What Directors and Officers Need to Know About Their Personal Liability for Wages: The Impact of the Ninth Circuit's Recent Decision in *Boucher v. Shaw*

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In a recent published case, the Ninth Circuit further extended application of the Fair Labor Standards Act of 1938 (FLSA),³ imposing personal liability on corporate agents for unpaid wages. Personal liability for unpaid wages is—and needs to be—a major concern for any company and its management, particularly when it reaches a liquidity crisis or heads towards insolvency. While this article primarily concerns employment law, it is in the insolvency context where the law imposing personal liability on corporate principals for unpaid wages acquires its teeth.

While bankruptcy generally gives a troubled company breathing room to reorganize, as the Ninth Circuit recently noted, a company’s bankruptcy (and the resulting automatic stay) does not change the analysis of corporate agents’ personal liability for federal wage violations. In light of this recent case and the current economic situation, directors and officers should understand their risk of personal liability for unpaid wages.

Business leaders are faced with tough choices as a company heads towards insolvency—made all the more challenging by potential personal liability. Limited liability is a principal reason most businesses organize themselves as legal entities rather than operating as sole proprietorships or general partnerships. The application of the basic premise of limited liability, however, is not universal or absolute, particularly when it comes to unpaid wages.

Corporate agents' personal liability for unpaid wages derives from the complex overlay of US federal and state laws and regulations. State law varies widely on whether directors and officers of corporations can be held personally liable for wages. Certain states, such as New York, Washington and Illinois, have held managers, directors and officers personally liable, and New York has imposed criminal penalties. Other states, such as California and Nevada, have proved steadfast in refusing to extend personal liability to corporate agents for state law based claims.
Federal law, through the FLSA, requires "employers" (broadly defined in the statute) to pay federally regulated minimum wages and overtime compensation (*not* contractual wages). If the employer does not meet these obligations when due, the employees may recover (1) their wages or unpaid overtime compensation, and (2) an equal additional amount as liquidated damages unless the employer can show that the failure to pay was in good faith and it reasonably believed it was not violating the law. See 29 U.S.C. § 216(b). The FLSA defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

In *Boucher v. Shaw*, the Ninth Circuit recently held that this definition of "employer" includes corporate agents who have economic control or exercise control over the nature and structure of the employment relationship, based on the circumstances and economic reality of the relationship. In a departure from previous Ninth Circuit case law, the court did not require that the corporate agent hold a significant ownership interest to be (potentially) personally liable for unpaid wages.

This broad definition of "employer" under the FLSA is cause for real concern for corporate agents, particularly since director/officer and employment practices insurance policies frequently exclude coverage for claims based on the FLSA or similar state laws. However, while the FLSA is far reaching, its coverage is limited to federal minimum wage and overtime violations. The FLSA does not cover claims for immediate payment of contractual wages, accrued vacation pay and other accrued benefits to which employees may be entitled under state law.

Thus, while *Boucher* is significant, the impact of its ruling is limited to the definition of "employer" under the FLSA. *Boucher* should not affect claims under other federal and state laws with different "employer" definitions. For example, the Federal Worker Adjustment Retraining and Notification Act (the WARN Act), does not include corporate agents within the definition of "employer." Consequently, the *Boucher* decision should not extend liability under the WARN Act to directors and officers.

Corporate agents' personal liability for certain common wage related issues in California can be summarized as follows:

- Corporate agents are liable for violations of the FLSA if they have economic control or exercise control over the nature and structure of the employment relationship (based on the circumstances and economic reality of the situation).
- Corporate agents are not liable for — unpaid wages, overtime and vacation pay based on
California state law, although they may be liable for certain claims involving their own conduct, such as discriminatory harassment or retaliation.

- Corporate agents are not personally liable for federal WARN Act violations.
- Corporate agents have not been held personally liable for violations of California's state law equivalent of the WARN Act. Although it is an open issue, the California Supreme Court's common law based presumption regarding personal liability may suggest that California courts will not create personal liability in such cases, absent a clear legislative mandate.

State Law

As noted, state law varies widely in imposing personal liability for unpaid wages on corporate agents. Certain states do not impose personal liability while others make directors and officers jointly liable. Some allow punitive damages and attorney's fees for willful violations, and some impose criminal sanctions.

