Labor Department Puts Another Nail In The Coffin For Updated Joint Employer Rule

Insights
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Striking another blow against the Trump-era joint employer rule that briefly created a new and more business-friendly standard to wage and hour compliance, the Department of Labor today proposed rescinding the rule altogether, which would most likely cement into place a broad standard that captures a wide swath of workers and business arrangements into the "joint employer" category. Today's announcement doesn't change anything in the short term – the Trump-era rule has been on ice since a New York federal judge struck it down in September 2020, and businesses have been operating under the standards previously set by courts around the country since then. However, in the long term, businesses can expect DOL to take further regulatory action to return to standards similar to the Obama-era approach to joint employer status.

Where Have We Been?

By way of quick background, many businesses across the country breathed a sigh of relief in March 2020 when the Department of Labor's new joint employer rule took effect. It created a four-part test to determine whether a business is equally liable for obligations under the Fair Labor Standards Act (FLSA), assessing whether the entity in question hires or fires the employee; supervises and controls work schedules; determines rate and method of payment; and maintains employment records. Critical to this updated new rule was that an entity must actually exercise — directly or indirectly — one or more of these factors in order to be considered a joint employer, not just reserve the right to control.

But the rule was only in effect for six months before a New York federal court judge struck down nearly all of the effective portions of the rule. He concluded that the Labor Department's new rule had "major flaws" and did not comport with the FLSA – mostly because it "ignored the statute's broad definitions" and inappropriately narrowed the definition of "joint employer." Specifically, the judge held that the rule's requirement that an entity actually exercise control over a worker to be deemed a joint employer conflicts with the FLSA, and that control is merely one factor courts and the Department of Labor have and should continue to review.

What Happened Today?

Echoing the judge's concerns, the Labor Department today proposed formally rescinding the rule,

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indicating it was "unduly narrow" and ran contrary to many judicial decisions from across the country. It noted that no courts had previously used the standard adopted by the final rule, and that most courts applied interpretations that encompassed a "totality of the circumstances" approach to the question rather than following a strict several-factor test.

The announcement from the Department of Labor did not advocate for any specific standard to be applied, nor even describe a possible new standard. Instead, the agency said it would take public comment for a 30-day period before determining its next steps.

What's Next?

The agency will receive and then review public comments. Presumably, after that time period expires, they will rescind the final rule on join employment and likely issue a new proposed rule – which will undoubtedly have much more in common with the Obama-era standards than anything we saw from the Trump DOL. We can expect to see something from the agency in the next several months.

However, it is also worth keeping an eye on the 2nd Circuit Court of Appeals, which is hearing an appeal of the September ruling that struck down the Trump-era version of the rule. While the appeal was originally filed by the Department of Labor, a consortium of business advocacy organizations have stepped into the government's shoes to take up the fight now that the agency has taken on new leadership and a new direction.

It is possible that the appeals court could determine that the lower court improperly axed the rule and could breathe new life into the Trump DOL version. If that were to occur, such a ruling could give fuel to business groups to launch a fresh attack on whatever new rule is introduced by the Biden administration, arguing that there is no valid reason for the agency to reverse course.

What Should You Do?

Again, today's announcement didn't result in any specific or immediate changes to the law. You should continue to operate under the same standards you had been using yesterday for the time being. Of course, if you still have not changed course since the September ruling in hopes that the Trump-era rules would somehow be resurrected, you should work with counsel in an effort to determine the correct course of action.

In terms of what you can anticipate from the new DOL in the near future, you can look back to a January 2016 interpretation – "Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act" – for an idea of what we can expect. This Obama-era guidance signaled that organizations engaged in multi-participant arrangements — such as outside-party management, joint ventures, staffing services, employee leasing, temporary help, subcontracting, certain kinds of "job sharing," and dedicated vendors or suppliers — were directly in the DOL's crosshairs. The agency essentially said that it wanted to put as many of them as possible on the hook for any alleged wage and hour violations filed under the FLSA.

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