

4 PJI 25 | MISCELLANEOUS ISSUES - JOINT EMPLOYERS

It is not always clear whether the law considers someone an "employee," and it is not always clear who the law considers someone's "employer." Some people, for example, perform services for others while remaining self-employed as independent contractors. Others are clearly employees. But it may not always be clear who is an employer of the employee. Sometimes an employee may have more than one employer at the same time.

So, in this case, you must decide: Was [Plaintiff] [Defendant]'s employee as well as an employee of [name of alleged other employer]? You should answer this question in light of the economic realities of the entire relationship between the parties based on the evidence.

Consider all the following factors to the extent you decide that each applies to this case:

- (a) the nature and degree of control over the employee and who exercises that control;
- (b) the degree of supervision, direct or indirect, over the employee's work and who exercises that supervision;
- (c) who exercises the power to determine the employee's pay rate or method of payment;
- (d) who has the right, directly or indirectly, to hire, fire, or modify the employee's employment conditions;
- (e) who is responsible for preparing the payroll and paying wages;
- (f) who made the investment in the equipment and facilities the employee uses;
- (g) who has the opportunity for profit and loss;
- (h) the employment's permanence and exclusiveness;
- (i) the degree of skill the job requires;
- (j) the ownership of the property or facilities where the employee works; and
- (k) the performance of a specialty job within the production line integral to the business.

Consideration of all the circumstances surrounding the work relationship is essential. No single factor is determinative.



Nevertheless, the extent of the right to control the means and manner of the worker's performance is the most important factor.

((Rev. 03/2022) | *Judicial Council of the United States Eleventh Judicial Circuit*)

Annotations and Comments

This instruction is derived from *Aimable v. Long and Scott Farms*, 20 F.3d 434 (11th Cir. 1994), which applies the economic realities test. See also *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996) and *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999) (per curiam), which were “vertical” joint employment cases. For “horizontal” joint employment issues under the Fair Labor Standards Act, consideration of the regulations may be of assistance. See 29 C.F.R. §791.2(a).

Under the regulations:

Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

- (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
- (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
- (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R. §791.2(b) (footnotes omitted).

The Eleventh Circuit determined that the question of employer status under the ADEA intertwines jurisdiction and the merits and so must be resolved by the jury. *Garcia v. Copenhaver, Bell & Assoc.*, 104 F.3d 1256, 1264 (11th Cir. 1997). Similarly, in *Morrison v. Amway Corp.*, 323 F.3d 920, 930 (11th Cir. 2003), the court held that eligible employee status under the Family Medical Leave Act is not solely a jurisdictional issue. Rather, eligible employee status is to be decided by a jury or under Federal Rule of Civil Procedure 12(b)(6) or Federal Rule of Civil Procedure 56. *Morrison*, 323 F.3d at 930.

