

ARE YOU INDIVIDUALLY LIABLE FOR WAGE/HOUR CLAIMS IN NEVADA?

by Anthony Hall and Tamara Jankovic

NRS 608.011 defines an “employer” as “every person having control or custody of any employment, place of employment or any employee.” Practitioners in Nevada know that the Labor Commissioner has historically read the statute to be an expansion of general agency principles under Nevada’s corporate law. In other words, the Nevada Labor Commissioner has read the statute in its broadest meaning to include “every person” that has any degree of control or custody over the pay of employees. Thus, the Nevada Labor Commission subjected a broad range of individuals to personal liability for unpaid wage claims.

The Labor Commissioner’s interpretation has been rejected by a recent Nevada Supreme Court opinion, *Boucher v. Shaw*, 124 Nev. 96 (2008). In the opinion, the Court concludes that it reads NRS 608.011 to be consistent with standard agency principles in Nevada and not an expansion of those principles. Because Nevada agency law does not extend personal liability to individual managers of corporations, neither can such individual managers be held liable as employers for unpaid wages under NRS Chapter 608. In so concluding, the Nevada Supreme Court aligned itself with the Colorado Supreme Court’s interpretation of “employer” for purposes of both states’ wage and hour laws.

Clarification of the Nevada Definition

On November 26, 2008, the Nevada Supreme Court issued a decision clarifying the definition of “employer” in NRS 608.011. In *Boucher v. Shaw*, The Castaways Hotel, Casino and Bowling Center (“Castaways”) filed for Chapter 11 bankruptcy protection and discharged its employees six months later. After the hotel casino ceased operations, a group of former employees sought to recover unpaid wages for themselves and a class of former employees under NRS Chapter 608 by filing suit against several high-level managers of the hotel casino. Named as defendants in the lawsuit were Castaways’ chairman and CEO, the labor and employment manager, and the former chief financial officer. Two of the three defendants also maintained a 100-percent ownership interest in Castaways. The former employees alleged that these three managers, as employers, were personally liable for their unpaid wages.

The employees argued that the Supreme Court should give meaning to all of the words in NRS 608.011, specifically the words “every person” with “control or custody.” As such, the employees urged the Court to recognize that multiple entities or persons, including individual managers, may have custody or control over an employee, his or her employment, or the workplace. In contrast, the managers argued that holding them personally liable for unpaid wages would represent a radical departure from the common law of agency, whereby an agent cannot be held jointly and severally liable for the debts of a principal when the identity of the principal is disclosed. Finding that the statute itself

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offered no guidance as to its meaning, and that the differing interpretations offered by the parties were both reasonable, the Supreme Court turned to the legislative history of the statute for a definitive answer.

The Supreme Court observed that prior to 1985, NRS 608.011 defined “employer” as “every person, firm, corporation, partnership, stock association, agent, manager, representative or other person having control or custody of any employment, place of employment or any employee.” This definition was modified in 1985 and the terms “manager” and “agent” were dropped by the Legislature. Despite the substantial amendment to the statute, the Supreme Court could not definitively conclude that the Legislature intended to change the law. This was because in the same year, 1985, the Legislature also enacted NRS 0.039, which generally defines a “person” as a “natural person” or nongovernmental entity, including a “corporation, partnership, association, trust, or unincorporated organization.”

To resolve the ambiguity in the statute, the Nevada Supreme Court examined existing principles of corporate law for guidance. The Court observed that, “a corporate officer is not considered the employer responsible for creating the contractual employment relationship and is not personally liable for a breach of that relationship.” Moreover, NRS 78.747 specifically states that officers, directors, or stockholders of a corporation cannot be held individually liable “except as otherwise provided by specific statute.” The Court noted that after 1985, NRS 608.011 has not contained specific language extending personal liability to individual managers. Therefore, without evidence of specific intent from the Legislature to permit “piercing the corporate veil,” the Court could not extend liability to managers for the unpaid wages of employees. The three Castaways’ high-level managers were therefore off the hook.

Nevada Aligns Itself With Colorado

As part of the opinion, the Nevada Supreme Court also looked to other jurisdictions for guidance in reaching its decision. In particular, the Court examined a 2003 Colorado Supreme Court decision, where the court addressed whether corporate officers and agents were individually liable under Colorado’s wage and hour laws. Colorado’s equivalent of NRS 608.011 defines “employer” as “every person, firm, partnership, association, [or] corporation . . . and any agent or officer thereof . . . employing any person [within the state].” Despite this language, the Colorado Supreme Court concluded that had its legislature intended to extend personal liability to corporate officers or agents, it would have done so explicitly by inserting appropriate language in the statute.