For instance, in Illinois, employers and their agents can be civilly and criminally liable for the willful nonpayment of wages. In Stafford v. Puro, 63 F.3d 1436 (7th Cir. 1995) and Johnson v. Western Amusement Corp., 510 N.E.2d 991 (1987), the courts held corporate agents personally liable for willfully failing to pay wages because the corporation was able to pay the wages when they were due, but did not. In Johnson, the executive was also held responsible for failing to pay union benefits after the company went bankrupt.

In Washington, state law imposes personal liability on directors and officers for unpaid wages, and allows for punitive damages and attorneys' fees if the violation is "willful." Morgan v. Kingen, 169 P.3d 487 (Wash. Ct. App. Div. 1, 2007), aff'd, 210 P.3d 995 (Wash. 2009). In Morgan, the CEO and CFO of Funsters Casino, who were also shareholders and general managers, were held personally liable for unpaid wages under Washington law, which imposes personal liability on individual executives, principals and agents of companies who fail to pay wages, as well as attorneys' fees for "willful" violations. Willful conduct under the statute involves the "intent to deprive the employee of any part of his wages." RCW 49.52.050 (2). The court found the violation was willful because the executives were in control of the funds when payroll was due.

New York, taking a very stringent position against corporate agents, imposes criminal penalties for knowing failures to pay wages, as well as failing to provide wage supplements or benefits, such as reimbursement for expenses, health, welfare and retirement benefits, and vacation, separation and holiday pay. See NY Labor Law § 198(c). In People v. Milton C.
Johnson Co., 337 N.Y.S.2d 477 (N.Y. City Crim. Ct. 1972), the president of the company was held criminally liable when the company did not pay wages and vacation benefits after the company's lender, which had supplied operating capital to the company for years, refused to do so. The president of the company terminated the employees, and the court held him liable because "it may be presumed that he knew or should have known of and taken some steps to prevent the nonpayment," even though the lender gave no prior indication that it would not fund payroll.5

In these jurisdictions, nonpayment of wages can create civil and even criminal liability for corporate agents, and "willful" conduct, exposing executives to punitive damages and attorneys' fees awards, has been found when the company had the ability to pay wages but these funds were directed to other purposes. This background makes California's and Nevada's refusal to hold directors and officers personally liable for unpaid wages under state law all the more remarkable.

California Law

In Reynolds v. Bement, 36 Cal. 4th 1075, 116 P.3d 1162, 32 Cal. Rptr. 3d 483 (Cal. Sup. Ct. 2005), the Supreme Court of California refused to hold an employer's officers, directors and shareholders liable for state law wage violations arising from nonpayment of overtime hours. The defendants' demurrer was sustained by the Superior Court, the Court of Appeal and California Supreme Court. Not only were the directors and officers exculpated, the case was dismissed based on the allegations on the face of the pleading without discovery or trial.

In California, under the Labor Code, "an employer" is obligated to pay minimum wages and overtime compensation. See California Labor Code §§ 510, 1194. An employee may seek judicial relief by filing a civil action for breach of contract or wage law violations, or may seek administrative relief. If electing judicial relief, section 1194 of the California Labor Code provides employees with a private right of action for minimum wage and overtime violations. However, neither section 510 nor section 1194 defines "employer," and section 1194 does not identify potential defendants.6 Under California law, no statute expressly subjects corporate control figures to liability for unpaid wages as "employers."

The plaintiffs asked the court to use the Industrial Welfare Commission's (IWC)7 definition of "employer," which "means any person...who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." Wage Order No. 9, subd. 2(F).8 The court declined to do so.
The California Supreme Court examined the issue, basing its decision on common law principals under which:

> corporate agents acting within the scope of their agency are not personally liable for the corporate employer's failure to pay its employees' wages. This is true regardless of whether a corporation's failure to pay such wages, in particular circumstances, breaches only its employment contract or also breaches a tort duty of care.

*Reynolds*, 36 Cal. 4th at 1087. The court concluded that if the legislature had intended section 1194 to expose corporate agents who "exercise control" to personal liability, then "it would have manifested its intent more clearly than by mere silence after the IWC's promulgation of Wage Order No. 9." *Id.* at 1087–88.

