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Who is a Joint Employer? Both the DOL and NLRB Release New Rules

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As this reader likely knows, the Fair Labor Standards Act (FLSA) requires that covered employers pay their employees the federal minimum wage, up to 40 hours worked in a workweek, plus one and one-half times the "regular rate" for every hour worked thereafter in the same workweek. The Department of Labor's (DOL) FLSA Joint Employer Rule (the Rule) provides that, where two or more employers are determined to be joint employers of an employee, the work hours that employee works, in a given workweek, must be aggregated to determine any overtime due to that employee. Additionally, when employers are deemed "joint," pursuant to the FLSA, such employers are jointly and severally liable for wage and hour violations under the FLSA. In these regards, the Rule remains unaltered.

Cursory Review of Legal Interpretation of the Rule, Why the Change?

Interpretations of the Rule, across several United States Circuit Courts of Appeal have been inconsistent.[1] Such inconsistencies cloud employers' ability to make sound judgments as to what business models or practices protect them from FLSA exposure. Employers realized that interpretation of the Rule oftentimes depended on the forum where the underlying FLSA allegations took place.

The difficulties created by these various interpretations of the Rule are self-evident; it is difficult enough for employers to control the models and practices of their own business, let alone having to look out for the models and practices of their franchisees, business partners, contractors, etc. Based on those interpretations, even the most scrupulous companies faced FLSA liability.

The DOL provides that a primary motivation for the update to the Rule is to resolve these inconsistencies. Given the seemingly haphazard application of the Rule, the DOL believes a Rule for determining joint employer status under the FLSA is necessary to provide companies greater certainty regarding what business models or practices could result in a joint employer status finding.[2] By issuing the Rule, the DOL hopes employers can improve their ability to remain in compliance with the FLSA and reduce litigation costs.[3] With these goals in mind, on January 12, 2020, the DOL released the updates to the Rule.

What's This Rule All About?

The meat and potatoes of the Rule lies in the newly established test for joint employer determination. The test is comprised of four factors and joint employer status determination is based on a balancing of such factors.[4] The four-factor test, derived from the *Bonnette v. California Health & Welfare Agency* decision, cited, *supra*, at n. three, and other cases from various United States Circuit Courts of Appeal, states that joint employer status depends on whether the alleged employer:[5]

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

- maintains the employee's employment records.[6]

Paramount to this analysis, the Rule expressly states that:

"[T]o be a joint employer under the Act, the other person must actually exercise – directly or indirectly – one or more of the four control factors. The other person's ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status *without some actual exercise of control*."[7]

The DOL makes clear that the Rule is a "fact-specific, totality of the circumstances analys[i]s" and all four factors need not be present to support a joint employer status finding.[8] Moreover, the Rule emphasizes that "additional factors may be considered, but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work."[9] For instance, where an employer determines an employee's wage rate and work schedule, but evidence also exists that the employer retains authority to fire the employee, such rights by the employer would be deemed relevant to the determination of joint employer status, and could, therefore, be considered in the final determination.[10]

As this analysis applies to indirect employment relationships, the Rule states that indirect control is demonstrated by "mandatory directions to another employer that directly controls the employee."[11] "[T]he direct employer's voluntary decision to grant the potential joint employer's request, recommendation, or suggestion does not constitute indirect control that may demonstrate joint employer status. Acts that incidentally impact the employee also do not indicate joint employer status."[12] The Rule provides the following illustration: where a restaurant requests lower fees from its cleaning contractor, which if agreed to, could impact the wages of the cleaning contractor's employees, this request would not constitute an exercise of indirect control over the employee's rate of payment because the cleaning service has discretion to lower its employees' wages, or not.[13]

Furthermore, the Rule specifically identifies the following business models, practices, or employer-employee relationships that do *not*, themselves, make a joint employer finding more or less likely:[14]

- the franchise-franchisee business model;[15]
- allowing an employee to operate their store on their own premises;[16]
- the brand and supply business model;[17]
- certain businesses that provide or share resources or benefits with another employer;[18]
- offering an association health or retirement plans to an employer participating in such plans;[19]
- or, inter alia, contractual agreements, whereby employees agree to implement sexual harassment policies or other quality control standards.[20]

Future Considerations

Certainly, the Rule will have an impact on the business models, practices, and contracts utilized by franchising companies, contractors, temporary staffing agencies, cleaning agencies, or other similarly situated companies.[21] Instead of paying counsel to review the latest finding of a given jurisdiction, employers can craft policies and procedures, particularly for their subordinates, subsidiaries, and other owned entities, directly targeting the four-factor test. This should make FLSA exposure more readily predictable and, hopefully, reduce litigation costs associated therewith. Clearly, the Rule is a positive step for employers.

