USDOL Proposes Significant Changes To Joint Employment Analysis

Insights
4.01.19

The US Department of Labor (USDOL) today released its much anticipated and significant Notice of Proposed Rulemaking (NPRM) intended to update and clarify the USDOL's interpretation of joint employer status under the Fair Labor Standards Act.

By way of background, in 2017, USDOL withdrew the previous administration's guidance on the topic of joint employment, providing a clear sign that changes likely were coming to the USDOL's analysis of joint employment.

What Do You Need To Know?

In today's notice of proposed rulemaking, which is open to public comment for 60 days once it is published in the federal register, the USDOL is proposing to issue regulations providing a new and different standard for joint employment. The USDOL proposal is a welcome turn to a clear standard that requires the "actual" exercise of control, rather than the difficult to define "potential" exercise of control.

Specifically, the USDOL is abandoning its dated "not completely disassociated" language. Instead, the agency proposes to issue regulations that define the joint employment relationship analysis on whether the potential joint employer **actually exercises** (directly or indirectly) one of these actions: (1) hires or fires the employee; (2) supervises and controls the employee's work schedules or conditions of employment; (3) determines the employee's rate and method of employment; and (4) maintains the employee's employment records.

Other factors also may be reviewed, but only if they are indicative of whether the potential joint employer is exercising significant control over the terms and conditions of the employee's work, or is otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

So What Changed?

This standard does not rely upon whether the employee has any degree of "economic dependence" on the potential joint employer, which is said to "not determine the potential joint employer's liability under the act." Thus, the actions of the employee in question, or the actions of their direct employer, are deemed to be not relevant to the analysis.

The NPRM contains a plethora of interesting information, but the proposed language below is particularly instructive for employers:

- Independent contractor analysis is deemed to be completely different, and therefore, the specialty of the employee's job, their opportunity for profit or loss, and their investment in equipment or materials is not relevant to the joint employment analysis;
- Mere ability, power or reserved contractual right to act in relation to an employee is not relevant to joint employer status;
- Franchisor/Franchisee relationships do not make joint employer status any more likely or unlikely;
- Business practices, such as providing a sample handbook to a franchisee, participating in or sponsoring an association health or retirement plan, allowing an employer to operate a facility on one's premises, or joint participating in an apprenticeship program, do not make joint employer status any more likely or unlikely; and
- Business practices of requiring safety, EEO or other programs in another employer/franchisee's workplace, do not make joint employer status any more likely or unlikely.

Takeaway

The NPRM, along with its examples that clarify when an employer may be deemed a joint employer, provides a clear and simplified analysis of joint employment. For employers, the mere potential to exercise power or control is not relevant, nor are other traditional independent contractor factors. In short, if the final regulations are issued in the same form as the NPRM, employers will overwhelmingly welcome this new standard.

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Marty Heller
Partner
404.231.1400
Email

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