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Rebecca Rainey (00:00)
Welcome to the FP5: Five Things for Your 9-to-5. We help employers make sense of the fast-moving world of workplace law and compliance by breaking down topics into five parts. I'm Becca Rainey from the Fisher Phillips Content team.

Businesses that use contractors or franchise out their brand may soon get some clarity about when those arrangements make them joint employers under federal law. Joint employer relationships often come up in the context of labor enforcement, where an agency like the US Department of Labor finds that more than one company has enough control over a set of workers that they share liability when something goes wrong.
The US Department of Labor recently released a proposal outlining its approach to joint employer liability under three different laws, setting up a test that will give companies greater flexibility and less risk when entering into business relationships.

Marty Heller joins us today to share what you need to know about this new DOL proposal. Marty is a partner at FP in our Atlanta office and a member of the firm's Wage and Hour Practice Group. Thanks for being on the show today, Marty!

Marty Heller (01:16)
Absolutely. Thanks so much for having me.

Rebecca Rainey (01:18)
Yeah, so tell us a little bit about your background. What originally drew you to employment law, and did you always know this was the path you wanted to take?

Marty Heller (01:27)
This is a really good question and kind of a comical answer. So in law school, I really thought I wanted to be a tax lawyer. And I took, yeah, a little different than what I do. I took a lot of tax classes in law school. I don't know what drew me to it, but I really enjoyed it and I wanted to go get my LLM in tax after law school. I graduated in 2008 and one of the last classes that I took was employment law. And before I took the employment law class, I had interviewed with a couple local firms-- I went to the University of South Carolina for law school--so I interviewed with a couple local firms in South Carolina, a firm in North Carolina, and a firm in Atlanta. And still was dead set that I was gonna go get my LLM and pursue tax law.

And I got an offer from a firm in Atlanta that I really just couldn't refuse, but it was an offer for employment law, which I knew nothing about. So that is why employment law was one of the last classes I took. It was literally after I got my offer that I decided, “I guess I better learn something about employment law and what I'm about to go do.” And I still thought, I'll take this job and I will, you know, work in employment law for a year or two and then I'll probably go get my LLM. And, you know, obviously the economy crashed in 2008 almost immediately after I graduated law school. And part of my experience was there were no jobs that existed after the crash. And I was lucky to be in a job that I got to keep. So I decided I was going to give it, you know, more than just the college try. And I was really going to focus on trying to see, can employment law be my career? And after just, you know, even a year or two, I realized this is an area of practice I really love. And so it was it was a sort of end around that, a creature of convenience, if you will, that led me to employment law, but I fell in love with it. And it's something, it's the only thing I've ever done, and I think I can very confidently say it's the only kind of law I will ever practice.

Rebecca Rainey (03:55)
So you're based in Atlanta and are involved in the business community there. Atlanta's been growing rapidly over the past couple of decades. How has the city's growth and evolving workforce influenced the work that you do now?

Marty Heller (04:09)
So I think it's a growth of the Atlanta market combined with a growth of wage and hour claims. For me in particular, I started at a firm where I did not specialize in one particular area. I learned all types of employment law. And by my third or fourth year, I realized I really enjoy wage and hour claims. And as Atlanta started booming, the number of FLSA Fair Labor Standards Act claims that were filed in the Atlanta area skyrocketed. And so for me, it combined an interest I had with an opportunity due to the growth. And I had a pretty unique chance to start specializing in wage and hour law as I became more experienced as a lawyer. And that has been my primary focus at this point for more than a decade. So I think the growth of Atlanta in general and especially big businesses moving their headquarters to the city of Atlanta has really given me the opportunity to do what I love doing.

Rebecca Rainey (05:17)
So, our first thing. The Department of Labor is trying to create more consistency around when businesses can be considered joint employers under federal wage and leave laws. What exactly is a joint employer and where do we typically see these types of relationships?

Marty Heller (05:36)
So there's two answers. We have vertical joint employment and we have horizontal joint employment. And they are distinct and separate, although they are often confused, we see that the primary use is going to be vertical joint employment, but I'll tell you what horizontal joint employment is first, because it's a little easier.
So the idea of horizontal joint employment is when there are separate entities from a legal perspective, who are so interrelated that the hours worked for those entities should be aggregated. So, what we're looking at is, for example, you might have a restaurant and they might have three or four or five locations. And you might have a server that works at one location for 25 hours a week and a separate location for 25 hours a week. And so the concept of horizontal joint employment is that if they are horizontal joint employers, their hours must be aggregated. And so that server has worked 50 hours for one employer rather than 25 hours for two different employers. So we are often looking at the interrelatedness of the operations. Is it common ownership? Do we see common management? Are they scheduling things together to make sure they don't overlap? Are they using common human resources from a management perspective? Do they have common operations teams from a regional level? And if all of those things point to consistency between the operations of the two entities, you're gonna see horizontal joint employment, and the hours should be added together to determine if someone is owed overtime.

