, including overtime pay. In that case, the overtime should be allocated between the two employers and prorated based on the employee's regular rate of pay.

If the employment arrangement simply involves common paymasters, however, and the requirements of CFR section 791.2 are not satisfied, there is no entitlement to overtime pay. If you have any questions with regard to an employer's obligations to pay overtime to its employees, please contact Anna E. Indahl at anna.indahl@modrall.com or by calling 505.848.1800.

Limiting the Scope of "Joint Employment" Under New Mexico Law

In a recent opinion, the New Mexico Court of Appeals refused to affirm a jury verdict finding that several affiliated entities qualified as either "joint venturers" or "joint employers." *See Wirth v. Sun Healthcare Grp., Inc.*, 2017-NMCA-007, 2016 N.M. App. LEXIS 94. The court's analysis provides insight concerning a parent corporation's exposure to liability under New Mexico law for the actions of a subsidiary entity's employees.

Wirth involved a wrongful death suit, which arose from the death of a nursing home resident. The defendants in the case consisted of Peak Medical Assisted Living, LLC ("PMAL") and three "upstream entities in its ownership chain." *Id.*, ¶ 1. PMAL was the wholly owned subsidiary of Peak Medical, LLC, which was the wholly owned subsidiary of SunBridge Healthcare, LLC, which was wholly owned by Sun Healthcare Group, Inc. After a six-day trial in the case, the jury concluded that all four entities were joint venturers and co-employers of the staff at the facility where the death occurred. *Id.*, ¶ 2.

The upstream entities had apparently drafted policies for the staff at PMAL concerning employee conduct, patient care, and regulatory compliance. *Id.*, ¶ 34. The Court of Appeals found nothing particularly troublesome about this course of conduct, and noted that "in New Mexico, limited liability is the rule and not the exception." *Id.*, ¶ 35. The court explained that "[s]tock ownership, as a matter of course, allows a parent to choose its subsidiary's board of directors, make bylaws, and vote on general matters of corporate governance put forth by the board[;]" and that "it is hornbook law that the exercise of the control which stock ownership gives to the stockholders will not create liability beyond the assets of the subsidiary." *Id.*, ¶ 35.

In determining whether a joint venture existed between the companies, the Court of Appeals looked at whether there was an agreement in place to share profits and losses. *Id.*, ¶¶ 36-37. The court found that it was not enough for a plaintiff to merely show that profits are later captured by parent corporations on the parent's income statement. *Id.* Instead, there must be evidence that the parent corporation has also agreed to share in the subsidiary's losses as well. The court found that the purpose of creating separate entities was to shelter the parent corporation from such losses. *Id.* As a result, an express joint venture agreement that shows that there is intent to share losses will likely be needed to establish liability for a parent corporation under a joint venture theory.

Similarly, the court refused to find that the defendants qualified as co-employers. In doing so, the court explained that while joint employment theories are recognized by some federal employment and labor statutes, even cases interpreting those statutes apply "a strong presumption that a parent company is not the employer of its subsidiary's employees[.]" *Id.*, ¶ 42 (citing *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993)). Accordingly, it is clear that the Court of Appeals is giving credence to the purpose of the corporate structure.

This decision provides a ray of hope to corporations doing business in the state. The decision was issued in the wake of several attempts by federal administrative agencies in 2016 to expand the scope of liability for "joint employers" under various federal employment laws. If you have questions about the *Wirth* opinion or a joint employer issue, please contact Jennifer Bradfute at Jennifer.bradfute@modrall.com or by calling 505.848.1800.