

## Service

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## Missouri Supreme Court Adopts Expansive View of Joint Employer Liability for Wage Violations

On August 19, 2014, the Missouri Supreme Court issued a novel decision that impacts Missouri employers. In *Tolentino v. Starwood Hotels & Resorts Worldwide, Inc.*, No. SC93379 (Mo. banc Aug. 19, 2014), the court unanimously endorsed an expansive view of what it takes to be considered a “joint employer” and held that all “joint employers” are liable for violations of the Missouri Minimum Wage Law (MMWL), even if those violations are caused by unforeseeable and intentional – even criminal – acts of another joint employer. The implications of this decision are varied and far-reaching.

### What This Means to You

With increasing frequency, businesses across all industries work with staffing agencies, independent contractors, and professional employment organizations. The Missouri Supreme court’s two holdings in *Tolentino* demonstrate the very difficult burden on an employer seeking to avoid liability for the wage-and-hour sins of third parties with whom it works. On the one hand, the court’s broad view of joint employment, which examines the amount of control an employer exerts over the form and amount of payment, counsels a hands-off approach when it comes to a staffing agency’s or contractor’s payroll practices. On the other hand, a company that does not maintain vigilance over its contractor’s practices risks liability for the contractor’s actions, even if unforeseeable or criminal.

Missouri employers should carefully evaluate the amount and type of control they exert over any worker and balance the competing interests in exerting control over the work performed while limiting potential liability as a joint employer. Employers should also ensure an attorney reviews their contracts with the source of temporary workers to determine whether the employer is

contractually protected from liability for the contactor's unlawful employment practices through indemnification or other means.

### ***Tolentino v. Starwood Hotels***

The defendants, Starwood Hotel & Resorts Worldwide, Inc. and Westin Hotel Management, LP (collectively, Starwood), operate the Westin Crown Center in Kansas City. Starwood contracted with Giant Labor Services, Inc. (GLS), a temporary staffing agency, to provide housekeepers. Starwood paid GLS for each room cleaned, its contract required GLS to pay the housekeepers in a manner that complied with the law, and GLS chose to pay the housekeepers on a per-room basis.

The plaintiff, Andro Tolentino, cleaned rooms at the Westin until Starwood notified GLS that it no longer wanted Tolentino to work as a housekeeper because it believed that he failed to complete his work in a timely manner. GLS reassigned Tolentino to a different hotel. During his last pay period working at the Westin, GLS illegally deducted *all* of Tolentino's after-tax earnings for "visa fees," leaving him with \$0.00 in take-home pay.

GLS's principals were then convicted of federal labor racketeering based in part on their withholding earned wages for visa fees. Starwood was never accused of having any role in or knowledge of GLS's criminal activity.

Tolentino filed a class action lawsuit alleging that Starwood and GLS were his employers and that Starwood failed to pay him the minimum wage and overtime required by the MMWL. Starwood moved for summary judgment, arguing that it was not subject to MMWL liability because it was not Tolentino's employer, and even if Starwood were his employer, the money Tolentino earned prior to deductions (that was indirectly paid by Starwood) reflected a legal wage rate and Starwood could not be held liable for GLS's criminal deductions.

The trial court granted Starwood's motion for summary judgment, concluding that although genuine issues of material fact existed as to whether Starwood and GLS were Tolentino's employers, Starwood adequately compensated Tolentino and that Starwood "cannot be held responsible for the unforeseen criminal activity committed by GLS." The Missouri Supreme Court agreed that fact issues existed as to whether Starwood was Tolentino's employer but held that GLS's criminal activity did not absolve Starwood of liability.

In its analysis, the court at least partially adopted the "joint employer" test used by federal courts interpreting the Fair Labor Standards Act (FLSA) and examined four "formal" factors: (1) who has the power to hire and fire the worker; (2) who supervises and controls the worker's work schedule and conditions of work; (3) who determines the rate and method of payment of the worker; and (4) who

maintains work records. The court identified additional “functional” factors used by federal courts interpreting the FLSA but did not expressly adopt or reject their application to the MMWL.