Vertical joint employment is the more controversial of the two types of joint employment, in that it gets more attention from courts. Horizontal is usually a little easier to figure out. And the vertical joint employment is the one that usually is whenever we see changes to the proposed rules, it's the one that's more likely to be challenged. And the concept of vertical joint employment is that two separate entities could be jointly and severally found liable for one violation. So in that concept, we're talking about company A and company B, they may not be related to each other, but may have a common relationship with respect to an employee such that they both could be deemed the employer of that employee. And that's when we see the economic realities test that has been interpreted by many different jurisdictions and modified in many different ways by USDOL. That's where we see that come into play. And the real reason you see, whether it's the Department of Labor or Plaintiff's Counsel trying to hold two entities liable for the same violation, is that one entity may have deeper pockets than the other entity. And so they want to find the best opportunity to be able to recover for a violation.

Rebecca Rainey (08:49)
Got it. So let's try and put this into a scenario for us non-wage-and-hour nerds here. So if we've got Marty's Chicken Shack, which is a national franchise brand, and Becca Rainey wants to open a Marty's Chicken Shack in Baltimore. So if I am opening up three or four Marty's Chicken Shacks, my relationship, or rather, my employees' relationship with your national brand, Marty Heller's national brand, is gonna be different than the relationship that they may have between my local three Marty's chicken shacks. Am I explaining that correctly?

Marty Heller (09:38)
Correct. That's precisely the situation where we might see--franchisee, franchisor, an association that has members--those kinds of things are precisely where we see allegations of joint employment.

Rebecca Rainey (09:53)
Got it, got it. And I'm trademarking that. Marty's Chicken Shack is mine.

Marty Heller (09:58)
You can have it. I don't think I'm cut out to be a franchisor.

Rebecca Rainey (10:03)
Okay. The second thing we'll discuss today, a major focus of this proposal from the Department of Labor is the amount of control one business exercises over another company's workers. What exactly is the agency proposing, and how does this new framework differ from the approach employers have been operating under in recent years?

Marty Heller (10:30)
The answer is going to depend on what jurisdiction we're talking about. But let's start with what USDOL is proposing. So they issued a proposed rule, which is still in the comment period, on primarily vertical joint employment, it does address horizontal, but the vertical joint employment is the key piece of this proposed rule. And it proposes that USDOL focus on four primary factors in a totality of the circumstances test to determine whether two entities are joint employers with respect to the employment of a single individual. It asks, number one, do they hire or fire the employee? Number two, do they supervise and control their work schedule and conditions of their employment to a substantial degree? Number three, do they determine that employee's rate of pay and method of pay? And number four, are they maintaining the employment records? So those are the four primary factors, no one of which is controlling, but instead looking at all four of those factors, can we reach a conclusion as to whether the two entities are both employers of that individual? Or instead are they separate employers and only one of them should be held liable for any FLSA violation?

Rebecca Rainey (11:52)

Right. And you kind of covered it here, but are there any particular parts of the working relationship that are going to be very important in this test? I mean, of course there's the four factors that you just outlined, but is there anything in this that is significant and different from the past?

Marty Heller (12:12)
So this is a modified version of a previous rule from the past Trump administration, US Department of Labor, that was struck down in New York. And there's a critical change that they've made to try to keep this as an enforceable rule and stop it from being struck down. And so I think that is probably the most important piece of this rule as compared to previous iterations of joint employer proposed rules, and that focuses on the reserved right to control.

So we talked about the four factors: the hiring and firing, the supervising work schedule and conditions of employment, the rate and method of pay, and maintaining employee records. In the previous iteration, the reserved right to control contractually, in other words, my contract says I can hire and fire your employees. But I don't actually ever exercise that control, I just have the right to do so in the contract, but I've never actually exercised that control. Under the previous iteration of this proposed rule, that was deemed to be irrelevant and not a factor to be considered by the courts or the US Department of Labor.

Under this version of the rule, and I'm comparing this to the 2020 rule, but when we look at this version of the rule, the reserved right to control is relevant. It's just less relevant than the actual exercise of control. So your contracts, if they say, I have the right to control your pay, I have the right to control hiring and firing, I have the right to control your work schedule, et cetera. Those are all going to be relevant, even if you've never done it. But it's not nearly as relevant as whether you have exercised control to a substantial degree of any of those factors. That is the critical analysis, but those other factors could still play a role.

Rebecca Rainey (14:24)
Our third thing, this proposal could have major implications for franchises, staffing relationships, contractors, and vendor partnerships. Why does this rule matter so much for employers and how does it fit into the broader trend of shifting federal employment law?

