**ANNOTATIONS AND COMMENTS**

This instruction is derived from *Aimable v. Long and Scott Farms*, 20 F.3d 434 (11th Cir. 1994), which applies the economic realities test. *See also Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996) and *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999) (per curiam), which were “vertical” joint employment cases. For “horizontal” joint employment issues under the Fair Labor Standards Act, consideration of the regulations may be of assistance. *See* 29 C.F.R. § 791.2.

Under the regulations:

Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

 Where there is an arrangement between the employers to share the employee’s services, as, for example, to interchange employees; or

 Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

 Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R. § 791.2 (footnotes omitted).

The Eleventh Circuit determined that the question of employer status under the ADEA intertwines jurisdiction and the merits and so must be resolved by the jury. *Garcia v. Copenhaver, Bell & Assoc.*, 104 F.3d 1256, 1264 (11th Cir. 1997). Similarly, in *Morrison v. Amway Corp.*, 323 F.3d 920, 930 (11th Cir. 2003), the court held that eligible employee status under the Family Medical Leave Act is not solely a jurisdictional issue. Rather, eligible employee status is to be decided by a jury or under Federal Rule of Civil Procedure 12 or Federal Rule of Civil Procedure 56. *Morrison*, 323 F.3d at 930.