Insights, News & Events

FP PEO SNAPSHOT: 4 THINGS PEOS SHOULD KNOW ABOUT THE NEW DOL JOINT EMPLOYER PROPOSAL

Insights
May 19, 2026

FP PEO Snapshot: 4 Things PEOs Should Know About the New DOL Joint Employer Proposal

The Labor Department's recent proposed joint employer rule is welcome news for the PEO industry. That being said, you've received similar welcome news every other time the DOL went through this same exercise in the past, only to see the helpful guidance unwound by a new administration. Watching the joint employer rule evolve is like watching a very slow and long tennis match with a volley returned every four years. But while we have the benefit of a helpful rule, PEOs should incorporate the guidance into their risk management strategy. Here's a recap and a review of the four things all PEOs should know.

Quick Recap of New Joint Employer Proposal

The DOL's Wage and Hour Division released a proposal last month outlining a four-factor test to determine when two businesses are liable as joint employers under the FLSA, FMLA, and MSPA. With no single factor being dispositive, the test considers whether:

- a business hires or fires the employee;
- supervises and controls their work schedule or conditions of employment to a substantial degree;
- determines their rate and method of payment; and

Related People

John M. Polson
Chairman & Managing Partner

949.798.2130

Service Focus

Government Relations

Wage and Hour

Industry Focus

PEO

- maintains their employment records.

The proposal largely mirrors a 2020 Trump administration rule that was subsequently blocked by a court and later rescinded under Biden, though this version places greater emphasis on *actual* control over merely *reserved* control which is helpful for the PEO industry. You can read our full recap of the prior rule here.

Top 4 Things PEO Leaders Need to Know

Here's a review of the top four things PEO leaders need to know about this proposal.

The four-factor test plays well when it comes to how PEOs operate.

Three of the four factors in the new test favor PEOs, as long as your service agreements, policies, and practices are managed in a way that aligns with the factors. For example,

- While PEOs need the **right to hire and terminate** from the standpoint of onboarding and offboarding worksite employees, they generally do not make the decision for the customer.
- Similarly, PEOs don't **supervise or control worksite employees** to a substantial degree, or **set their rate of pay**, and it is important the PEO avoid the appearance of doing so.

The PEO's role in these things, or lack thereof, must be made very clear in the service agreement. Your other written materials also must align with the contract on these items.

Marketing related documents can be particularly thorny when it comes to keeping these things in synch because, compared to a contract, they are so informal.

When trying to give a potential customer a brief list of helpful services provided by your PEO, it is very easy to accidentally give the impression the PEO is responsible for things it merely supports by offering tools or guidance to the customer. For example, your service agreement probably says that only the customer is responsible for deciding who is exempt from overtime, even though the PEO may provide guidance or tools for that subject. That is a very important provision. If the sales department's marketing-oriented list of services includes a vague reference to "exempt / non-

exempt status" that can work against what the service agreement is trying to do.

Make sure your legal team reviews any marketing materials to make sure they don't inadvertently create exposure.

The "reserved control" wrinkle shouldn't be overblown.

The proposed rule departs from the 2020 Trump administration standard in one notable way: it treats the mere right to control (even if never exercised) as relevant to the joint employer analysis. This is the provision that drew the most attention when the rule dropped, and it's worth understanding why it's there.

The new approach in the rule is likely there to enhance the ability of the rule to survive a challenge in court and not to actually expand joint employer liability. The 2020 rule's strict "actual control" standard was struck down in court, with the judge finding it conflicted with the FLSA. The new language hopefully fixes that problem, while practically speaking not significantly increasing the risk of joint liability. The proposed rule itself supports this directly, stating that actual control is "much more relevant" to the analysis than a mere reserved right.

Common PEO services are expressly insulated from the analysis.

One of the most significant wins buried in the proposed rule is what it excludes. The DOL explicitly states that certain business practices, standing alone, do not make joint employer status more or less likely. That list reads like a PEO service menu:

- providing sample employee handbooks
- offering association health plans or association retirement plans
- providing health, safety, or legal compliance services
- supplying sample workplace policies like anti-harassment programs

The third bullet point is the most useful for PEOs since you often provide all of those services and adversaries often point to them as evidence of joint employer status. The two mentioning "sample" documents are not as helpful because

PEOs may do more than just provide samples when they assist customers with things like employee handbooks. But the factors will be helpful in that they acknowledge the difference between providing resources and controlling policy. The association health plan factor is inapplicable.

State law remains the wildcard.

The proposed rule would establish a uniform federal standard for DOL enforcement under the FLSA, FMLA, and MSPA, which is a welcome upgrade from the current patchwork of circuit-by-circuit tests. But it doesn't preempt state law. California, New York, and several other states apply broader joint employer standards, and PEOs with worksite employees in those jurisdictions will need to continue navigating state-specific analysis.

Some Steps PEOs Should Take Now

- Review service agreements to ensure they align with the proposed rule.
- Audit marketing and website content to ensure it aligns with the way the service agreement describes the PEO's responsibilities.
- Ensure legal counsel is familiar with the rule and how to use it in the PEO context, particularly in big-ticket cases like FLSA collective actions.
- Watch for the next version of the rule and adapt, again.

Conclusion

Fisher Phillips will continue to monitor the DOL's joint employer rulemaking and its implications for the PEO industry. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information directly to your inbox. For further information, contact your Fisher Phillips attorney, the author of this Insight, or any member of our PEO Industry Team.