Washington Supreme Court Recognizes Joint Employer Liability Under the Washington Minimum Wage Act

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On August 7, 2014, the Washington Supreme Court issued its decision in *Becerra v. Expert Janitorial*, ruling that the "joint employer" doctrine is available under the Washington Minimum Wage Act to assess minimum wage and overtime liability against entities that are not the primary employers of underpaid workers. While the ruling is consistent with decisions under the federal Fair Labor Standards Act (FLSA), the Becerra case is another reminder to employers that they may be responsible for the wage claims of their contractors and subcontractors.

The Facts

The plaintiffs performed janitorial work at Fred Meyer stores in the Puget Sound area, mostly at night while the stores were closed and locked. Their employment relationship was complex. Fred Meyer contracted with Expert Janitorial to provide cleaning services. Expert, in turn, subcontracted the work to a series of other entities, which in turn engaged the workers. The subcontractors did not pay minimum wage or overtime pay.

In addition to suing the subcontractors, the plaintiffs also sued Fred Meyer and Expert, claiming that they were really Expert's and Fred Meyer's employees, and therefore should be able to collect lost wages from those companies. The trial court dismissed the claims against Expert and Fred Meyer, but the Supreme Court reversed.

The Analysis

The Supreme Court relied on the FLSA in making its decision. Under the Washington Minimum Wage Act and the FLSA, an employee may have more than one employer, each of which is responsible for paying minimum wage and overtime. The two (or

more) responsible entities are often referred to as joint employers. An entity can be considered an employer or a joint employer if various factors are met. The Supreme Court identified 13 non-exclusive factors:

1. The nature and degree of control of the workers;
2. The degree of supervision, direct or indirect, of the work;
3. The power to determine the pay rates or the methods of payment of the workers;
4. The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;
5. Preparation of payroll and the payment of wages;
6. Whether the work was a specialty job on the production line;
7. Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes;
8. Whether the "premises and equipment" of the employer are used for the work;
9. Whether the employees had a business organization that could or did shift as a unit from one worksite to another;
10. Whether the work was "piecework" and not work that required "initiative, judgment or foresight;"
11. Whether the worker had an "opportunity for profit or loss depending upon [his or her] managerial skill;"
12. Whether there was "permanence" the working relationship; and,
13. Whether "the service rendered is an integral part of the alleged employer's business."

Unfortunately, the Supreme Court did not apply these standards to the facts at issue. Instead, the Supreme Court sent the case back to the trial court to apply the factors.

Impact on Companies and Government Bodies

The *Becerra* case is only the latest demonstration that even well-meaning companies and government bodies may be held responsible for the labor and employment violations of their contractors and subcontractors. However, the entity seeking services may not know enough of the facts to predict how a court might apply the 13 factors listed above.

Possible steps to reduce risk might include:

- Investigate the solvency and track record of any contractor.

- Bar the contractor from further subcontracting work without your consent.
- Ensure that the agreement with the contractor identifies the contractor as the entity responsible for paying wages in conformity with law.
- Include strong indemnification provisions in the agreement so that the contractor is responsible for defense of claims and any liability or settlement.
- Determine whether insurance coverage is available.

If you have any questions regarding application of *Becerra* to your workplace, please contact any member of the Foster Pepper Employment & Labor practice.