Federal Appeals Court Puts Final Nail in Coffin for Business-Friendly Joint Employer Rule

Insights
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Laying any doubt to rest that employers would miss out on the chance to enjoy a business-friendly interpretation of the standard to determine joint employment status, a federal appeals court on Friday put the final nail in the coffin of the Trump-era attempt to shield businesses from being considered joint employers in a wide spectrum of circumstances. This move clears the way for the current administration to cement into place a broad standard that captures a wide swath of business arrangements into the "joint employer" category. Nothing much is changed in the short term – the business-friendly standard had been on ice since a New York federal judge struck it down in September 2020 and on death watch since the new Department of Labor proposed rescinding it altogether in March and formally pulled it in July – and businesses have been operating under the standards previously set by courts around the country since then. Now, you can anticipate that the DOL may take further regulatory action to return to standards similar to the Obama-era approach to joint employer status. What do you need to know about this October 29 court order?

Where Have We Been?

By way of quick background, many businesses across the country celebrated 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 actually exercises its power to:

- hire or fire employees;
- supervise and control work schedules;
- determine rates and methods of payment; and
- maintain employment records.

The key to this updated new rule for many businesses was that they 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

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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.

Next Blows Struck by Labor Department Earlier This Year

Once a new administration took the reins at the White House, it was no surprise when the Labor Department proposed formally rescinding the rule in March, 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.

That 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 before determining its next steps. In July, the agency formally rescinded the rule.

What Happened?

Before the DOL has unveiled any proposed new standard, the 2nd Circuit Court of Appeals got in on the action. It was assigned the task of hearing the appeal of the September 2020 ruling that struck down the Trump-era version of the rule. The appeal was originally filed by the Department of Labor, but a consortium of business advocacy organizations stepped into the government's shoes once the Biden administration assumed control of the agency to take up the fight.

In a terse one-paragraph order released Friday, the Court concluded that the DOL's move to rescind the Trump-era rule was procedurally sufficient to kill off the appeal. It essentially concluded that the legal challenge was moot because the agency no longer supports the business-friendly version of the rule, and that the business consortium could not sufficiently breathe life into it. It ordered the matter to be returned to the lower court and instructed the judge there to formally dismiss the action once and for all.

What's Next?

There appear to be no further steps for the challengers to take, and you can pronounce the business-friendly interpretation dead once and for all. The runway is now cleared for the DOL to issue a new proposed joint employer 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 coming months.

What Should You Do?

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Again, Friday's court order doesn'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 2020 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.

We will monitor the situation and provide updates as appropriate, so you should ensure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our PEO and Staffing Practice Group or Wage and Hour Practice Group.

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