Marty Heller (14:41)
So I think the reason this is so important to those types of employers and really other types of employers as well is clarity and consistency. So the economic realities test, as it's looked at in federal courts right now, has different factors in different jurisdictions. And even when we're talking about federal law only, and this will only impact federal law, states could still pass state law changes that impact their wage laws that might be different.
But we still see the Ninth Circuit has a different analysis than the Eleventh Circuit, which is a little bit different than what we see in the Seventh Circuit. And so what this should do if it if it remains in place, becomes a final rule in the same form that we see now is it should give employers who are in multiple jurisdictions an opportunity to understand the law as it applies to the FLSA and also the FMLA and MISPA in the same way, regardless of which jurisdiction you're in.

So, you know, when I'm been asked about this previously, I think the number one reason why this is so important for employers is that it gives you a chance to maybe have the same rule apply regardless of where you are, while taking into account the fact that separate state law issues may apply.

Rebecca Rainey (16:14)
This is the FP5. I'm Becca Rainey, and we're here with Marty Heller. Marty is a partner at Fisher Phillips in our Atlanta office and is a member of our Wage and Hour Practice Group. Quick reminder: you can find a link to the insight we've been talking about today in our podcast show notes.

And the fourth thing for today: even with more clarity from the DOL, businesses could still face risks under state laws and evolving court interpretations. What are some of the common mistakes employers make when structuring these relationships? And where do you see the biggest areas of legal exposure?

Marty Heller (16:51)
So I think one of the common mistakes people make is they assume that, you know, as you pointed out, that there aren't separate state laws. And so they put together what they believe is a uniform contract or relationship agreement with another entity without realizing they've got to contact their attorney or contact whomever they use for business relationship advice and find out is there something different, for example, in California.

Where, of course California is the easiest example to give where we have massive differences in law with respect to employer and employee relationships there than we would see under federal law. So I think the biggest mistake people make is they get legal advice on a federal level in one jurisdiction and they're not looking at local changes that they might need to make specific to where they're entering into relationships.

Rebecca Rainey (17:49)
Are there any states in particular that are really strict when it comes to joint employment relationships?

Marty Heller (17:55)
So I think when we look at where we're seeing trends on joint employment changes, it sort of coincides with where we see changes on the independent contractor relationships as well. And I think you want to look at the states that are most active in protecting employee-side rights. So we're looking at California, Washington State, Oregon. We're looking at New York and New Jersey and DC. And those are the types of places where we're going to be extra careful and really ensure that, you know, when we're reviewing an agreement or litigating a case, that we have a local team that can give the proper advice that is jurisdiction-specific, because those types of locations can lead to aggressive, either local agencies or aggressive plaintiffs' counsel that if not handled properly can lead to significant liability.

Rebecca Rainey (18:50)
Right. And I feel like this comes up nearly every episode on this show, but where state law is more protective than federal law, employers need to follow the most protective law. Is that right?

Marty Heller (19:02)
Yes, so for the most part, that's correct. And with respect to joint employment, you know, especially under the Fair Labor Standards Act, the FLSA sets the floor, not the ceiling. So there are a lot of states that have said, hey, that's not protective enough of our employees. And we want different laws with respect to overtime, with respect to joint employment, with respect to independent contractor status, et cetera. And those are still enforceable in those states, but limited to employees that work in those states.

Rebecca Rainey (19:39)

Alright well, fifth and finally, while this rule is still in the proposal stage, employers are already thinking about compliance and risk management. What practical steps should organizations take now to review their contracts, their policies and business relationships in anticipation of a final rule?

Marty Heller (19:58)
So I think there's different steps that employers should take depending upon the type of industry that they're in and the type of relationships that they have. But I think one consistent piece that every employer should be doing if they contract with other entities or they are the other entity that contracts with, sort of parent entity or an entity providing services to their employees, is make a decision one way or the other.

If I have joint employment risk, am I attempting to space myself as much as possible away from the joint employment risk? In which case you're going to want to review your contracts. You're going to want to make sure reserve right to control isn't there. You're going to want to make sure that you are not inviting hiring, firing, scheduling, setting of pay, et cetera. Or are you more in the type of relationship where you want to embrace the joint employment aspect?

In those cases where control of the employees is critically important to you as an entity, then you want to sort of look at it from a reverse perspective of do I want to embrace the joint employment so that I can audit their records, I can ensure they're complying at all every single step of the way with the Fair Labor Standards Act, with the FMLA, with MISPA for our AG clients.

And so I think the first thing they're gonna wanna do when they look at the proposed rule is say, do I have these kind of relationships? And am I trying to distance myself from a joint employer status? Or do I find control of the individuals is so important to my entity that I want to embrace it?

Rebecca Rainey (21:53)
Alright, so let's get to know you a little bit better in five questions. Are you ready?

Marty Heller (21:58)
Ready when you are.