The California Division of Labor Standards Enforcement (DLSE), as *amicus curie*, sided with the plaintiffs, warning that the court’s refusal to impose personal liability could create an obstacle to the Labor Commissioner's ability to recover wages owing to employees, noting that it was existing DLSE practice to apply the "exercise control" prong of the IWC's "employer" definition to name corporate agents as joint defendants. *Id.* at 1088. The court refused to allow a private cause of action against individuals under state law. *Id.* at 1088–89. It determined that the IWC's definition of "employer" and DLSE practice should not be given interpretive deference in the context of private actions under section 1194, and declined to resolve the apparent disconnect between DLSE administrative practice and litigants' rights. *Id.*

The *Reynolds* court also determined that *Frances T. v. Village Green Owners Assn.*, 42 Cal. 3d 490, 229 Cal. Rptr. 456, 723 P.2d 573 (1986), which held corporate directors jointly liable with the corporation if they "personally directed or participated in" a corporation's tortuous conduct, did not create personal liability for unpaid wages under the facts of *Reynolds*. The *Reynolds* court reasoned that *Village Green* imposes liability on directors and officers based on "their own tortuous conduct, not from their status as directors or officers of the enterprise." *Village Green*, 42 Cal. 3d at 503. The *Reynolds* court concluded that a "simple failure to comply with statutory overtime requirements" does not qualify as the kind of tortuous conduct for which *Village Green* imposes personal liability. *Reynolds*, 36 Cal. 4th at 1089–90.

As compared to other jurisdictions, which have held that similar managerial decisions constitute "willful" conduct, forming the basis of punitive and criminal sanctions, these holdings of California's highest court make California stand out in its adherence to agency
principles. While the court's decision in Reynolds was limited to holding that section 1194 of the Labor Code does not support a private cause of action against individual defendants (Id.), the California Courts of Appeal have extended the reasoning of Reynolds to claims under other sections of the Labor Code. In Jones v. Gregory, 137 Cal. App. 4th 798 (Cal. Ct. App. 2006), the Court of Appeals held that like section 1194, "none of the Labor Code...sections 201, 202, 203, 227.3, 1194.5, or 2802—define 'employers'." 137 Cal. App. 4th at 804. Rather, the "presumption is that the common law definition of an employer applies, precluding personal liability for corporate agents." The court held more broadly that individuals are not liable under the Labor Code to pay wages upon termination, accrued vacation time, or expense reimbursements. See generally Id.

Further, in Bradstreet v. Wong, 161 Cal. App. 4th 1440 (Cal. Ct. App. 2008) the California Court of Appeal again declined to hold corporate principals personally liable for "restitution" of unpaid wages under the Unfair Competition Law (the UCL),10 which broadly prohibits unfair business practices, and "the many violations of the Labor Code that occurred when these employees were not paid, and the corporations went out of business. Bradstreet, 161 Cal. App. 4th at 1449. The court reasoned that the labor performed, which went unpaid, was not for the defendants' personal benefit, but rather for the corporations', and as such, the duty to pay for this labor was owed by the corporations which employed the plaintiffs, not by the defendant individuals as owners, officers or managers, whether brought under the auspices of the Unfair Competition Law or the Labor Code. Id. at 1460.

Boucher v. Shaw and Nevada Employment Law

Boucher v. Shaw posed state law issues similar to those presented in Reynolds, this time in Nevada, but also included claims for violations of the FLSA. The Nevada Supreme Court disposed of the state law labor issues in much the same way as the California Supreme Court in Reynolds. The defendants were three managers of Castaways Hotel, Casino and Bowling Center (Castaways), including the Chairman/CEO and 70 percent shareholder, the Chief Financial Officer, and the 30 percent shareholder who was also responsible for labor and employment matters.

Three discharged employees of Castaways brought suit against the individual managers for unpaid wages under state and federal law. Castaways filed for Chapter 11 on June 26, 2003. The plaintiffs were discharged in January 2004. On February 10, 2004, after the discharge, the case was converted to a Chapter 7 liquidation and ceased operations. One plaintiff alleged she was not paid for the last pay period she worked at Castaways (Ballard), another that she was not paid for this period until two weeks after her employment was...
terminated (Boucher). All of the plaintiffs additionally alleged they had not been paid for accrued vacation and holiday time, asserting claims under Chapter 608 of the Nevada Revised Statutes and the FLSA, 29, U.S.C. § 206(a). Boucher at 9735.

