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Employers Receive Guidance in DOL Final Joint Employer Rule

February 24, 2020
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Effective March 16, 2020, employers will be able to use a four-factor balancing test in determining joint employment status under the Fair Labor Standards Act (FLSA), based on the new final rule adopted by the Department of Labor (DOL).

The joint employer final rule is the first restatement of the DOL's joint employer regulations in more than 50 years, and marks a material change to the trend set in motion by the Obama administration to broaden the joint employer doctrine. Employers and management-side employment attorneys have expressed approval, agreeing that the four-factor test expressed in the final rule, which is based on a test adopted in one form or another by several federal appellate courts, is a practical and useful tool that balances competing interests.

Note that the final rule applies only to the FLSA. Whether a person or entity is a joint employer under other federal laws such as the National Labor Relations Act or Equal Employment Opportunity Commission (EEOC) is not addressed. Guidance on joint employer status from the National Labor Relations Board was just issued (watch for our upcoming post); guidance from EEOC is expected later this year.

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Below are the highlights of the DOL final rule and steps for employers to consider moving forward.

Two Scenarios

The final rule describes two potential scenarios where an employee may have one or more joint employers. In the first scenario, the employee has an employer who suffers, permits, or otherwise employs the employee to work (the primary employer), but another individual or entity simultaneously benefits in some way from that work. In the second scenario, one employer employs an employee for one set of hours in a workweek, and another employer employs the same employee for a separate set of hours in the same workweek, but the jobs and the hours worked for each employer are separate. The final rule describes the standards for determining joint employer status in each scenario.

The First Scenario

The final rule provides a four-factor balancing test to make a determination of joint employment under the first scenario, and focuses on whether the other individual or entity:

- hires or fires the employee;
- supervises and controls the employee's work schedules or conditions of employment *to a substantial degree*;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

Unfortunately, it remains unclear whether all, some, or even just one factor is required for a finding of joint employment. As expected, the DOL emphasized that in evaluating the four factors, all facts will be considered, and no one factor is more relevant than another.

Notwithstanding this general statement, the DOL did provide clarity on perhaps the most troublesome

factor for many employers—maintaining employer records. Under the rule, employment records refer to those records that reflect, relate to, or otherwise record information pertaining to the hiring or firing, supervision, and control of the work schedules or conditions of employment, or determining the rate and method of payment of the employee, such as payroll records. In many business arrangements, an entity other than the primary employer maintains some or all employee records. For this reason, many business associations and others raised concerns to the DOL over this factor, and argued that the presence of this factor alone, without more facts demonstrating actual control of an employee, should not be the basis for joint employer status. Fortunately, the DOL agreed. The final rule provides that the maintaining of employment records will not, without more, create a basis for a finding of joint employer. This is good news to many businesses.

Note that additional factors not articulated in the final rule may also be relevant for determining joint employer status in this scenario, but only if they indicate whether the potential joint employer is exercising significant control over the terms and conditions of the employee's work.

Business Models

In the final rule, the DOL expressly noted that certain business models (i.e., franchises), certain business practices (i.e., allowing the operation of a store on one's premises), and certain contractual agreements (i.e., requiring a party in a contract to institute sexual harassment policies) do not make joint employer status more or less likely under the FLSA. Thus, the existence of a franchise relationship or other business arrangement, without more, will not likely lead to a finding of joint employment. This is good news.

Economic Dependence Not Relevant

An employee's economic dependence on a potential joint employer is not relevant in determining whether that individual or entity is an FLSA joint employer. Factors cited as not relevant because they assess the employee's economic dependence include: (i) whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight; (ii) whether the employee has the opportunity for profit or loss based on managerial skill; (iii) whether the employee invests in equipment or materials required for work or the employment of helpers; and (iv) the number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services. While courts have used these factors for determining whether a worker is an employee or independent contractor, they are not relevant for determining whether additional entities are jointly liable under the FLSA to a worker whose classification as an employee has already been established.

Reserving a Right of Direction or Control

Employers were relieved at the agency's clarification that mere reservation of a contractual right by a business to act with respect to an employee's terms and conditions of employment was relevant to joint employer status. "Only actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the [FLSA]," the DOL said in the final rule. Thus, reserving a contractual right of direction and/or control over an employee, without more, is NOT enough to create joint employer status. Actual direction and control is required. This is also good news.