Rebecca Rainey (22:00)
You've got a lot of litigation experience. Describe for us how it feels to win a big case.

Marty Heller (22:07)
So it's a good question with probably an impossible answer. I think generally a lot of lawyers, and I am definitely one, don't have a ton of work-life balance. And we tend to pour ourselves into, you know, whatever the hottest and most active litigation matter we have is. So I'll put a caveat in here that I think there's a lot of different ways to win. And I don't define winning as necessarily always having the case dismissed or you know, getting summary judgment in a case. Sometimes it's just getting the best result for the client.

But I think big picture, it's why we do what we do. The feeling that you've got the best outcome for your client at the end of the day, again, whether it's dismissal or whether it's just a really good resolution, it's what gets you to come back to the table the next day. And it's the kind of thing we strive for in every case. We can't always have the best outcome. And certainly the facts of the cases control what happens. But I think it's sort of like an addiction. the feeling you get is something you want to keep chasing, and it's part of why we do what we do.

Rebecca Rainey (23:31)
Yeah, and I wonder too, like when you wrap up a case, if you're kind of like, “What do I do with myself now?” You know, once it's all done.

Marty Heller (23:40)
There can be that feeling sometimes, but I think more than anything, it's: take a mental reset. Have a moment to yourself where you pour yourself into something other than work for a day or so and then dive back into the next one.

Rebecca Rainey (23:56)
Right. Okay, so what is one place that's still on your bucket list?

Marty Heller (24:01)
So I don't think I can limit it to one. I'd love to just say there's only one place I haven't been that I'd love to be, but there's so many I'd love to go to still. I'm a big skier and I love to go scuba diving. So I ski with my children a lot every year, and I go diving with my son. And I think the two places I'd like to go the most on family trips would be, I'd love to go skiing in Japan and my wife would love a trip to Japan, but trying to find time to get there and really be able to experience it is difficult. But that's definitely on the bucket list. And then I'd love to go diving in Australia. I just think there's so much really cool diving there that I've never gotten the chance to do.

Rebecca Rainey (24:55)
Can you tell us a little bit about your volunteer work with charities in the Atlanta area?

Marty Heller (25:01)
Sure. So with the caveat that my kids are at an age where most of my volunteer work these days is coaching sports on the weekends whenever I can between baseball and soccer and everything else they do. But when I'm not volunteering as a coach, I really love building for Habitat for Humanity. I've had the privilege of doing it a few times, and have always learned a new skill when I go do it, but it's very rewarding and I find that type of volunteer work really pairs nicely with what I feel like I get them the most reward out of.

Rebecca Rainey (25:43)
So we hear you have three dogs. What are their names?

Marty Heller (25:49)
So my wife and I are both Georgia grads and we met and started dating when we were at Georgia. So all of my dogs I've ever had, that I've owned, you know, as an adult, have been named after something University of Georgia-related. So I had a number of dogs over the years that aren't with us anymore, but our three dogs now we have a Schnauzer named Kirby. We have a Bernedoodle named Sony. And we have a Great Dane. He is an absolute massive dog. His name is Stafford after Matthew Stafford.

Rebecca Rainey (26:27)
But I feel like that's a big height difference there.

Marty Heller (26:31)
Huge and it's hilarious. The Schnauzer and the Great Dane are best friends and the Bernedoodle just kinda keeps to himself.

Rebecca Rainey (26:39)
I love it. So what's one hidden talent people don't know about? And I wanted to, you know, kind of save this question because you mentioned your work for Habitat for Humanity. So is there, you know, a very cool construction skill that you have gained from that work? What's a hidden talent that you've gained from that?

Marty Heller (27:00)
So it's funny, it's probably the reverse of a talent. You know, it's probably a hidden skill set that I lack that I continue to chase after. But I really would love to be handy. And I try desperately to do things that I probably shouldn't do. And it they usually get done about 90% of the way correctly. But, I have redone the hardwood floors in our master bedroom, I have redone all of the boarding on our deck, and I always take on these projects and think, surely this isn't that hard, I can figure it out. And I can figure out about, like I said, about 90% of it. And then I'm usually staring at the end of the project thinking, "maybe professional help would have gone a little ways."

Rebecca Rainey (27:50)
And then it's like you have it like sitting there and you're like, I need to finish this and y it's just been so frustrating the whole time that you don't wanna do it. I've been dealing with that with painting my house too.

Marty Heller (28:03)
Absolutely.

Rebecca Rainey (28:04)
Well, that is all the time we have for now. Thanks again for being on the show, Marty.

Marty Heller (28:09)
Absolutely. Thanks so much for having me.

Rebecca Rainey (28:12)
And thank you for listening to the FP5. For this insight on the proposed joint employer rule and for other insights from Fisher Phillips, visit fisherphillips.com.

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