The Nevada Supreme Court rejected all of the plaintiffs' state law claims. Ballard was the only plaintiff alleging a violation of the FLSA, so only her case was considered by the Ninth Circuit.

*Boucher v. Shaw: The Ninth Circuit FLSA Rule*

While the Ninth Circuit accepted this interpretation of state law (as it had to), it held that the FLSA's definition of employer was broad enough to include the CEO/shareholder, CFO/non-shareholder and a manager/shareholder with control over operations and employment matters.

The FLSA provides that every "employer" must pay a minimum wage. 29 U.S.C. § 206(a). Any employer who does not do so "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

This statutory definition of "employer" under the FLSA is so broad (potentially covering middle management, for instance) that the Ninth Circuit (and a multitude of other courts (see endnote 10)) found it appropriate to impose some criteria for liability. In Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 1999) (en banc), the Ninth Circuit held the CEO and COO of a corporation personally liable as "employers." The court affirmed the decision at trial, in which the jury was instructed that

> it could find the [CEO and COO]—liable only if it determined that they had a "significant ownership interest with operational control of significant aspect of the corporation's day-to-day functions; the power to hire and fire employees; the power to determine salaries; the responsibility to maintain employment records."

*Lambert*, 180 F.3d at 1012. The court relied on its earlier panel decision in Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983), which concluded that these factors have been considered by other courts in various combinations to impose personal liability.

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1. In *Boucher*, Ballard, one of the plaintiffs, alleged violation of the FLSA. She claimed that the individual managers of Castaways were personally liable as her "employers" under the FLSA's definition which covers "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The Ninth Circuit agreed, holding that the FLSA's definition of "employer" was not limited to the common law's conception, but rather "is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes." *Boucher* at 9739, citing *Lambert*, 180 F.3d at 1011–12 (internal quotations omitted), quoting *Bonnette*, 704 F.2d at 1469.

The defendants in *Boucher* argued that with the conversion to Chapter 7, any obligation they had to pay wages ended. The court noted that the wages were due before the conversion of the case, and cited *Donovan v. Agnew*, 712 F.2d 1509, 1511, 1514 (1st Cir. 1983) for the proposition that the "overwhelming weight of authority" is that managers of a bankrupt corporation with operational control can be personally liable under the FLSA for unpaid wages. *Boucher*, at 9744. The court also cited *Chung v. New Silver Palace*, 246 F. Supp. 2d 220, 226 (S.D.N.Y. 2002) for the notion that the automatic stay, affecting only the debtor, does not protect directors and officers from liability under the FLSA in suits brought against them as co-defendants for unpaid wages.

The court held that an individual who exercises control over "the nature and structure of the employment relationship" or "economic control" over that relationship is subject to liability as an employer under the FLSA. *Boucher* at 9739. The court concluded that the defendants in *Boucher* were "employers" under the FLSA, in light of the "circumstances of the whole activity" and "economic reality" of the relationship, relying on the US Supreme Court's decisions in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) and *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961). Missing from the standard was the requirement from the jury instructions in *Lambert* of "substantial ownership," and indeed, one of the individual defendants in *Boucher* (the CFO) was not a shareholder of Castaways.

Courts interpreting the FLSA, including the Ninth Circuit, have more uniformly held that individual directors and officers could be personally liable for unpaid wages than those interpreting state (and other federal) laws. While the circuits vary in the additional factors required for corporate agents to be personally liable, they have consistently found that senior corporate agents who have operational control over the employing entity can be personally liable.11

The Ninth Circuit's recent ruling in *Boucher* is not surprising in the context of FLSA jurisprudence, but is significant for two reasons. First, *Boucher* (as well as *Lambert*) has the
practical effect of significantly undermining the protections against personal liability for unpaid wages afforded corporate agents under state law by imposing liability under overlapping federal law. Second, unlike in Lambert, the court did not make "significant ownership" a requirement for personal liability. Thus, Boucher marks something of an expansion of personal liability for corporate agents in the Ninth Circuit under the FLSA.

