

Staying Out of Court: Lessons Gleaned from Recent Agriculture Cases on Joint Employment and FLSA Cases

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Overview – Review of Recent Cases

- Joint Employment
 - Garcia-Celestino v. Ruiz Harvesting, Inc.
- FLSA “Agriculture” Overtime Exemption
 - Acosta v. Bland Farms Prod. & Packing, LLC
- H-2A and FLSA Wage Issues
 - Ulloa v. Fancy Farms, Inc.
- Management of Overtime
- Impact of Farm Labor Contractor

Joint Employment: Garcia-Celestino

- 38 migrant farm workers sued.
- Ruiz Harvesting, Inc. ("RHI") – labor provider.
- Consolidated Citrus Limited Partnership ("CCLP") was orange grove owner.
- Claimed RHI and CCLP were joint employers under FLSA and Contract

Joint Employment: Garcia-Celestino

- FLSA Claim – Did not meet minimum wage.
- Contract claim was based on H-2A Visa Job Clearance Orders filed with USDOL.
 - (1) Defendants required Plaintiffs to kick back the supplemental wages (threat of deportation by RHI).

Joint Employment: Garcia-Celestino

- Contract claim was based on H-2A Visa Job Clearance Orders filed with USDOL.
 - (2) Defendants automatically deducted an hour from each picker's recorded work time to account for travel time between the grove check-in gate and the work site; and
 - (3) Defendants failed to fully reimburse Plaintiffs for their inbound and outbound transportation, visa, and subsistence expenses.

Joint Employment: Garcia-Celestino

- Labor Provider Settled; Case Went to Trial Just as to the Grove Owner
- Trial Court Found Grove Owner Liable under FLSA and Contract Claim Joint Liability Claim
 - \$2,722.20 on the individual FLSA claims
 - \$192,434.34 on the class-wide breach of contract claims

Eight Joint Employment Factors under FLSA

- (1) The nature and degree of control of the workers;
- (2) The degree of supervision, direct or indirect, of the work;
- (3) The power to determine the pay rates or the methods of payment of the workers;
- (4) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;

Eight Joint Employment Factors under FLSA

- (5) Preparation of payroll and the payment of wages;
- (6) Ownership of facilities where work occurred;
- (7) Performance of a specialty job integral to the business; and
- (8) Investment in equipment and facilities.

Joint Employment Factors Under Common Law

- (1) The source of the instrumentalities and tools;
- (2) The location of the work;
- (3) Whether the hiring party has the right to assign additional projects to the hired party;
- (4) The extent of the hired party's discretion over when and how long to work;

Actual Factors Considered

- Practices such as assigning worksites and establishing production goals serve to regulate only the ends rather than the manner and means of work, having no effect on workers' moment-to-moment tasks – CAUTION – May be different under FLSA.

Actual Factors Considered

CCLP's harvesting supervisors checked on each crew of workers for a few ten-to-fifteen-minute increments throughout each workday, during which they "confirmed that the crew was picking in the right place," "tested the fruit," "scanned the block to see if any fruit had been mistakenly left on the trees," "and checked for garbage, debris ..., and obvious safety hazards."

Actual Factors Considered

- Company officials did not interact with the workers directly; rather, they notified Ruiz Harvesting supervisors when any issues required attention. And Ruiz Harvesting then ascertained how best to fix the situation.
- Mandatory decontamination procedures, which the company implemented in an effort to prevent the spread of citrus canker disease, was not controlling.

How does your FLC Contract Matter?

- “will not direct employees of [Ruiz Harvesting] in any fashion, but will communicate with [Ruiz Harvesting] regarding timing and quality control of harvest operations on [Consolidated Citrus’s] groves.”
- All workers Ruiz Harvesting hires “shall be subject to the exclusive control and direction of [Ruiz Harvesting].”

FLSA's General Rule

- Under the Fair Labor Standards Act ("FLSA"), employers must generally pay their employees overtime wages when the employees work more than 40 hours in a week. [29 U.S.C. § 207\(a\)\(1\)](#).
- Based on seven (7) day workweek

Agriculture Overtime Exemption

- Employees “employed in agriculture” are not entitled to overtime wages. [29 U.S.C. § 213\(b\)\(12\)](#).
- Therefore, availability of overtime exemption turns on meaning of “agriculture.”

Two Branches of “Agriculture”

- Primary agriculture includes typical farming activities like the cultivation and tillage of the soil – EXEMPT.
- Secondary agriculture is broader and includes any practices (not just farming practices), such as processing crops, that are performed by a farmer or on a farm *and* are incident to or in conjunction with the farmer's own farming operations and not to the farming operations of other farmers – ALSO EXEMPT.

Limits of Secondary Agriculture

- The processing of crops grown by other farmers is incidental to, or in conjunction with, the farming operation of the other farmers – NOT EXEMPT.

Bland Farms

- US Department of Labor (DOL) brought 2014 suit claiming workers in sweet onion packing shed entitled to overtime pay for years 2012-2016.
- During 2012-2016 period, farmer packed both onions grown itself and onions grown by "contract growers."

Bland Farms

- In not paying overtime for period while packing onions grown by the “contract grower”, farmer had relied on a 1985 letter from a representative of DOL which basically said if farmer bought an entire field of onions, its packing-shed employees would be exempt from the FLSA when they processed those onions.
- No dispute that overtime would have been required if other grower paid on a per bag basis.

