U.S. DEPARTMENT OF LABOR FINALIZES RULE TO DETERMINE JOINT EMPLOYER STATUS

The U.S. Department of Labor's (DOL) new rule governing joint employer liability for wage and hour violations under the Fair Labor Standards Act (FLSA) goes into effect on March 16, 2020.

The rule is intended to clarify the circumstances under which more than one entity may be jointly and severally liable to an employee for payment of minimum wage and overtime under the FLSA. The intent of the rule is to achieve greater uniformity in determining joint employer status and, ultimately, to reduce the volume of related litigation.

The National Labor Relations Board and Equal Employment Opportunity Commission (EEOC) are also expected to issue their own rules about joint employer status in the near future. As the rule is an interpretive regulation, it remains to be seen whether the federal courts will be deferential to the rule.

THE DOL RULE

Two scenarios remain under the DOL rule in which an employee may have joint employers:

>> Category 1: If one employer employs an employee for one set of hours, and a second employer employs the employee for a separate set of hours in the same workweek; or

>> Category 2: If an employee works for an employer and the work performed by the employee also benefits a second employer.

The rule does not significantly change the standard for determining joint employer liability for Category 1. If the employers are "disassociated" from the employee's services and act independently of one another, then each employer does not have to take into consideration the work performed by the employee for the other employer when determining wages. But if the employers have any arrangement between them to share the services of the employee, they share control of the employee or one employer has direct or indirect interest in the other employer, the employee's total hours worked in the workweek for both employers must then be considered in the aggregate and the employers are jointly liable for wages owed under the FLSA.

To address joint employer status under Category 2, the DOL adopted a new four-factor test, which is derived from the Ninth Circuit case *Bonnette v. California Health & Welfare Agency*. The test is intended to narrow the circumstances under which an employee can allege joint employment. The four factors are whether the potential joint employer:

>> Can hire or fire 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.

No single factor is determinative, and the weight of each factor will vary

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THE BOTTOM LINE

Employers should be mindful of the DOL's new four-factor test for determining joint employer liability, which appears to be the DOL's attempt to narrow the joint employer definition, clarify the joint employment relationship and reduce litigation nationwide on joint employer status. Time will tell whether the courts defer to the DOL's rule and the impact that other agencies, such as the NLRB and EEOC, may also have on defining joint employment status in the United States.

depending on the circumstances. The rule does clarify that the maintenance of employment records, by itself, is insufficient to establish joint employer status.

The DOL may also consider additional factors where it appears that an entity is exercising significant control over the terms and conditions of an employee's work. For example, if one employer mandates to another that employees must follow specific directions or rules to perform their jobs, this is evidence of indirect control that suggests joint employment. But mere suggestions or recommendations, even if they would impact wages, are not evidence of exerting control over employees, and thus are not evidence of joint employer status.

Notably, the rule also clarifies that merely contracting with a party, which *reserves the right to* or even *has the authority to* exert control over the conditions of employment, is not sufficient to establish joint employer status. Rather, the entity must *actually exercise* such control to be considered a joint employer.

The final rule clarifies that certain contractual arrangements and business practices are not relevant to the determination of joint employer status, including:

- A contractual agreement that requires the employer to comply with its legal obligations or to meet certain standards to protect the health or safety of employees or the public, including compliance with sexual harassment laws;
- A contractual agreement with an employer which requires quality control standards to ensure the consistent quality of the work product, brand or business reputation;
- Providing the employer with a sample employee handbook or other forms, allowing the employer to operate a business on its premises and offering an association health or retirement plan to the employer or participating in such a plan with the employer;
- Jointly participating in an apprenticeship program with the employer, or any other similar business practice;
- Factoring in whether the employee is economically dependent on the potential joint employer and other factors that are typically considered in determining whether a worker is an independent contractor; and
- Operating as a franchisor, entering into a brand and supply agreement, or using a similar business model.

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