Before turning to what employers can do about this recent holding, it is important to identify certain limits on the impact of Boucher. This case is an interpretation of a definition contained in the FLSA, and should only apply to that statute; it does not naturally extend to other federal statutes which have their own, different definitions of "employer." Similarly, Reynolds (in California) and the state law holdings of Boucher (in Nevada) are not affected by the Ninth Circuit's decision interpreting the FLSA. These issues are highlighted in the context of the WARN Act and California's equivalent (see below).

Warn Violations under California and Federal Law

The WARN Act requires employers to give employees at least 60 days notice of a plant closing or "mass layoff." The WARN Act defines an "employer" to be "any business enterprise" employing 100 or more full time workers. 29 U.S.C. § 2101. Federal courts have not read this language to extend liability for WARN Act violation to directors and officers, except when the plaintiffs could pierce the corporate veil, relying on alter ago theories of liability. See International Union, Aut., Aerospace & Agric. Implement Workers v. Aguirre, 410 F.3d 297, 302–03 (6th Cir. 2005).

The California Supreme Court has not addressed whether the California equivalent of the WARN Act (the California WARN Act) will extend liability to a company's directors and officers. Unlike California Labor Code sections 510 and 1194, employers are expressly defined in the California WARN Act. Under this statute, "employer" means "any person—who directly owns or operates" an "industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons." Although the California Supreme Court has not interpreted the statute, the language of the definition and the court's narrow interpretation of "employer" in adherence to common law precepts in Reynolds gives reason to hope it would narrowly construe the definition of employer in this context as well.

So far, California courts have demonstrated remarkable restraint in creating personal liability for labor and employment violations, and have held fast to the agency principals underlying the employment relationship. Thus, corporate agents are not individually liable
for those portions of compensation which only arise under state law, such as accrued vacation time. However, the legal standard espoused by the Ninth Circuit in Boucher cuts deeply into the efficacy of the protections afforded to corporate agents under state law relating to unpaid wages and overtime compensation.

**Impact of Boucher v. Shaw on Directors and Officers**

If the business cannot make payroll, directors and officers have serious issues to confront. While thus far federal and California law have refrained from imposing personal liability for WARN Act violations and mass layoffs, the law of the Ninth Circuit now holds that directors and officers could be jointly and severally liable for FLSA wage violations as co-defendants with the corporation. This amounts to payment of unpaid minimum wages and overtime compensation, and likely an equal amount as liquidated damages.

As a business heads towards insolvency (and/or bankruptcy), the effect of Boucher is to strongly incentivize directors and officers to make certain that employees are paid for time worked. In order to avoid the risk of personal liability, directors and officers must make sure that payroll is met, both before and during the bankruptcy. Thus, the company should not continue to employ workers it cannot pay, unless the directors and officers are prepared to pay for this work themselves. Corporate agents are not relieved of liability by virtue of a company entering bankruptcy, either Chapter 7 or Chapter 11.

Certain steps may help mitigate these risks. The first relates to corporate structure. In Boucher, the corporate agents must have economic control of, or exercise control over, the nature and structure of the employment relationship in order to have liability. Under Lambert, they also had to have a significant ownership interest to be individually liable. Although the court in Boucher indicated that this may not be strictly necessary, the lack of a significant ownership interest could reduce the risk of personal liability. The lack of material control over the employment relationship may reduce this risk as well.

Second, directors and officers should endeavor to insure themselves against this risk. This is likely to be difficult because many insurance policies, including employment practices policies, exclude claims based on FLSA violations. It is thus important for the directors and officers to be proactive—to understand their coverage and to involve insurance counsel in negotiating that coverage.

A third option for corporate agents is to terminate their own employment with the corporation. To maximize the possibility that resigning will shield the corporate agent from
liability, this should be done before the unpaid wages are earned and certainly before they are payable. Any resignation also needs to be done while there are remaining competent officers and directors overseeing the company's affairs. However, putting aside the directors' and officers' fiduciary duties, it is not clear that a court could not look back to hold a resigning corporate agent personally liable for wages that ultimately go unpaid. Given the Ninth Circuit's (as well as others') expansive reading of the FLSA, courts may reach to impose liability on directors and officers who resigned shortly before payroll (that could not be met) was due.

