

Joint Employer Responsibility Between Growers and Labor Contractors

Presented by:

Anthony P. Raimondo

McCormick, Barstow, Sheppard, Wayte & Carruth LP

(559) 433-1300

anthony.raimondo@mccormickbarstow.com

Terrence O'Connor

Noland, Hammerly, Etienne & Hoss

(831) 424-1414

toconnor@nheh.com

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Introduction

- Historically growers of agricultural commodities have used the services of farm labor contractors (FLCs) for the growing and harvesting of such commodities
- It has always been assumed that the workers supplied by the contractors were those of the contractor not the grower
- This assumption is now being challenged as a result of recent lawsuits and court decisions

Advantages of a Grower-Farm Labor Contractor Relationship

- Advantages for Grower
 - Obtain steady supply of qualified workers while avoiding problems of being considered an “Employer”
- Advantages for FLCs
 - Conduct an independent business with the opportunity to maximize profit based upon workers provided

Licensing Requirements

- FLC is required to be licensed in both state and federal law (California Labor Code §1682, *et. seq.*; Migrant Seasonal Worker Protection Action (MSWPA), 29 U.S.C. 1801, *et. seq.*)

Statutory Definitions of “Employer”

- FEDERAL LAW
- MSWPA
- The term “agricultural employer” means “any person who owns or operates a farm, ranch, processing establishment, cannery, gen, packing shed or nursery, or who produces or conditions seed, and who either recruiters, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker” (29 U.S.C. 1802(2))

Definition of Employer, California Law

- Industrial Welfare Commission Order 14 regulating “AGRICULTURAL OCCUPATIONS” defines “Employer” as “...any person as defined in section eighteen of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours or working conditions of any person.”
- The California Supreme Court in *Martinez v. Combs* 49 Cal.4th 35 (2010) ruled that “to employ” means “(a) to exercise control over wages, hours or working conditions, or (b) to suffer or permit work, or (c) to engage, thereby creating a common law employment relationship.”

Definition of Employer, California Law - Continued

- California Agricultural Labor Relations Act (ALRA): The ALRA defines employer as: (a) California Labor Code §1140.4(c): “...any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, or individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a farm labor contractor. The employer engaging such farm labor contractor or person shall be deemed the employer for all purposes under this part.” (Emphasis added.)
- This exclusion applies only to cases arising under the ALRA.

Class Action Lawsuits

- Recently a number of class action lawsuits alleging wage and hour violations have been filed against growers and FLCs
- The cases are alleging that the growers are responsible for the actions of the FLCs because (a) the FLCs are not “independent contractors” and/or (b) they are otherwise “joint employers” with the growers
- Bottom line – “deep pocket” theory of recovery. Use of an FLC is not a defense to grower liability

Arredondo v. Delano Farms Company (U.S.D.C. Ed. California) (2013 WL 459 234)

- Class action lawsuit brought against grower, Delano Farms, and two FLCs utilized by the grower
 - Plaintiff alleged violations of California Labor Code, California Wage Order 14 and MSWPA
 - Has been certified as a class
 - February 5, 2013 – court issued decision on the issue of who was the “employer” of the employees in the class. Delano Farms or labor contractors?
 - Court ruled that Delano Farms was “joint employer” along with labor contractors
- Impact: Delano Farms could be jointly and severally liable for any wage and hour violations of the labor contractors

Arredondo v. Delano Farms Company - Continued

- Analysis of court's ruling: two issues
 - Independent contractor status
 - Joint employer status
- Plaintiffs were alleging that the FLCs were not truly “independent contractors” meaning the FLCs’ employees were the employees of Delano Farms. In the alternative, Plaintiffs claimed there was a “joint employer” relationship between Delano Farms and the FLCs
- The Court analyzed both of those factors

Arredondo v. Delano Farms Company - Continued

- Independent contractor review
 - Were the FLCs “independent contractors” or in fact employees of Delano?
- There is no one determining factor as to the existence of an independent contractor relationship. The Court considered the following criteria:
 - Control as to the manner in which the work is performed;
 - The FLCs opportunity for profit or loss depending upon managerial skill;
 - The FLCs investment in equipment or materials required for the task;
 - The extent to which the FLCs provided services for growers other than Delano Farms;
 - The permanence and duration of the working relationship between the FLCs and Delano Farms
 - The extent to which the FLCs services were an integral part of the business of Delano Farms

Arredondo v. Delano Farms Company - Continued

- Court's findings
 - The Court found that an independent contractor relationship existed
- Joint employer analysis
 - The Court reviewed this issue using both “regulatory” and “non-regulatory” criteria
- Regulatory criteria (U.S. DOL regulations interpreting MSWPA – 29 CFR, Section 500.20(h)(5)(i)(v))
 - The regulatory factors were as follows:
 - Whether grower has the power, either independently or through the FLC, to control or supervise the workers or the work performed;
 - Whether grower has the power to directly or indirectly hire, fire, or modify employment conditions and methods of payment;
 - The degree of permanency of the relationship;
 - The extent to which the services rendered by the workers are repetitive, rote, and requiring skills which are acquired with relatively little training;
 - Whether the activities performed by the workers are an integral part of the overall business operation of the grower

Arredondo v. Delano Farms Company - Continued

- Non-regulatory factors
 - The Court considered the following “non-regulatory factors” in determining whether or not a joint employer relationship existing
 - Whether the work was a specialty job;
 - Whether the responsibility under the contracts could be interchanged with different labor contractors without materially changing the relationship;
 - Whether the premises and equipment of the grower are used for the work;
 - Whether the FLC had a business organization that could shift from one work site to another;
 - Whether the work was piece work as opposed to work that required a higher level of skill;
 - Whether the FLC had an opportunity for profit or loss depending upon the FLC’s skill;
 - The extent to which the relationship was permanent;
 - The extent to which the service was an integral part of the grower’s business.

Arredondo v. Delano Farms Company – Ruling of the Court

- The Court found that a joint employer relationship existed.
- The case can now proceed to trial. If wage and hour liability is established both Delano Farms and the FLC could be considered liable.
- What is wrong with the ruling?

Recommendations for Growers to Maintain an FLC Relationship that Avoids Liability for Actions of the Contractor

- Perform a “self audit” as it relates to FLC relationships using the factors noted in *Arrendondo*
- Review, redraft FLC agreements in light of the factors listed in *Arrendondo*
- Ensure viability of FLCs particularly as it relates to “independent contractor” issue
- Ensure FLCs and foremen have proper state/federal licenses
- Consider indemnification agreements as part of FLC contract
- Carefully review the legal entity that is retaining the services of the contractor
- Consider EPLI insurance for grower and/or contractor
- Carefully review with counsel

Questions and Answers

Thank you!

Scott A. Wilson, Esq.

Law Offices of Scott A. Wilson

711 8th Avenue, Suite C

San Diego, CA 92101

619-234-9011 – office

Email: scott@pepperwilson.com

Website: www.pepperwilson.com

