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PERSPECTIVE

Rethinking the joint-employer standard

By Stephen L. Raucher

What does it take to be considered a joint employer? Does it require direct control? Is the ability to dictate wages, even if indirectly, enough? Must the joint employer have explicit authority to fire the employee, or is practical ability sufficient?

According to the California Supreme Court in *Martinez v. Combs*, 49 Cal. 4th 35 (2010), joint-employer status is determined by a standard consisting of three alternatives: (1) to "exercise control," (2) to "suffer or permit work," and (3) to engage. If any one of these tests is met, then an entity can be considered a joint employer.

In *Medina v. Equilon Enterprises, LLC*, 2021 DJDAR 9558 (Sept. 10, 2021), the 4th District Court of Appeal departed from the rulings of its sister courts in its application of the first and second tests and held that where sufficient indirect control is exercised, or where a practical ability to prevent a person from working at a location is present, then the entity exercising this control should be considered a joint employer.

Defendant Equilon Enterprises, LLC is a Shell Oil Company subsidiary. Shell operates its gas stations through a so-called multi-site operated, or "MSO," model. What this means as a practical matter is that Shell owns the locations of the stations themselves, but leases them out to MSO operators who, theoretically, exercise actual control of their Shell location. R&M Enterprises was an MSO operator within the Shell model and employed plaintiff Santiago Medina as a gas station cashier and manager. Medina was terminated by R&M Enterprises in 2008 and sued both Shell and R&M Enterprises in a putative class action.

Medina brought causes of action against the two entities for misclassification, violation of California Business and Professions Code Section 17200, failure to pay overtime wages, and failure to pay missed break compensation. Medina's case was thereafter stayed for a number of years while pending class actions against Shell dealing with the same issues were decided elsewhere. Two of those cases, *Curry v. Equilon Enterprises, LLC*, 23 Cal. App. 5th 289 (1st Dist. 2018), and *Henderson v. Equilon Enterprises, LLC,* 40 Cal. App. 5th 1111 (4th Dist., Div. 2 2019), found that Shell did not qualify as a joint employer. After these cases were decided, the trial court in *Medina* lifted the stay and granted summary judgment to Shell based on *Curry* and *Henderson*.

The 4th District reversed this decision, disagreeing with the application of both the "to exercise control" test and the "suffer or permit test" as applied by the *Curry* and *Henderson* courts. The *Medina* court also noted that the plaintiff presented facts that "differ[ed] meaningfully" from the other decisions, and which were significant in the differing outcome of this case.

As a preliminary matter, all three courts rejected the plaintiffs' argument that the "ABC" test from *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), should apply to the joint-employer determination. The issue in *Dynamex* was the test for independent contractor classification. The *Dynamex* court found that the "suffer or permit to work" formulation in Martinez did not apply to the question of independent contractor classification, and instead adopted the ABC test. *Medina*, like *Curry* and *Henderson*, found that *Martinez* continues to supply the operative joint-employer test.

However, the courts differed in their application of the Martinez test. Both *Curry* and *Henderson* turned in large part on the notion that the plaintiffs had not provided evidence of Shell's ability to hire or fire the plaintiffs. In contrast, the plaintiff in *Medina* produced evidence that Shell employees represented to him they had the power to fire him directly or at least have him fired. Further, the *Medina* court noted the other cases failed to address Shell's ability to add or remove stations from MSO operator clusters for any reason at all. Nor did they address the direct flow of payments for fuel to Shell, or Shell's contractually mandated control of MSO operators' bank accounts. The court said these facts were significant in showing the nature and degree of control Shell had over its MSO operators and their business, and that they showed that Shell had the ability to prevent the plaintiff from working in R&M Enterprises' station.

The 4th District reasoned that to exercise control for the purposes of joint-employer status does not require a person to exercise direct control over the employee. Indirect control is sufficient when a person exercises a particular degree of control over an intermediary — i.e. enough to indirectly dictate the wages, hours or working conditions of the employee. In *Medina*, Shell exercised that degree of control over MSO operator R&M Enterprises and indirectly dictated the wages and hours at minimum of the station at issue.

Shell had unilateral discretion in setting reimbursements for labor costs for R&M, and mandated hours of operations for

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their gas station. In addition, while the contract between Shell and its MSO operators called for the operators to "hire, fire, train, discipline, and maintain payroll records for their employee," Shell provided detailed instructions on how to manage their gas stations and prohibited deviation from these instructions. The MSO operators were not permitted to modify tasks set forth in these instructions and other manuals. In sum, Shell exercised control over both hours and wages through the MSO model.

Medina also departed from the *Curry* and *Henderson* courts in its application of the "suffer or permit" test. *Medina* reasoned that to "suffer or permit work" can be understood as including situations in which the entity has the practical ability to prevent the employee from doing the work in question. The *Medina* court noted that while Shell may not have possessed the ability to directly fire the plaintiff, it did possess the practical ability to do so and therefore had "suffer[ed] or permit[ted] work" by the employee. As mentioned previously, Shell retained the authority to add or remove individual stations from MSO operator clusters without reason, which gave them the ability to exclude the plaintiff from their stations at any time by replacing the employees at the station with those of a new MSO operator. The court also pointed to the fact that the plaintiff was actually threatened with termination by a Shell employee rather than the MSO operator or any of the operator's employees. Accordingly, the court concluded that Shell had both the practical power to induce its MSO operators to fire any employee because the MSO operators "were essentially at Shell's mercy," as well as the apparent authority to do so on their own.

The *Medina* opinion provides an interesting departure in its application of the Martinez tests in the joint-employer context. While it does not represent a direct rebuttal of the *Curry* and *Henderson* decisions, it does intimate a more expansive view of the meaning of "control" and "suffer and permit." Indeed, the opinion concludes by asking, "Who should bear the risk of an MSO operator's inability to pay its employees' wages — Shell or the employees themselves?" The *Medina* court concluded that "it should be Shell's risk to bear, given Shell's near-complete control over the MSO operators' finances, day-to-day operation, facilities and practices." Companies with business plans similar to Shell's MSO model could find themselves subject to joint-employer liability if they employ comparable methods of indirect control. ■

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