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CLIENT ALERT

Department of Labor Issues New Joint Employer Rule

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For the first time in sixty years, the United States Department of Labor (DOL) has published a new standard for determining whether two entities are "joint employers" of workers for purposes of liability under the Fair Labor Standards Act (FLSA). The new final rule adopts a four-factor balancing test to determine joint employer status, with no factor dispositive of the ultimate question. As part of the test, the DOL will consider whether an entity (a) hires or fires the employee, (b) supervises and controls the employee's work schedule or conditions of employment to a substantial degree, (c) determines the employee's rate and method of payment, and (d) maintains the employee's employment records. The DOL also clarified that certain factors that some courts had previously relied upon to expand the concept of joint employment are not relevant to the joint employment inquiry. The new rule, to be published at 29 C.F.R. § 791, represents a more employer-friendly approach designed to bring greater predictability to employers attempting to manage their compliance liability under the FLSA. The new rule will take effect on March 16, 2020.

The DOL Adopts a Four-Factor Balancing Test to Determine Joint Employer Status

The new rule posits two joint employer scenarios under the FLSA. In the first, the employee has an employer who "suffers, permits, or otherwise employs the employee to work," while "another person simultaneously benefits from that work." Under the new rule, that other person – which could be an individual or a business entity – "is the employee's joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee." The new rule advances four factors that "are relevant to the determination," which are whether the other person:

- Hires and 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.

The DOL does not view any of the factors as dispositive and, instead, will accord the various factors the weight appropriate in the circumstances of a particular case. In addition, the DOL cautioned that merely maintaining employment records in and of itself will not be sufficient to demonstrate joint employer status.

The new rule further notes that an employee's "economic dependence" on a company does not impact whether the company is a joint employer under the FLSA. Implicitly responding to court decisions that had taken an expansive view of joint employer liability, the DOL's new rule also clarifies other factors that do not influence the joint employer determination, including:

- Operating as a franchisor;
- Providing a sample employee handbook or forms to an employer;
- Allowing an employer to operate a business on the company's premises (including "store within a store" arrangements);
- Offering an association health or retirement plan to an employer or participating in such a plan with the employer; and
- Requiring a business partner to perform background checks or to establish minimum wages and workplace-safety, sexual harassment prevention and other policies.

The DOL Addresses Simultaneous Employment

The second joint employer scenario posited by the DOL is when "one employer employs a worker for one set of hours in a workweek, and another employer employs the same worker for a separate set of hours in the same workweek." In this scenario, the new rule notes, the "jobs and the hours worked for each employer are separate, but if the employers are joint employers, both employers are jointly and severally liable for all of the hours the employee worked for them in a workweek."

For this scenario, the new rule establishes a standard by which "each employer may disregard all work performed by the employee for the other employer" in determining its own responsibilities under the FLSA, where "the employers are acting independently of each other and are disassociated with respect to the employment of the employee." However, "if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining compliance with the Act." The new rule provides that association is generally sufficient to create joint and several liability when:

- There is an arrangement between them to share the employee's services;
- One 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.

The new rule then provides a number of illustrative examples meant to clarify application of this standard in various common circumstances.

Impact of the New Rule on Employers

The DOL's new joint employer rule is generally more favorable to employers than was the DOL's previous rule and provides far more clarity than both the prior rule and case law on the topic. Employers can now identify those individuals for whom they are likely to have FLSA compliance liability with greater certainty, but employers should note that the new rule by itself does not act to overrule any court decisions or existing state laws. Nor will agencies enforcing other federal employment laws, such as the NLRB and the EEOC, be required to adopt the new rule with respect to the laws under their respective purviews.

Advice Moving Forward

Employers should revisit their relationships with third parties, including business partners and vendors, paying particular attention to whether they make employment decisions with respect to those third parties' employees, and whether they share common employees with those third parties. Employers should also factor in the guidance provided by the new rule in drafting and negotiating contractual arrangements they enter into with business partners and vendors going forward.

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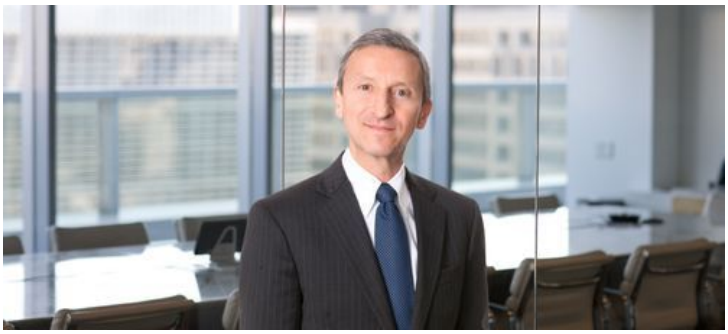

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