LEGAL UPDATES

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DOL Issues Final Rule Updating the FLSA Joint Employer Rule

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Key Points

The Department of Labor, Wage and Hour Division, issued a final rule that updates the joint employer regulations under the Fair Labor Standards Act and is effective on March 16, 2020.

The new rule is an agency interpretive rule that adopts a four-factor balancing test to determine whether joint employer status should be imposed where an individual's work for one entity benefits a second entity.

The final rule also identifies factors not relevant to the joint employer analysis and a list of common business models and practices that do not impact the determination of joint employer status.

While the interpretive rule may assist businesses in their ability to determine whether a business practice or model exposes them to joint employer status, courts are not required to give deference to the agency's interpretive rules and will be entitled to engage in their own analysis of joint employer status.

The Department of Labor (DOL), Wage and Hour Division, issued the final rule that updates the joint employer regulations for minimum wage and overtime obligations under the Fair Labor Standards Act (FLSA). The final rule is an interpretive regulation that will be published in the Federal Register on January 16, 2020 and is effective 60 days after the date of publication.

Four-factor balancing test

The revisions to the rule are meant to provide guidance to employers regarding

whether employment of the same individual by more than one employer constitutes joint employment or separate and distinct employment under the FLSA. Joint employers are jointly and severally liable for an individual's wages. The final rule recognizes two scenarios under which an employee can be considered to have more than one employer:

1. An individual is employed by one entity and a second entity benefits from that work; and
2. An employer employs an individual for one set of hours during a work week and a second employer employs the same individual for a second set of hours during the same work week.

The revisions to the rule focus largely on the first scenario, and the rule adopts a four-factor balancing test derived from the case *Bonnette v. California Health and Welfare Agency* to determine whether the employer exercises direct or indirect control over the employee. To make that determination, the factors assessed are whether the potential joint employer:

1. Hires or fires the employee;
2. Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
3. Determines the employee's rate and method of payment; and
4. Maintains the employee's employment records.

According to the DOL, no single factor is dispositive, and the weight accorded to any one factor will depend on the circumstance of the individual situation. However, maintaining employment records alone will not demonstrate joint employment status. The definition of employment records is limited to payroll records that pertain or relate to the first three factors of the four-factor balancing test. Additionally, the ability, power or reserved contractual right to control any one of the four factors is insufficient to establish joint employer status unless the potential joint employer exercises actual control.

Irrelevant factors and immaterial business models or practices

The rule also identifies factors that are **not** relevant to the determination of joint employer status such as factors relating to whether the employee is economically dependent on the employer. Those factors include:

1. Whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment or foresight;
2. Whether the employee has the opportunity for profit or loss based on management skills;

3. Whether the employee invests in materials or equipment for work or the employment of helpers; and

4. The number of contractual relationships, other than with the employer, the potential joint employer has entered into to receive similar services.

A number of business models, business practices and contractual arrangements that do not, by themselves, make it more likely that joint employer status exists under the FLSA are also identified in the final rule. The following such business models, practices or agreements are itemized in the rule:

1. Operating as a franchisor and entering into a brand and supply agreement or using a similar business model;

2. Requiring the employer to satisfy certain legal obligations or to meet health and safety standards. Examples include agreements that mandate compliance with FLSA laws; compliance with Occupational Safety and Health Administration standards; and institution of sexual harassment policies;

3. Requiring quality of control standards to assure consistent quality of work, brand, product or business reputation; and

4. A potential employer's practices of allowing an employer to operate a business on the potential employer's premises, offering an association health or retirement plan or other similar business practice.

A policy victory

The identification of business models and practices that do not affect the determination of joint employer liability provides the type of clarity and certainty for businesses, including the franchising industry that results in positive growth. In a January 12, 2020 op-ed co-authored by Mick Mulvaney, Acting White House Chief of Staff and Director of the Office of Management and Budget, and Eugene Scalia, Secretary of Labor, the authors assert that the new final rule "draws on leading court opinions to codify reasonable familiar standards for determining joint employer status"… and allows companies "in traditional contracting and franchising relationships" to demand compliance with employment laws without risking the imposition of joint employer status.

The Notice of Proposed Rulemaking issued by the Office of Information and Regulatory Affairs, however, acknowledges that a number of circuit courts have implemented various multifactor tests resulting in inconsistent treatment of workers in similar situations. Specifically, some federal circuit courts have adopted a broader interpretation of the FLSA and apply a broader joint employer test.

Instead, the DOL final rule seeks to interpret the FLSA and exemptive provisions such as the joint employer liability by applying a "fair reading" of the FLSA.

Despite the agency's efforts to establish greater uniformity in the application of the joint employer rule, it seems likely there will be challenges to the new rule. As we discussed here, the U.S. Supreme Court's 2019 decision in *Kisor v. Wilke* significantly limits the circumstances under which the courts must defer to an agency's interpretation of these regulations. Instead, the courts are to exercise their own judgment. As a consequence, despite the DOL's new clarifying regulation as to interpretation of the joint employer rule, we can expect continued litigation of joint employer status in FLSA cases.

What this means to you

The updated rule provides employers with greater clarity concerning joint employment status and business practices and models that will not be factored into joint employer considerations. It will take time to determine whether the federal courts will agree with the agency's interpretive rule. As a result, employers should review their business relationships and consider whether changes to their business practices or the structure of the business relationship would be prudent in light of the final rule.

Contact us

If you have questions about the new DOL joint employer rule and the implications for your business, or require an assessment of your status as a potential joint employer, please contact Chris Ottele, John Moore or your Husch Blackwell attorney.

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