As is so often seen in other contexts, the narrowing of the Rule seems to be a political calculation, largely predicated on the occupant of the oval office. As such, two key issues will be necessary to monitor after the Rule goes into effect: (1) who will win the general election in 2020; and (2) to what extent, if any, do courts attempt to adhere to the true intention of the Rule? As to the first question, 2020 is an election year. As such,

the November 2020 results could foreshadow expedient disposal of the DOL's narrower Rule. Only time can tell that narrative. As to the second question, what is less obvious, is the extent to which the courts will interpret and apply the Rule as the DOL intended. Unfortunately, the Rule, and its interpretation, is now in the courts' hands, leaving the possibility that muddled interpretations resurface.

For now, franchisors, franchisees, companies, and human resources departments would be wise to create action plans that analyze their employer's relationships with other potentially joint employers. To that end, the below battle plan is designed to help a company implement proper protections against potential FLSA liability. Keep in mind, no plan is one size fits all. The demands of your business, together with your business's models and practices, will be the facts cited by an adjudicator in the totality of the circumstance analysis when determining whether you are a joint employer with another individual or entity under the FLSA. Regardless, these steps, we hope, will assist you in doing what you can to protect against FLSA exposure:

1. **C**ompile a list of *all* your employees (if you do not have one already);

2. **A**ssign each such employee a category by identifying which employees could, or do, receive employment terms and conditions from two or more employers;

3. **R**eview your company's overall relationship with potential joint employers by conducting an in-house analysis (using the four Rule factors, above) of that employer's right to determine the terms and conditions of employees working for your company;

4. **D**etermine, with the help of legal counsel, whether the relationship with the potential joint employer requires restructuring, procedurally or substantively, to implement more or less rights to control the terms and conditions of your employees' employment;

5. **A**lter or create administrative plans necessary to proactively root out latent problems with potential joint employers *prior* to the Rule's effective date (March 16, 2020); and

6. **C**onsult with legal counsel to: (1) ensure FLSA compliance; (2) assist in implementation of any altered or creative administrative plans; (3) keep you up-to-date on the most recent interpretations of the Rule; and (4) maneuver through DOL regulations and changes.

The bottom line is, while interpretation of the Rule has been amorphous, and the political climate could quickly abrogate the Rule, there is no doubt that by taking steps to identify problem areas, now, prior to when the changes take effect on March 16, 2020, you have the power to proactively review your current practices and models in an effort to avoid the pitfalls, complexities, and serious financial consequences of non-compliance with the FLSA. Just think **CARD, AC**, to minimize the risk of liability!

NLRB Also Releases Its Version of Joint Employer Rule

The National Labor Relations Board (NLRB) is set to release its version of the Joint Employer Final Rule (NLRB Rule), which will take effect on April 27, 2020.[22] Similar to the DOL Rule, the NLRB Rule is focused on the degree of control over the employee exercised by the company. The final NLRB rule restores the standard the Board utilized for decades prior to the Board's controversial 2015 decision in *Browning-Ferris* case. Under the NLRB Rule, joint employment requires that a company possess and exercise "substantial, direct, and immediate control" over the employee's essential terms and conditions of employment. Essential terms are defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction. Moreover, the NLRB Rule makes clear that *de minimus*, sporadic, or isolated control is *not* substantial. While indirect or contractually reserved control can be considered in the analysis, substantial direct and immediate control are necessary findings to be deemed a joint employer. Perhaps most critical is that the NLRB rule specifically

states that routine elements of an arm's-length contract cannot turn a contractor into a joint employer. Clearly, in the labor context, the NLRB Rule will have significant impacts on the relationships between labor unions and employers. Hopefully, interpretation of the NLRB Rule, as with the Rule, will be consistent, such that employers actually realize the benefits of predictable joint employer statuses and decreased labor-related litigation expenses. This certainly seems like a step in that direction.

[1] *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir.1983) (utilizing a four-factor test in determining joint employer status); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003) (utilizing a ten-factor test in determining joint employer status); *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017) (utilizing an entirely new test in determining joint employer status).

[2] U.S. Dep't. of Labor Issues Final Rule to Update FLSA's Joint Employer Regulations, Dep't. of Labor Wage and Hour Division Release No. 20-57-NAT, 85 FR 2820 (Jan. 12, 2020).

[3] *Id.*

[4] 85 FR 2820, 2824–26 (Jan. 12, 2020).

[5] *Id.*

[6] *Id.* at 2820 (note, "satisfaction of the maintenance of employment records … alone[,] does not demonstrate joint employer status.").

[7] *Id.* at 2821.

[8] *See id.*, at 2832, 2834.

[9] *Id.*, at 2821.

[10] *Id.*, at 2834.

[11] *Id.*, at 2835.

[12] *Id.*, at 2823.

[13] *Id.*, at 2835.

[14] 85 FR 2820, 2821 (Jan. 16, 2020).

[15] *Id.*, at 2823.

[16] *Id.*

[17] *Id.*, at 2841.

[18] *Id.*, at 2839.

[19] *Id.*

[20] 85 FR 2820, 2821, 2843 (Jan. 16, 2020).

[21] *Id.*, at 2828.

[22] *NLRB Issues Joint-Employer Final Rule*, Office of Congressional and Public Affairs (Feb. 25, 2020), https://aboutblaw.com/O4s