Similarly, and despite an expansive definition of “employer” in regulations issued by the state’s Industrial Welfare Commission (IWC), the California Supreme Court also held that liability for unpaid wages does not extend to corporate control figures, such as the officers and directors of a corporation. In *Reynolds v. Bement*, 116 P.3d 1162 (2005), the plaintiff sought to recover unpaid overtime wages, and urged the Court to extend the IWC’s definition of “employer” to corporate directors and officers. The IWC definition defines employer as any individual “who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or work of any person,”

thus exposing any manager or supervisor who exerts any authority over another person to potential liability if the company fails to pay the subordinate employee's wages.

In declining to apply IWC's definition of "employer" to the state court action, the California Supreme Court reasoned that had the Legislature intended to hold individual corporate officers liable for unpaid wages, it would have done so explicitly by defining the term "employer" in California's labor statutes to include individual corporate agents. Because the statutes were silent, the Court instead turned to the common law definition of employer, reasoning that corporate agents acting within the scope of their agency are not personally liable for the corporate employer's failure to pay its employees' wages. Under the latter definition, the company itself is the only party who can be classified as an "employer." The Court was careful to note that its holding was a narrow one, and that nothing in its opinion would preclude hearing officers from finding individual corporate agents liable for unpaid wages under federal law as well as in certain circumstances under state law, when such liability is proven on established common law or statutory theories.

Comparison to a Few Other States

Unlike the conclusion reached by the Colorado Supreme Court, and now Nevada, a different standard applies in several jurisdictions, including Illinois, Kansas, and Connecticut. In both Illinois and Kansas, the respective state legislatures have included explicit language in the statutory definitions of "employer" to extend liability to officers and agents. For example, the Illinois statute provides that "[a]ny officers of a corporation or agents of an employer who knowingly permit such employer to violate the provisions of th[e] Act shall be deemed to be the employers of the employees of the corporation," and "may be personally liable under [the Illinois wage and hour law] for a claimant's wages." Similarly, the applicable Kansas statute provides that "any officer [of a corporation] or any agent having the management of the corporation who knowingly permits the corporation to . . . violat[e] [Kansas labor protection laws] shall be deemed the employer."

In contrast, the Connecticut statutory definition of "employer" does not explicitly extend liability to corporate officers and agents. Nevertheless, the Connecticut Supreme Court concluded that its legislature must have intended to hold officers and agents individually liable under the civil wage and hour statutes because corporate officers and agents could be criminally liable for the failure to pay wages. The Nevada Supreme Court found this reasoning unpersuasive because it could still not reconcile such a conclusion with well-settled principles of corporate law.

Comparison with the Applicable Federal Standard

The Nevada Supreme Court's decision in *Boucher* should also be distinguished from the prevailing federal interpretation as to who may constitute an "employer" for purposes of the Fair Labor Standards Act (FLSA) and the Family Medical Leave Act (FMLA). The test applied by the Ninth Circuit Court of Appeals to determine whether an individual may be considered an "employer" for purposes of the FLSA is the "economic realities" test. Pursuant to this test, federal courts examine whether an individual exercises control

over the nature and structure of the employment relationship or exercises economic control over the relationship. Similarly, under the FMLA, an employer is “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.” 29 USC 2611(4)(A)(ii)(I). Federal courts have indicated that any person, including an employee’s immediate supervisor, who has control or involvement with the practice that allegedly violates the FMLA, acts in the interest of the employer within the meaning of the FMLA and, therefore, may be individually liable for FMLA violations.

The *Boucher* case did not raise any questions of liability under federal law and the Nevada Supreme Court declined to incorporate the “economic realities” test into its interpretation of Nevada’s wage and hour law. Instead, the Court reemphasized its reliance on corporate law in reaching its decision that the high-level Castaways managers could not be held personally liable for any unpaid wage claims of the hotel’s former employees. As a result, while Nevada’s wage/hour laws now follow general agency rules and limit individual liability, individual liability may still exist for managers and Human Resources professionals under the FLSA’s and FMLA’s economic realities test.