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DOL narrows FLSA's joint employer standard

On January 16, the DOL issued a final rule clarifying its interpretation of joint employment under the Fair Labor Standards Act. The rule, slated to take effect on March 16, establishes a four-factor balancing test for determining whether two or more entities are jointly liable for minimum wage and overtime pay violations. The new standard is expected to make finding joint employment under the FLSA less likely in franchise and other common business scenarios.

Background

The federal Fair Labor Standards Act (FLSA or Act) requires covered employers to pay their nonexempt employees at least the federal minimum wage for every hour worked and overtime for every hour worked in excess of 40 in a workweek. While the Act does not use or define the term "joint employer," the FLSA regulations recognize that a worker may have "two or more employers at the same time."

Whether multiple employers have separate and distinct — or shared — responsibilities under the FLSA depends on the extent to which they act independently of one another with respect to the employment of the same employee. Entities that are determined to be joint employers are all responsible, both individually and jointly, for compliance with the Act and are jointly and severally liable for the same employee's wages, including overtime.

Current regulations, which have not been meaningfully revised in 60 years, address two scenarios — where the employee (1) performs work for an employer that simultaneously benefits another individual or entity, or (2) works separate sets of hours for multiple employers in the same workweek. With respect to the first scenario, the regulations provide that multiple entities may be joint employers of an employee if they are "not completely disassociated" with respect to that worker's employment.

While Obama-era guidance took an expansive view of joint employment, it was later withdrawn when administrations changed. (See our February 11, 2016 *FYI* and June 8, 2017 *FYI Alert*, respectively.)

On April 1, 2019, the DOL proposed revisions to existing regulations to clarify the standard for determining joint employer status under the FLSA. (See our June 12, 2019 *FYI*.)

Final rule

On January 16, the DOL issued a final rule clarifying its interpretation of joint employment under the FLSA. Effective March 16, the rule replaces the current "not completely disassociated" standard with a four-factor balancing test to determine whether separate entities are joint employers where an employee works one set of hours for an employer that simultaneously benefits another entity. It also provides additional guidance on how to apply the test, as well as examples of its application.

> **Buck comment.** While the final rule applies only to joint liability for FLSA compliance, the NLRB is also engaged in rulemaking to eliminate uncertainty over the joint employer standard under the National Labor Relations Act. (See our September 14, 2018 *FYI Alert*.) The EEOC has recently indicated that it also will propose rules clarifying when an entity qualifies as a joint employer under the federal EEO laws.

Four-factor test

The four factors to be considered under the new balancing test are whether the potential joint employer:

- Hires or fires employees
- Supervises and controls employees' work schedules or conditions of employment
- Determines employees' pay rates and method of payment, and
- Maintains employees' employment records

Under this test, no one factor is dispositive. Rather, the weight for each factor and analysis will vary based on the particular circumstances. However, to be jointly liable for properly paying employees overtime or minimum wages, an employer must actually exercise — directly or indirectly — at least one of the above control factors. Simply maintaining an employee's employment records does not establish joint employer status. Similarly, the potential ability, power, or contractually reserved right to act is alone insufficient to create joint liability.

Other factors

The rule clarifies that additional factors may be relevant, but only if they indicate whether the potential joint employer is:

- Exercising significant control over the terms and conditions of the employee's work
- Otherwise acting directly or indirectly in the interest of the employer in relation to the employee

By contrast, “economic reality” factors — while key in determining whether an individual is an employee or independent contractor under the FLSA — are no longer relevant considerations in determining potential joint employer status under the Act. Such factors include whether the employee:

- Is in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight
- Has the opportunity for profit or loss based on his or her managerial skill
- Invests in equipment or materials required for work or for the employment of helpers

Common business scenarios

The final rule singles out certain common business models, practices, and contractual agreements that do not “make a finding of joint employer status more or less likely” including:

- A franchise relationship, a brand and supply agreement, or a similar business model
- Allowing an employer to operate a business or facility on another’s property
- Jointly participating with an employer in an apprenticeship program
- Offering or participating in an association health or retirement plan
- Requiring health, safety, or legal compliance (including obligations under the FLSA or other similar laws), or monitoring and enforcing such contractual commitments
- Contractual agreements that require the potential joint employer to maintain “quality control standards to ensure the consistent quality of the work product, brand or business reputation” or monitoring compliance with these types of agreements

The final rule includes only non-substantive changes to current regulations that address joint employer status where an employee works separate sets of hours for multiple employers in the same workweek. Multiple employers are deemed joint employers only if they are sufficiently associated with one another — such as when the employers share the employee’s services, one employer acts directly or indirectly in the interest of the other in relation to the employee, or one employer controls, is controlled by, or is under common control with the other. If so, the hours worked for each employer would be aggregated to determine FLSA liability.

> **Buck comment.** While the final rule clarifies how the DOL will interpret joint employment status under the FLSA, interpretations may differ under other federal laws as well as state wage and hour laws. Since the FLSA does not expressly give the DOL authority to define joint employment, it remains to be seen how much deference the courts will give the final rule and how they will apply the agency’s new four-factor test.

In closing

The final rule, which takes effect on March 16, 2020, is intended to reduce uncertainty and clarify FLSA compliance obligations in common business scenarios. The new standard is likely to narrow

joint responsibility for unpaid wages, particularly for businesses that use franchise arrangements or rely on staffing agencies.

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