In applying the “formal” factors to this case, the court first held that an issue of fact existed as to Starwood’s authority to both hire and fire the housekeepers despite very limited involvement in either process by Starwood. Starwood allegedly interviewed housekeepers and required them to sign a list of expectations prior to starting work at the Westin. The court held that, if true, this demonstrates that Starwood effectively “‘hired’ [Tolentino] for MMWL purposes by exercising practical control over whether he commenced work and earned wages.” Slip op. at 9.

Even less evidence existed of Starwood’s involvement in firing. Although it admitted its ability to request that GLS stop sending an under-performing worker, Starwood argued that GLS was not required to fire the employee. The facts of Tolentino’s employment bore this out: after Starwood complained about him, he was transferred to another hotel, not fired. Still, the court held that if Starwood had “the authority to tell GLS not to send a certain housekeeper” then it held “the practical authority to prevent that worker, at least temporarily, from working and earning a wage.” Slip op. at 10. In this sense, the court held, “Tolentino and similarly situated housekeepers are economically dependent on both [Starwood] and GLS as joint employers.” *Id.* Under this view of hiring and firing, companies that provide *any* input into which temporary employees or independent contractors are assigned to work at their facilities risks a finding that they have indirect authority to hire or fire those workers.

Second, the court held that an issue of fact existed as to whether Starwood supervised and controlled the housekeepers’ work. The housekeepers were required to attend a meeting each morning to receive their room assignments for the day, and Starwood inspected rooms after cleaning and required housekeepers to correct any deficiencies. The court determined that this was enough to create a factual dispute, noting that the “relatively simple” and “repetitive” nature of the housekeeping work made it subject to supervision or control. Under this standard, a company that exercises *any* level of quality control over the work done by temporary employees or independent contractors risks a finding that it is asserting supervision and control.

Third, the court held that an issue of fact existed as to whether Starwood controlled the rate and method of pay. The court reasoned that Starwood effectively controlled the method and rate of pay for the housekeepers by paying GLS per room cleaned (which, the court found, indirectly caused GLS to pay its housekeepers by the room) and raising the per-room rate that it paid GLS in response to an increase in the minimum wage. Based on this understanding of controlling the rate and method of payment, any company that pays for temporary employees per hour risks a finding that it is setting the method of payment for those workers.

Finally, the court held that an issue of fact existed as to whether Starwood maintained work records for the housekeepers because it maintained “time sheets and productivity records.” Slip op. at 13. Again, this is a very low threshold and suggests that employers who keep any records related to the work performed by temporary employees or independent contractors risks a finding that this factor weighs in favor of joint employment.

Deciding an issue of first impression, the court next held that all joint employers are responsible for ensuring that an employee is properly paid minimum wage and overtime. One joint employer is therefore not absolved from liability even when the underpayment is caused by the actions (unforeseeable, criminal, or otherwise) of another.

The court based its holding on the MMWL’s remedial purpose and the obligation it imposes on an employer “to pay a minimum wage to its employees.” Slip op. at 16. Thus, the court held, “[i]f [Starwood is] found to be Tolentino’s employer along with GLS, then, it follows that [Starwood is] individually responsible for paying a minimum wage.” *Id.*

The court’s holding on this point leaves no room for a company to argue that it has discharged its duty short of double-checking to ensure that every temporary employee or independent contractor is paid the appropriate wages every pay period. As the court explained, “[e]ven if [Starwood] remitted sufficient funds to GLS to enable GLS to pay the minimum wage, [Starwood], if found to be Tolentino’s employer, [is] not absolved from MMWL liability due to GLS’s failure to pay a minimum wage to Tolentino.” Slip op. at 17. The amount of oversight necessary to meet the burden imposed by the court would be significant and costly.