\n\n"); ubertags_renderMarkup(container, bezen.nix);

Co-owner Who Has No Operational Control Over Employees Is Not 'Employer'

3/19/2012 By Mina Madani

A member of a limited liability corporation (LLC) who was not involved in the day-to-day operation of the business was not an "employer" under the Fair Labor Standards Act (FLSA), the 5th U.S. Circuit Court of Appeals held.

Nicholas Gray sued his former employer and one of the owners of the nightclub, Michael Powers, for violating the minimum wage standards under the FLSA. Gray alleged that he and his fellow bartenders were not paid an hourly wage and were compensated solely by tips. Gray asserted that Powers was a supervisor, although Powers was not involved in the club's day-to-day operations. Powers was an original member of the LLC, contributing money and supervising the remodeling of the nightclub. Aside from that, Powers' involvement was minimal. He rarely even visited the club.

The district court ruled for Powers, holding he was not an employer under the FLSA, and the 5th Circuit affirmed. The FLSA requires employers to pay their employees a minimum wage. Tipped employees must receive a wage equal to the minimum wage, though tips can be counted as a part of that wage as long as the employer pays the tipped employee a minimum of $2.13 per hour.

An employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee. To evaluate whether there is an employer/employee relationship, the 5th Circuit uses the economic reality test. This test originated in the U.S. Supreme Court's holding that "economic reality" should govern the determination of employer status under the FLSA.

To determine whether an individual or entity is an employer, the court considers whether the alleged employer: possessed the power to hire and fire the employees, supervised and controlled employee work schedules or conditions of employment, determined the rate and method of payment, and maintained employment records. The district court determined, and the 5th Circuit confirmed, that based on this four-factor economic reality test, Powers was not an employer under the FLSA. Powers was simply not sufficiently involved in the operation of the business to be an employer.

Merely being an officer or shareholder does not subject an individual to FLSA liability. Those who have operating control over employees may be individually liable for FLSA violations. An individual's operational control can be shown through the four factors of the economic reality test. While each element need not be present in every case, the court declined to adopt a rule that would potentially impose individual liability on all shareholders, members and officers of entities that are employers under the FLSA based on their position rather than the economic reality of their involvement.

Gray v. Powers, 5th Cir., No. 10-20808 (Feb. 29, 2012).

Professional Pointer: This case serves as a cautionary tale for a shareholder who wants to be hands-on in the operation of the business. Exerting too much control may make the individual liable under the FLSA.

Mina Madani is an attorney with Neel, Hooper and Banes, P.C., the Worklaw® Network member firm in Houston.

Society for Human Resource Management

1800 Duke Street
Alexandria, Virginia 22314 USA

Phone US Only: (800) 283-SHRM (7476)
Phone International: +1 (703) 548-3440

TTY/TDD (703) 548-6999
Fax (703) 535-6490

Questions? Contact SHRM
Careers Careers @ SHRM

\n\n\n"); ubertags_renderMarkup(container, bezen.nix); \n"); ubertags_renderMarkup(container, bezen.nix); \n\n\n"); ubertags_renderMarkup(container, bezen.nix);