COLORADO
Department of
Labor and Employment

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Interpretive Notice & Formal Opinion ("INFO") # 11A:

Individual Liability under the Colorado Wage Act (CWA) and Healthy Families and Workplaces Act (HFWA)

Overview

As of January 1, 2020, employees can bring a claim for unpaid wages under the Colorado Wage Act (CWA) not only against an employer's *business*, but also against certain *individuals* — "person[s]" who also qualify as "employers." C.R.S. 8-4-101(6). For example, an employee working as a mechanic at "Smith's Auto Body" could bring a wage claim simultaneously against *both* the business ("Smith's Auto Body LLC") and the owner who manages the business ("Bob Smith"). If an individual qualifies as an "employer," they are personally (*i.e.*, "individually") liable – legally responsible – along with the business, for paying the *full amount owed* for any wage-and-hour violations, including any fines and penalties. This is known, in longstanding law that is well-established both inside and outside of labor law, as "joint and several liability." If a party that is jointly and severally liable for wage violations does not or cannot pay the full amount owed, such as if one party goes bankrupt but the other does not, then the other liable party (or parties) must still pay the full amount owed, as the law does not assign a proportional amount to each liable party (however, a party can consider payments made by other liable parties in determining its own obligations). And if a person is individually liable, their personally-held assets – personal bank accounts, personal or real property, etc. – can be seized or garnished to satisfy the liability, and any judgment remaining unpaid can be reported to credit reporting agencies. An individual person may also be jointly and severally liable for violations of the Healthy Families and Workplaces Act (HFWA), because its definition of "employer" mirrors the CWA's definition. *See* C.R.S. 8-13.3-402(4).

Background

In *Leonard v. McMorris*, the Colorado Supreme Court held that officers and agents of a corporation could not be individually liable for unpaid wages that the corporation owed to its employees, under the then-existing CWA "employer" definition.[1] But in 2019, the Colorado legislature specifically criticized *Leonard* in explaining its adoption of the same "employer" definition found in the federal Fair Labor Standards Act (FLSA): "Existing law, as interpreted by the Colorado Supreme Court in *Leonard v. McMorris*, 63 P.3d 323 (2003), does not provide sufficient protections for workers and their families...[i]n order to protect all workers, it is necessary to close loopholes that allow for the exploitation of human labor for profit." 2019 Colo. Legis. Serv. Ch. 182, House Bill 19-1267 ("H.B. 19-1267"). Thus, H.B. 19-1267 replaced the CWA's prior "employer" definition, which the Colorado Supreme Court had interpreted as excluding individual liability, with the definition "set forth in the federal 'Fair Labor Standards Act', 29 U.S.C. Sec. 203(d)," which, as explained below, explicitly provides for individual liability. *Id. Leonard* and other cases before H.B. 19-1267 that had disallowed individual wage liability have thus been legislatively overruled and abrogated, respectively. *Id.* (codified at C.R.S. 8-4-101(6)).

Legal Standard

As of January 1, 2020, the CWA defines "employer" in relevant part as follows: "'Employer' has the same meaning as set forth in the federal 'Fair Labor Standards Act' [FLSA], 29 U.S.C. sec. 203(d)...." C.R.S. 8-4-101(6). Under Section 203(d) of the FLSA, an "employer" includes "*any person* acting directly or indirectly in the interest of an employer in relation to an employee," and the FLSA also defines a "person" as "*an individual*, partnership, association, corporation, business trust, legal representative, or any organized group of

[1] *Leonard*, 63 P.3d 323, 325-26 (Colo. 2003); *see also Fuentes v. Compadres, Inc.*, 2018 U.S. Dist. LEXIS 48307, at *25-26, 2018 WL 1444209, at *10 (D. Colo. Mar. 23, 2018) (because defendants were "officers, or at the very least agents" of the corporate defendants, "pursuant to *Leonard*" they could not be personally liable for unpaid wages under the CWA).

persons." 29 U.S.C. 203(a),(d) (emphasis added). "The term 'person' is … broadly defined under the FLSA to include … an 'individual.' Thus, an individual who acts directly or indirectly in the interest of an employer in relation to an employee, including an individual corporate officer, owner, participating shareholder, manager, or supervisor, may be subject to individual liability for FLSA violations."[2]

In determining whether an individual is an "employer" who is liable for CWA or HFWA violations, the Division is guided by multiple existing federal court decisions applying the FLSA's "employer" definition, which Colorado now has adopted in state law.[3] Specifically, the Division applies a four-factor "economic realities" test that considers whether the individual exercises sufficient "operational control" over an employer's business and an employee's terms and conditions of employment, including:

(1) the individual's power to hire and fire employees;

(2) the extent to which the individual supervises or controls employee work schedules or conditions of employment;

(3) whether the individual determines the rate and method of employee payment; and

(4) whether an individual maintains employee records.[4]

In making this determination, "[n]o one factor is dispositive," and the fact-finder must also "consider the economic realities and the circumstances of the whole activity."[5] "Since economic reality is determined based upon all the circumstances, any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition."[6]

Accordingly, an individual need not have *exclusive* control as to any of the four factors, and can exercise control indirectly — for example, by managing other supervisors or managers.[7] Because of the holistic nature

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[2] Ellen C. Kearns et al., *The Fair Labor Standards Act*, at 3-86 (3d ed. 2015). *See, e.g., Lopez v. Next Generation Constr. & Envtl., LLC*, No. 16-cv-00076-CMA-KLM, 2016 U.S. Dist. LEXIS 154769, at *7-8, 2016 WL 6600243, at *4 (D. Colo. Nov. 8, 2016) (noting that "the FLSA contemplates individual liability...on the ground that the particular individual [person] falls within the FLSA's definition of 'employer' and thus shares statutory obligations with the corporation itself.") (citing *Donovan v. Agnew*, 712 F.2d 1509, 1511-12 (1st Cir. 1983) ("The overwhelming weight of authority" provides that an individual, "along with the corporation," can be held jointly and severally liable for FLSA violations)); *Hodgson v. Okada*, 472 F.2d 965, 966, 968–69 (10th Cir. 1973) (affirming finding that, in addition to incorporated farm, individual owners and a crew leader were also "employers" who were individually liable for unpaid wages under the FLSA).

