Labor Department's Proposed Four-Factor Rule Would Limit Joint Employment

Insights
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The U.S. Department of Labor just became the latest federal agency to propose a rule to limit the scope of joint employment liability, this time for wage and hour matters. If the rule released earlier today is adopted in its current form, the USDOL would examine whether a business is a "joint employer"—equally liable for liability under federal wage and hour laws—through the use of a four-factor balancing test, assessing whether the potential joint employer:

1. hires or fires the employee;
2. supervises and controls the employee's work schedule or conditions of employment;
3. determines the employee's rate and method of payment; and
4. maintains the employee's employment records.

If this rule is adopted, it would almost certainly mean that fewer businesses would be found to be a joint employer by a court or agency when it comes to minimum wage, overtime, and other similar liability under the Fair Labor Standards Act (FLSA). The Labor Department's move is in the same vein as the proposal unveiled by the National Labor Relations Board in September, which also aims to fundamentally alter the definition of joint employment in matters related to unionization purposes. What do employers need to know about today's development?

Long Wait Could Prove To Be Well Worth It

Employers have been reeling since the January 2016 release of Administrator's Interpretation No. 2016-1, subtitled "Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act." 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 USDOL'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.

But in June 2017, Secretary of Labor Alexander Acosta withdrew the guidance and created massive expectations for employers. The agency later announced that it expected to release a fully fleshed-out proposal by December 2018. Several months later, employers can say that the wait was well worth it.

A Summary Of The Proposed Regulations

Today's release from the USDOL proposes that if an employer suffers, permits, or otherwise employs someone to work and another entity simultaneously benefits from that work, the other entity would only be considered a joint employer under the FLSA for those hours worked if that person is acting directly or indirectly "in the interest of the employer" in relation to the employee. To make that determination "simpler and more consistent," the agency refashioned a common balancing test currently used by a plurality of federal appellate courts (the *Bonnette* standard), and proposes that it should examine whether the potential joint employer:

1. hires or fires the employee;
2. supervises and controls the employee's work schedule or conditions of employment;
3. determines the employee's rate and method of payment; and
4. maintains the employee's employment records.

The agency points out that there are four very good reasons to adopt this four-part balancing test. First, it says that the factors are consistent with the FLSA itself. Second: "they are clear and easy to understand." Third, they can be used across a wide variety of contexts. And finally, they are highly probative of "the ultimate inquiry" in determining joint employer status: whether a potential joint employer "actually exercises sufficient control over an employee" to qualify as a joint employer under the FLSA.

The agency also said that other factors not specifically included in this four-part test may end up being considered in the joint employment determination, 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 otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

Factors That Would Be Irrelevant Under New Test

Just as important as examining which factors would be examined under the proposed rule are those factors that would be ignored should the agency's proposal be adopted. The agency took the time to specifically articulate several aspects common to modern business arrangements that would not be factored into its joint employment consideration. Among those:

- **Right to control:** An employer's ability, power, or reserved contractual right to act with respect to the employee's terms and conditions of employment would not be relevant to that person's joint employer status. "Only actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract," would be relevant to joint employer status under the FLSA, the agency explained.
- **Economic dependence:** Whether an employee is economically dependent on the potential joint employer would also not be relevant. In fact, the agency identified certain factors that would be ignored under its analysis, including whether the employee:

- is in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight;
- has the opportunity for profit or loss based on his or her managerial skill; and
- invests in equipment or materials required for work or for the employment of helpers.

- **Business models, practices, and arrangements:** The agency notes that an entity's business model (such as a franchise relationship), business practices (such as allowing an employer to operate a store on the person's premises or participating in an association health or retirement plan), and certain business agreements (such as requiring an employer in a business contract to institute sexual harassment policies), do not make joint employer status more or less likely.

USDOL Joins Labor Board In Narrowing Joint Employment Definition

The Labor Department's actions in this regard track somewhat of a parallel course at the National Labor Relations Board (NLRB), which is expected to finalize its own joint employer rule later this year. For decades, that agency had applied a flexible joint-employer test, through which separate businesses were deemed equally responsible for certain labor and matters (such as unfair labor practices and collective bargaining obligations) only if they codetermined and *actually exercised the right to directly control* essential terms and conditions of employment. In 2015, however, the Obama-era Board issued its controversial *Browning-Ferris* decision, replacing the actual direct control requirement with a broader standard triggered merely upon retaining the right to *potentially impose indirect control (through an intermediary)*—even if never exercised.

The Trump-era Board briefly reinstated the narrower "actual control" test in December 2017, when it effectively overturned *Browning-Ferris* through its short-lived *Hy-Brand Industrial Contractors, Ltd.* decision, which was set aside on ethical grounds shortly thereafter. That means that, as of today, employers remain subject to the broader *Browning-Ferris* standard, which has since been upheld by the D.C. Circuit Court of Appeals.

But the current iteration of the NLRB—a majority of which is comprised of Republican appointees—seems determined to restore balance to the situation by reverting to the original pre-Obama-era legal standard. In September 2018, the Board announced a proposed joint employer rule that would only be triggered by actual control over meaningful and "essential terms and conditions," such as day-to-day supervision, hiring, discipline, and firing. The putative joint employer would need to substantially, directly and immediately exercise (as opposed to possess) meaningful control over employment terms, and doing so on a "limited and routine" basis would be insufficient to trigger such status. As proposed, this narrower standard would likely mean that fewer businesses would be deemed to jointly employ workers loaned, shared or contracted by a separate entity on the heels of union organizing efforts or related activities.

What's Next?

The USDOL's proposed rule appears to better reflect the realities of the modern business atmosphere. The rise of staffing arrangements and contingent relationships offers businesses the ability to better manage costs and business operations, and have been adopted by countless entities

in recent years. If adopted in its current form, these regulations will enable businesses to operate with more certainty when it comes to wage and hour responsibilities.

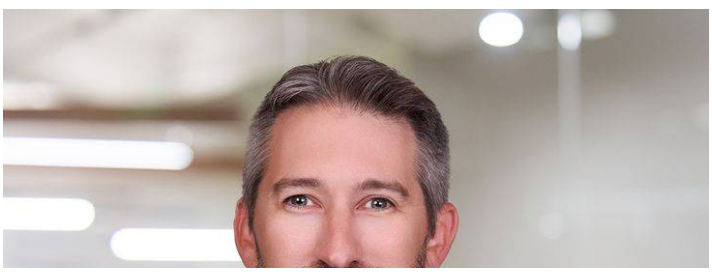
With today's publication, the notice-and-comment process will kick into gear for the Labor Department. The agency will accept comments from interested parties for the next 60 days, and then will continue the typical administrative process necessary to finalize any federal regulations—including public hearings and formal responses to substantive comments. We could also expect critics of the rule to seek to block or delay implementation of the proposal, especially if they believe that the notice-and-comment period lacks substance.

We will continue to monitor further developments and provide updates, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, or any attorney in our Staffing and Contingent Workers Practice Group or Labor Relations Practice Group.

This Legal Alert provides an overview of a specific proposed federal regulation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People

Steven M. Bernstein
Regional Managing Partner and Labor Relations Group Co-Chair
813.769.7513
Email



Marty Heller
Partner
404.231.1400
Email

Richard R. Meneghello
Chief Content Officer
503.205.8044
Email

John M. Polson
Chairman & Managing Partner
949.798.2130
Email

Service Focus

Labor Relations

Wage and Hour

Industry Focus

PEO Advocacy and Protection