Bland Farms

- Case proceeded to bench trial in February 2017.
- District court essentially considered 1985 letter immaterial (except as to damages).
- District court analyzed whether the defendant farmer was *"the farmer of the onions grown by the contract growers."*

Bland Farms– Facts Considered

- The contract growers were in charge of preparing the seedbeds, planting, transplanting, fertilizing the onions, spraying, irrigating, and harvesting.
- The contract growers paid all the expenses of growing the onions.
- Subject to reimbursement, defendant packer would occasionally provide labor to the contract growers and would often help the contract growers haul the onions out of the field.

Bland Farms– Facts Considered

- Defendant packer purchased the onions from the contract growers based on a pack-out rate, meaning the amount of money a contract grower received depended on how well his onions graded (occasionally paid based on across the scales weight).
- The risk of loss was on the contract growers throughout the entire growing process (including their carrying of crop-insurance).
- Defendant packer suggested seed varieties for the contract growers to plant, helped them choose what chemicals to apply, suggested harvest times, and provided other advice throughout the growing process – *Suggestions were controlling on growers.*

Bland Farms: Appeals Court Affirms

- Summation of District Court's Conclusion: because defendant packer did not take risk of loss of onions from contract growers, defendant packer's packing of onions grown by others was not within exemption.
- Court awarded \$1,480,268.55.
 - \$552,070.86 for the 2012, 2013, and 2014 season in back wages.
 - \$94,888.69 for the 2014 season in reduced liquidated damages
 - \$416,654.50: 2015, 2016, and 2017 seasons in back wages.
 - \$416,654.50: 2015, 2016, and 2017 seasons in back liquidated damages (which amounts to doubling the back wages).
- 11th Circuit Summarily Affirmed, Except as to Liquidated Damages

Bland Farms – Individual Liability

- DOL sought to establish individual liability against corporate packer principal.
- Individual liability is appropriate where an officer “involved in the day-to-day operation or has some direct responsibility for the supervision of the employee[s].”
- Court rejected individual liability, essentially finding another corporate manager was responsible for packing shed employee supervision.

How to Manage Risk?

- Pay overtime during all work weeks where purchased products are being packed; OR
- Manage crews to avoid overtime during any work weeks (7 day) where purchased products are being packed; OR
- Draft grow contracts where packer . . .
 - Leases land where product is grown.
 - Assumes risk of loss.
 - Other factors that show packer is the farmer.

How to Manage Risk?

- Maintaining accurate and complete records.
- If there is no record, court may conclude it did not happen.
- Liquidated damages – attorney opinions could guard against liquidated damages claims.

Fancy Farms

- Fancy Farms contacted a worker recruiting firm, All Nations, explaining the need for extra workers to assist with the strawberry harvest.
- Fancy told All Nations that he wanted to hire workers from Guatemala because of positive past experiences with these workers.
- Fancy never directed All Nations to charge recruitment fees and specifically told firm that the recruitment and hiring had to be “done correctly” and “by the book.”

Fancy Farms

- Molina (principal for All Nations) had begun recruiting Honduran H-2A workers months before Fancy Farms hired him.
- Unbeknownst to Fancy Farms, Molina and his associate informed interested workers that they would have to pay a fee as a condition of employment. The fees ranged between \$3,000 and \$4,000, and Molina told the workers that the fees would be refunded at the end of the harvest season.

Fancy Farms

- In H-2A applications, Fancy Farms certified that it would contractually forbid any foreign labor recruiter that it employed from seeking or receiving payments from potential employees.
- Fancy Farms also submitted the required DOL clearance orders, in which it agreed to abide by the regulations that forbid any foreign labor recruiter whom the employer engages from seeking or receiving payments from prospective employees.

Fancy Farms Claims

- (1) Fancy Farms failed to reimburse their recruitment fees, which resulted in their wages dropping below the minimum wage guaranteed by the FLSA; and
- (2) Fancy Farms breached the plaintiffs' employment contracts by failing to include a provision barring recruitment fees in its agreement with All Nations Staffing, in violation of a federal regulation.

Fancy Farms – No Valid FLSA Claim

- No FLSA claim because the undisputed facts establish that no words or conduct on the part of Fancy Farms could reasonably have led the plaintiffs to believe that Fancy Farms authorized Molina or anyone at All Nations Staffing to demand and collect recruitment fees on its behalf.

Fancy Farms – Trial Required on Breach of Contract

The district court opined that Fancy Farms' failure to prohibit contractually Molina and his agent from collecting the fee could support a cause of action for breach of contract; however, it concluded that the claims still failed because the plaintiffs did not proffer enough evidence to demonstrate proximate causation between Fancy Farms' breach and the damages the plaintiffs suffered.

Fancy Farms – Trial Required on Breach of Contract

- Court of Appeals Reversed on Damage Issue, pointing to the following evidence:
 - Farmer stated in his deposition that he knew that “a big ploy for a lot of recruitment of H-2As, is to extort money from the workers.”
 - Farmer had heard of similar recruitment situations in the news and knew that the charging of recruitment fees to H-2A foreign workers was a problem.
 - Handwritten notes while checking references.

Questions?

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