[3] Based on the caselaw to date, the Division relies most significantly on decisions by U.S. District Courts within the federal court of appeals with jurisdiction over Colorado, the Tenth Circuit. *See Phillips v. Carpet Direct Corp.,* No. 16-CV-02438-MEH, 2017 U.S. Dist. LEXIS 4828, at *12-13, 2017 WL 1216302017 WL 121630, at *5 (D. Colo. Jan. 10, 2017) (under the FLSA, an "'employer' is recognized as either an individual [person] or an entity."); *Lopez*, 2016 U.S. Dist. LEXIS 154769, at *7-8, 2016 WL 6600243 (same); *Powers v. Emcon Assocs., Inc.*, No. 14-cv-03006- KMT, 2016 U.S. Dist. LEXIS 36874, at *17, 172016 WL 1111708, at *5-6 (D. Colo. Mar. 22, 2016) ("[A] corporate officer may be an employer within the meaning of the FLSA (and thus [is] jointly and severally liable along with the corporation.)"); *Fuentes*, 2018 U.S. Dist. LEXIS 48307, at *10, 2018 WL 14442092018 WL 1444209, at *4 ("Separate persons or entities that share control...may be deemed joint employers under the FLSA).

[4] *Inniss v. Rocky Mountain Inventory, Inc.*, 385 F. Supp. 3d 1165, 1167 (D. Colo. 2019).

[5] *Id.* at 1168 (internal quotation marks omitted); *see also Goldberg v. Whitaker House Coop., Inc*., 366 U.S. 28, 33 (1961) ("economic reality", not "technical concepts," governs the evaluation of employment relationships under the FLSA).

[6] *Herman v. RSR Sec. Servs*., 172 F.3d 132, 139 (2d Cir. 1999) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

[7] *Id.*

of the inquiry, the Division also considers any other facts about the employment relationship that shed light on the extent and nature of an individual's "operational control," such as the person's: (1) ownership interest in the employer's business; (2) job title and work tasks; (3) involvement in reviewing or approving potentially unlawful policies or practices; (4) awareness of (and response to) potential wage-and-hour (or HFWA) violations; and (5) scope of decision-making authority, including the authority to make financial decisions for the employer, such as the decision to borrow money for the business or continue operations in the face of financial hardship.[8]

Example:

Cory works as a mechanic for Smith's Auto Body, LLC, which is co-owned by Bob Smith and his best friend, Sam Jones. Cory worked over 40 hours a week and wasn't paid overtime. He raised the issue with one of the shop managers, but when he failed to hear a response, he brought the issue directly to Smith's attention. After that does not resolve the issue, he files a CWA claim for his unpaid overtime wages against all three of (A) Smith's Auto Body, LLC, (B) Bob Smith, and (C) Sam Jones. Cory wins a decision that he was entitled to unpaid overtime, but soon after, Smith's Auto Body, LLC, filed for Chapter 11 bankruptcy.

Sam Jones was a "hands-off" investor who lived outside Colorado and had no involvement in operating the business. Bob Smith was the "general manager" of the shop. Smith did not directly supervise mechanics, but came into the shop about once a week "to check in on things," and he managed the other two shop managers — who, in turn, supervised mechanics, including Cory. Smith did not oversee employee scheduling, or directly hire or fire employees, but shop managers would notify him when they were considering hiring a new mechanic, and mechanics were hired at rates Smith approved in advance. Smith also made all financial decisions for Smith's Auto Body, LLC, including reviewing its financial records, paying its bills and income taxes, and signing off on business loans to purchase new shop equipment, such as vehicle lifts. Smith did not maintain or review employee personnel records, but supervised the managers who did so.

Under these circumstances, Smith – but not Jones – would be individually liable. Jones's involvement in the business was very limited; financial contribution to a business alone is not enough. In contrast, Smith's management role was extensive, including exercising enough "operational control" to qualify as an "employer," and consequently: (1) Smith would be individually liable for any amounts owed to Cory for wage-and-hour violations; (2) if Smith's Auto Body, LLC, does not pay any of the overtime liability, Cory's claim against Smith would not be affected by the bankruptcy of Smith's Auto Body, LLC, and Smith would remain independently liable for the full amount due; and (3) if Smith does not pay the full amount due, his personal assets, such as his personal bank accounts, real property, etc., could be garnished or seized to satisfy the liability, and his personal credit score could be negatively affected if the judgment remains an unpaid liability.

For Additional Information:

Visit the Division's website, call 303-318-8441, or email cdle_labor_standards@state.co.us.

[8] *Id.; see also Lopez*, 2016 U.S. Dist. LEXIS 154769, at *9, 2016 WL 6600243, at *4 (internal quotation marks and citation omitted) ("Courts have also looked at the level of operational control the individual has over the company, including whether the individual is involved in the day-to-day operation."); Ellen C. Kearns *et al.*, *The Fair Labor Standards Act*, at 3-86 - 3-87 (3d ed. 2015) ("The key consideration in determining individual liability is whether the individual has exerted sufficient operational control over significant aspects of the employer's *employment policies*. This is a factual matter to be determined on a case-by-case basis.").