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RETAIL INDUSTRY SNAPSHOT: DOL'S NEW JOINT EMPLOYER PROPOSAL EXPECTED TO REDUCE RISK

Insights
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Retail Industry Snapshot: DOL's New Joint Employer Proposal Expected to Reduce Risk

A new proposal from the Department of Labor (DOL) is expected to reduce joint employer exposure for retailers that rely on staffing agencies or other third parties to fill certain roles or complete certain tasks. The Trump administration's proposal, released last month, focuses on **actual control** rather than on broad, theoretical control over workers. If finalized, the rule will make it less likely for multiple entities to be deemed a "joint employer" or jointly liable for violations of key workplace laws enforced by the DOL. However, retailers could still be liable when they truly direct hiring, firing, pay, schedules, or day-to-day supervision of workers assigned by a staffing firm or other third party. Here's everything retailers need to know about the proposal and how it could impact your company.

What the DOL is Proposing

The rulemaking from the DOL's Wage and Hour Division (WHD) aims to clarify the approach DOL investigators will take when determining whether multiple businesses should be legally responsible for compliance with minimum wage and overtime pay rules, child labor limits, and other requirements under the Fair Labor Standards Act (FLSA). This test would also apply to enforcement actions brought under the Family and Medical Leave Act (FMLA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

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Overall, the simplified approach sought by the Trump administration would make it less likely for multiple businesses to face joint liability for any wages, damages, and other relief stemming from violations of those three laws.

Notably for retail brands, the proposal clarifies that **franchisor status** isn't necessarily relevant to determining joint employer status. Providing standard forms to ensure compliance with the law or requiring that vendors or franchisees follow worker safety and minimum wage laws, aren't forms of control that would point to joint employer status, according to the proposal.

For more details about the rulemaking, check out FP's full coverage here.

Why It Matters for Retailers

Retailers often rely on staffing and temp agencies, fulfillment partners, security and janitorial vendors, and sometimes franchise or license arrangements. Telling a staffing agency whom to hire or fire, as well as directly disciplining or setting the pay and hours of agency or third-party workers can be potential risk areas for retailers. The same is true for retail franchisors or licensors who engage in similar directive conduct with their franchisees and licensees.

Staffing out warehouse and fulfillment work, and other store services, like delivery or food counters, also creates unique risks for retail establishments.

The Trump administration's proposal would provide much needed clarity, factors, and examples of when entities can be found to be "joint employers" for purposes of the FLSA, FMLA and MSPA. It would also clarify that franchise brands shouldn't be considered a joint employer just by offering written guidance or instructing storefronts operating under their brand name to follow the law.

But, even with more predictability around the DOL's approach, retailers should still ensure their contracts, policies, and procedures are reviewed by legal counsel. If the rule is finalized, retailers should also revisit manager training and internal practices to ensure they are in compliance and have clear lines around how to handle contracted or third-party staff.

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What This Would Mean For Your Business

- **Flexibility:** More freedom to set standards for your vendors and contractors, including safety, quality, and compliance rules, without those terms alone presenting joint employment risk.
- **Branding:** Less risk from "brand control" or contract language by itself, especially for franchise-style retail models.
- **Possible operational cleanup:** Retailers may need to more clearly define the line between general oversight of vendors versus actual control over workers.
- **Risks remain:** Remember that liability risks would still exist for store or regional managers who directly control agency or third-party workers in practice. Factors such as assigning shifts, disciplining staff, or determining pay all may factor towards joint employer status.

What's Next?

The public still has time to comment on the proposal. Then, the DOL will have to review the thousands of comments that are likely to be submitted on the rulemaking docket and prepare responses as part of the final rule. The agency may also make changes to the rule based on public input. But we do expect the administration to prioritize finalizing this rule, so retailers should be watching for updates.

Conclusion

We will continue to monitor the DOL's joint employer rulemaking and provide updates as the rulemaking advances. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Retail Industry Team.