Indirect Control

Note, however, that actual direction and control can be indirect. The final rule includes some helpful examples to illustrate what the DOL considers

sufficient indirect direction or control. A potential joint employer may exercise indirect control by directing an "intermediary employer," or primary employer, to fire or hire an employee; set an employee's schedule; or determine an employee's pay. In other words, indirect control refers to control that flows from the potential joint employer through the intermediary employer to the employee. For example, if a golf course hires a landscaping company to provide services and the COO of the golf course directs the landscaping company to discipline a landscaping employee, such a direction, if mandatory, would be indicative of indirect control. If on the one hand, the "directive" was a suggestion, but not mandatory for the landscaping company to maintain its contract, it would be less likely to be indirect control. In the end, if the potential joint employer makes a recommendation or request, and the "receiving employer" (the primary employer) has the discretion to reject it, such an act, without more, is insufficient for indirect control to exist.

These comments are, in effect, instructions for employers on how to structure a contractual agreement between a primary employer and a potential joint employer to minimize the chance of a joint employer finding. To minimize joint employer risk, each such agreement should include language clarifying that the "primary" employer has the discretion to accept or reject any request, recommendation, or even directive from the potential joint employer.

Other Contractual Rights

The final rule and commentary provide some clarity on the effect of other contractual rights between possible joint employers. Not wanting to discourage parties from encouraging or even requiring compliance with health, safety, and legal obligations, the final rule provides that enforcement of such requirements is not an indication of joint employer status. For example, requiring the other entity to comply with policies in a workplace handbook, or

even providing training, is not indicative of joint employer status.

Examples

To assist employers in applying the final rule, including the four factors, the DOL included 11 separate examples, including a franchising relationship, a contract for janitorial services, an outsourced contract for landscaping services at a golf course, and an association with various requirements on members, and two involving traditional temporary staffing arrangements. In each example, the DOL offers guidance on whether joint employer status is likely.

In sum, under the first scenario, whether a person is a joint employer will depend on all the facts in a particular case: how many of the four factors are present; whether there are other facts to show actual direct or indirect control; and the appropriate weight given to each factor. We also know that there are a couple of "safe harbors" to provide shelter from joint employer status under this scenario.

The Second Scenario

The final rule did not make any substantive changes to the standard for determining joint employer liability in the second scenario. In short, if two employers are acting independently of each other and are disassociated with respect to the employment of a single employee, each employer may disregard all work performed by the employee for the other employer in determining its liability under the FLSA. Employers will generally be sufficiently associated if there is an arrangement between them to share the employee's services, the employer is acting directly or indirectly in the interest of the other employer in relation to the employee, or they 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.

An example of this would be two restaurants that each allow the same employee to work at their respective businesses, but do not coordinate between them the person's schedules, and there is no common ownership or management. On the other hand, if the restaurants are commonly owned or managed, and have a common or shared schedule for employees, the two employers would likely be deemed sufficiently associated with respect to the employment of the employee, and therefore likely joint employers. In that case, the restaurants should aggregate the hours worked by the employee for each for purposes of determining if they are in compliance with wage and hour laws. The most common issue would be overtime entitlement. In the latter example, whenever the employee exceeds 40 hours in a workweek, regardless of whether the hours are logged at separate restaurant locations, the employee would be due overtime wages.

If after application of this test, two entities are found to be joint employers of an employee, they will share responsibility under the FLSA for employee wages, including the duty to pay minimum wages and overtime for hours worked in the aggregate that exceed 40 in a workweek, and legal liability for any wage violations.

In conclusion, although the final rule provides much needed guidance, and does clarify whether certain facts or arrangements are, without more, indicative of joint employment, the particular facts will be determinative after application of each test under the two scenarios. Nonetheless, it does appear employers susceptible to joint employer status now have valuable guidance and some guard rails to erect when forming business relationships with other parties, some "bright lines" to provide a clearer path under certain circumstances (i.e., franchising, maintaining employee records).

Having said that, all employers with a risk of joint employer status should consult with experienced labor and employment counsel to review their

respective arrangements under the new final rule to determine whether any adjustments are warranted.