Ultimately, the most viable strategy is to plan ahead and work proactively. Meeting payroll is increasingly important with the addition of personal liability under the FLSA. Operations need to be scaled back at a rate commensurate with the company's ability to pay employees. The general freedom from personal liability under the WARN Act and California law (both its WARN Act equivalent (unsettled) as well as its laws on unpaid wages and vacation pay) may make layoffs a preferable (although risk-laden and undesirable) option for senior leadership as compared to violating the FLSA. The other planning options, such as corporate structuring, requiring indemnification, and protecting directors and officers with appropriate insurance coverage must be done in advance of insolvency.

Conclusion

The effect of Boucher v. Shaw is to impose personal liability on corporate agents with control over the employment relationship for unpaid, federally prescribed minimum wages and overtime compensation (under the FLSA), even though they are broadly protected from liability for unpaid wages by the laws of California and certain other states. Although these states have protected directors and officers from liability, that protection is limited, as a practical matter, by the risk of liability under overlapping federal law.

Corporate directors and officers must face substantial personal risk for unpaid wages and overtime compensation during insolvency planning. Employees will be paid for their last pay period (limited to unpaid federal minimum wages and overtime compensation plus equal liquidated damages), either from the corporation or from the directors and officers having control over the employment relationship, even if they are not significant owners of the company. Senior corporate agents of businesses with operations in California will become acutely aware of these issues when the company becomes insolvent if they do not address them before.
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Note, these exclusions are not uniform, however, and competent insurance counsel should be consulted regarding the coverage provided by any particular policy, and ideally, while negotiating coverage. Note, these exclusions are not uniform, however, and competent insurance counsel should be consulted regarding the coverage provided by any particular policy, and ideally, while negotiating coverage.

In New York, it is necessary for the officer to have active involvement or actual authority in running the company. Where neither exist, neither does personal liability. In New York, it is necessary for the officer to have active involvement or actual authority in running the company. Where neither exist, neither does personal liability. See People v. Lustig, 420 N.Y.S.2d 624 (N.Y. App. Term 1979).

Unlike other sections, such as 1197.1 which exposes "any employer or other person acting either individually or as an officer, agent, or employee of another person" to liability. Unlike other sections, such as 1197.1 which exposes "any employer or other person acting either individually or as an officer, agent, or employee of another person" to liability.

The IWC is authorized to "formulate regulations (known as wage orders) governing employment in the State of California," The IWC is authorized to "formulate regulations (known as wage orders) governing employment in the State of California," Tidewater Marine Western Inc. v. Bradshaw, 14 Cal. 4th 557, 561, 59 Cal. Rptr. 2d 186, 927 P.2d 296 (1996).

See Cal. Code Regs. Tit. 8, § 11000 et seq.

The DLSE is headed by the Labor Commissioner and is authorized to enforce California's labor law, including IWC wage orders. The DLSE is headed by the Labor Commissioner and is authorized to enforce California's labor law, including IWC wage orders. See Tidewater, 14 Cal. 4th at 561–62.


See, e.g., Agnew, 712 F.2d at 1511 (expressing concern that middle management should not be held personally liable); Baystate Alternative Staffing v. Herman, 163 F.3d 668 (1st Cir. 1998) (discussing how the "economic reality" test applies to determine personal liability); Chao v. Hotel Oasis, Inc., 493 F.3d 26 (1st Cir. 2007) (upholding liability for president of corporation in charge of hiring and firing, setting employees' wages and
schedules, and requiring employees to attend meetings without pay); Herman v. RSR Sec. Servs., 172 F.3d 132 (2d Cir. 1999) (discussing "economic reality" test); Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962 (6th Cir. 1991); United States Dep't of Labor v. Cole Enters., Inc., 62 F.3d 775, 778–79 (6th Cir. 1995) (holding president/50 percent owner liable as an employer under the FLSA where he ran the business, wrote checks, kept the records, and managed hiring, termination, employment practices and schedules).

12 Defining "mass layoff" to mean more than 50 employees at a single site of employment.

13 The count does not include workers employed for less than six months or working fewer than 20 hours a week. The count does not include workers employed for less than six months or working fewer than 20 hours a week.


15 Labor Code Section 1400(a). It is as yet unclear if this means 75 employees at one time, or a total of 75 people over any 12-month period.

16 Indemnification, if it will impact the bankruptcy estate may allow the matter to be resolved by the bankruptcy court. While the law would be the same, the matter may be resolved more efficiently. See Boucher at 9753.