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The 'Joint Employer' Problem: Expanding Targets of Liability in Motion Picture Wage and Hour Cases

Allen B. Grodsky is a partner at Grodsky & Olecki LLP in Santa Monica and specializes in entertainment and business litigation.

When a studio or production company produces a motion picture, it almost always creates a single purpose entity to enter into contracts for the production. For example, if a studio were making a movie called "The Entertainment Litigator," it would almost certainly create a single purpose entity called something like "The Entertainment Litigator LLC," which would hire the cast and crew, contract with the unions, pay location fees, and enter into contracts with other third party vendors for the movie. Though there may be other reasons for creating such single purpose entities, a primary reason is to limit liability to the single purpose entity and not risk that other studios and production companies involved in the movie become liable for obligations incurred in the production or distribution of the movie.

This single purpose entity concept works well to limit liability for studios and production companies in most situations. But if the studios and production companies are not careful, there may still be a risk of liability for federal employment claims under the Fair Labor Standards Act (FLSA), which provides a right to sue employers for failure to properly and timely pay minimum wage or overtime, among other things, and which provides steep penalties for violations. Plaintiffs' employment lawyers increasingly bring FLSA claims for minimum wage and overtime violations in connection with the production of motion pictures. And, in those lawsuits, they do not sue only the single purpose entities that technically employ the cast and crew on the movie; rather, they also seek to hold liable studios and production companies otherwise involved in the production of the movie.

Plaintiffs' lawyers do so using the FLSA "joint employer" doctrine by which "any person acting directly or indirectly in the interest of an employer in relation to an employee" is considered an employer. 29 U.S.C. Section 203(d). In other words, under the FLSA, a company does not have to be the entity signing or issuing the paychecks, or a party to employment contracts with the cast or crew, to be liable for wage and hour violations.

Few, if any, published cases applying the FLSA's joint employer doctrine to the motion picture context exist. To the contrary, most of the cases involve clothing company sweatshops, farm workers being mistreated by their employers, and other inapposite situations where companies have created "sham employers" who do the dirty work but have little or no assets. In most of these cases, the courts make broad decisions to hold these companies liable, exemplifying the old saying "bad facts make bad law." Plaintiffs' lawyers have been trying to fit the movie-making business into the broad language of these decisions from other industries. As a result, studios and production companies need to take extra care to make sure that there is no legitimate argument that they are a "joint employer" of the cast and crew hired by the single purpose entity. Specifically, the studios and production companies must look at four areas when beginning production on a motion picture to make sure they are not considered joint employers.

First, courts have held that an entity is more likely to be a joint employer if it had the power to hire and fire the employees at issue. This can be tricky. It is not uncommon that employees from the studio or production company also serve as producers on the movie and make hiring and firing decisions. *Before* any hiring or firing takes place, each of those producers should sign a contract for producing services with the single purpose entity. Persons who are not officially employed by the single purpose entity should not have anything to do with hiring or firing. Rather, contemporaneous records should be created of every individual participating in the interview process and the

ultimate hiring decision for each cast and crew member. Finally, each cast and crew member should sign a written employment deal memo with the single purpose entity, stating the terms (at will or for cause) under which the single purpose entity can fire the employee.

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Second, courts look to see if the alleged joint employer supervised work schedules or conditions of employment for the employees on a day-to-day basis. Naturally, it is important that the supervisors all be employed by the single purpose entity. But it is also a good idea to have the employment deal memo identify that employee's supervisor (for example: "You will report to the line director") so that the employee cannot later dispute this fact.

Third, courts look to see whether the alleged joint employer determined the rate and method of payment; if so, the court is more likely to consider it a joint employer. Typically, this factor will already weigh in favor of the studio or production company. For example, usually it is the single purpose entity that enters into contracts with the various unions (and therefore fixes the rate of pay). For non-union or supervisory employees, pay rate decisions should be made only by employees of the single purpose entity and those decisions - including who made the decision - should be documented.

Finally, courts want to know who maintained employment records because whoever did is more likely to be a joint employer. Most movie productions will use a payroll service to pay cast and crew. To avoid problems, it makes sense to use a different payroll service than that used by the studio or production company. Or, if the same payroll company is used, it is essential that an entirely separate account is set up, so that payroll for the studio or production company is not combined with payroll for the movie production. Similarly, studio and production companies should not use in-house employees to do the production accounting; they must make sure there is a separate production and post-production accountant hired by the single purpose entity.

These simple steps can protect a studio and production company from being considered a joint employer on an FLSA claim. In those situations where the movie flops, and creditors will have a hard time trying to collect from the single purpose entity, the last thing a studio or production company will want is to get pulled into an employment dispute and risk being held a joint employer and having to cough up even more money for a losing proposition.