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## **MA independent contractor test - by De Oliveira and Dickman**

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On December 13, 2021, the Supreme Judicial Court of Massachusetts (SJC) issued a decision in *Jinks v. Credico (USA) LLC*, holding that Massachusetts courts must apply the Fair Labor Standards Act (FLSA) test when deciding whether an entity is a joint employer—not Massachusetts' independent contractor test.

The plaintiff employees in the case were salespersons directly retained by DFW Consultants, Inc. (DFW). The defendant, Credico (USA) LLC, (Credico) is a client broker for independent direct marketing companies. DFW subcontracted with Credico to provide regional direct sales services for its national clients.

Credico and DFW had entered into a 2015 services agreement, which provided that DFW retained exclusive control over its labor and employment practices, including policies relating to wages and working conditions, and the right to hire and assign its employees.

Plaintiffs filed suit, alleging that Credico, as their joint employer, violated Massachusetts' independent contractor statute and wage laws. Since Credico was not the plaintiffs' "direct employer," it would not ordinarily be liable for the plaintiffs' claim for alleged independent contractor

misclassification—unless it was a joint employer.

The SJC ultimately granted Credico's motion for summary judgment on all of plaintiffs' claims, concluding that Credico was not a joint employer.

Plaintiffs appealed. On appeal, plaintiffs argued that the SJC should apply the independent contractor statute test, otherwise known as the ABC test, to determine whether Credico was a joint employer.

Under the ABC test, an individual who performs service for an entity that derives an economic benefit is an employee (not an independent contractor)—unless the following factors are met:

- The individual is free from control and direction in connection with the performance of the services, both under his contract for the performance of service and in fact; and
- The service is performed outside the usual course of the business of the employer; and
- 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.

The SJC did not agree with the plaintiffs' argument that the ABC test should apply to determine whether Credico was a joint employer. Indeed, the SJC noted that the ABC test determines who controls an individual for purposes of the wage laws, but it does not determine whether an individual is subject to the control of multiple entities. Using this test in a joint employer analysis, according to the court, "would be rather like using a hammer to drive in a screw: it only roughly assists the task because the hammer is designed for a different purpose."

Instead, the SJC was persuaded that the FLSA, the model for Massachusetts' wage laws, offers the appropriate test to determine whether an entity is a joint employer. The FLSA's "totality of the circumstances" test examines the following four factors:

- Whether the alleged employer (1) had the power to hire and fire the employee; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.

This test, according to the SJC, is the correct test that should be applied when deciding whether an entity is a joint employer—not the independent contractor test. It bears mentioning that no one factor is dispositive of the issue. After adopting this standard, the SJC concluded that the plaintiffs in the underlying case could not satisfy any of the FLSA factors.

This case resolves what had been unsettled law in Mass. Business entities should keep the applicable joint employer test in mind when contracting with other business entities to ensure that they are not running afoul of Massachusetts' wage and hour laws. Employers with questions should consult with a K&S employment attorney.

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