

Massachusetts Supreme Judicial Court Adopts FLSA's Joint Employer Test

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On December 13, 2021, the Massachusetts Supreme Judicial Court (SJC) considered whether the so-called “ABC Test” set forth in M.G.L.c. 149, §148B (“Section 148B”) should be applied to determine whether an entity is a worker’s “joint employer” for purposes of Massachusetts’ wage laws. In *Jinks v. Credico (USA) LLC*, the SJC held that it does not.

The ABC Test provides the standard to determine whether a worker is an employee or an independent contractor. Specifically, Section 148B provides that an “individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:

- (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
- (2) the service is performed outside the usual course of the business of the employer; and,
- (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

In holding that the ABC Test does not apply to the joint employer determination, the SJC rejected the plaintiffs’ argument – namely, that an entity is an individual’s employer so long as the individual is performing



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any service' from which the entity derives an economic benefit. *Jinks v. Credico (USA) LLC*, No. SJ-13106 (December 13, 2021).

Instead, the SJC utilized the test under the federal Fair Labor Standards Act (the "FLSA") to determine joint employer status. The FLSA test considers the totality of the circumstances of the relationship between the individual and the entity. The four factors considered under the FLSA include: "whether the entity (1) had the power to hire and fire the individual, (2) supervised and controlled the individual's work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."

In *Jinks*, plaintiffs were salespersons directly retained by DFW Consultants Inc. ("DFW"), an entity that Credico subcontracted to provide regional direct sales services for its national clients. The SJC applied the four-factor framework from the FLSA to the facts of *Jinks* and concluded that Credico could not be held liable for violations of wage laws as *Jinks*' joint employer because Credico did not exercise the type of control over plaintiffs' employment necessary to conclude it was their joint employer.

Although the SJC's holding clarified that the ABC Test does not apply to the determination of joint employer status under Massachusetts law, employers should be aware of the FLSA's totality of the circumstances test and be cautious when exercising control over workers employed by other entities. As our firm has previously reported, in *Could You be Liable for the Sins of Your Staffing Agency*, employers can indeed be liable for the legal violations committed by their staffing agencies.

If you have any questions regarding the FLSA joint employer test or any other concerns regarding wage & hour law, please contact a member of our Labor & Employment Group.