



Expect A Trio Of Federal Joint Employment Rules In December

Insights

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Joint employment took center stage yesterday during the release of the Fall Regulatory Agenda, as three separate federal agencies announced plans to move forward with revised joint employment rules in December. While the Department of Labor and the National Labor Relations Board had already released versions of their draft rules, it came as somewhat of a surprise to see the Equal Employment Opportunity Commission also announcing that it would weigh in on the topic before the end of 2019. With the uncertainty of an election year coming up in 2020, it appears that the agencies are kicking into overdrive in order to clarify joint employment standards as soon as possible.

Labor Board's Proposed Rule

Over a year ago, the National Labor Relations Board (NLRB) published a proposed rule that would fundamentally alter the definition of joint employment, making it more difficult for businesses to be held legally responsible for alleged labor and employment law violations by staffing companies, franchisees, and other related organizations. The rule would also limit the ability of employees from affiliated companies to join together to form unions.

The notice-and-comment period for the proposed rule expired in January 2019, and employers have been waiting patiently for the release of the final rule since then. In yesterday's brief announcement, the Board simply reminded the public that it is currently "engaging in rulemaking to establish the standard for determining joint-employer status under the National Labor Relations Act," and provided a December 2019 expected final date for release of the rule.

Under the proposed rule, an employer would be considered a joint employer of a separate employer's employees only if the two employers share or co-determine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. As the Board states, a putative joint employer would have to possess *and actually exercise* substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

If adopted, this would overturn the controversial Browning-Ferris decision from 2015, which eliminated the requirement that the entity actually exercise control in order to be found a joint employer. The current standard means that businesses need only retain the contractual right to control to be considered a joint employer—even if it has never exercised it. Further, indirect control (e.g., control through an intermediary) can be sufficient to find joint employment under the *Browning-Ferris* standard.

On another note, the NLRB's announcement and regulatory agenda also provided a preview of what to soon expect when it comes to regulations that would revise procedures governing the representation process. The first of those regulations has also already been proposed in the form of a rule promulgated this past August that, among other things, would curtail the union tactic of filing "blocking charges" that delay decertification elections pending the investigation's outcome. The second presumably contemplates changes that could roll back aspects of the agency's 2014 "quickie election" rule, which compresses the time period between representation petition and election. Lastly, the agenda includes plans to regulate standards governing employer property access rights, which has been the subject of multiple Board decisions in recent months.

Labor Department's Wage And Hour Proposal

The U.S. Department of Labor (USDOL) joined the fray in April 2019 when it also proposed a rule to limit the scope of joint employment liability, this time for wage and hour matters. Like the NLRB's proposed rule, the notice-and-comment period for the USDOL's rule has already expired, and yesterday's announcement indicates that we can expect to see the final rule issued in December.

Under its proposal, the USDOL would examine whether a business is a "joint employer" — equally liable for liability under federal wage and hour laws — using a four-factor test, assessing whether the potential joint employer:

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

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 specifically articulated 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 their 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.

While these proposed new standards may sound like good news, some employers have concerns. First, the proposed regulations provide no guidance regarding the weight to be given to each of the four factors when applied to specific facts. For example, a minor factor such as "maintaining employment records" could carry the same weight as a major factor such as "direction of work."

Second, some commenters contend the mundane task of maintaining employment records does not belong in the analysis at all. Finally, the proposed regulations may also create uncertainty because they include broad catch-all language implying that agencies and courts may in their discretion rely on factors not included in the four-factor test.

EEOC Jumps Into Picture

Joining the Labor Department and the Labor Board is the Equal Employment Opportunity Commission (EEOC). There was no prior fanfare about a possible joint employment rule, so the announcement was somewhat unexpected. But the EEOC was without a permanent Chair until Janet Dhillon's confirmation in May 2019, and it now appears as if the Commission is making up for lost time by following in the footsteps of the USDOL and the NLRB.

The EEOC's brief announcement states that it wants to explain its "interpretation of when an entity qualifies as a joint employer" based on the definitions of the statutory terms "employee" and "employer" under federal civil rights laws. Specifically, the EEOC oversees enforcement of Title VII of the Civil Rights Act, the Equal Pay Act (EPA), the Age Discrimination in Employment Act (ADEA), and portions of the Americans with Disabilities Act (ADA), the Rehabilitation Act, and the Genetics Information Nondiscrimination Act (GINA). "The proposed rule will clarify when an entity is covered under the federal EEO laws as a joint employer," the announcement states, "and consolidate the EEOC's position on the topic to regulatory locations that are easier for the public to find."

While we have no further substance at this point, we do have a sense for the expected timing of this proposed rule. The announcement reveals that a proposed rule will be released in December, and a notice-and-comment period will then commence. Currently, the agency anticipates wrapping that up in February 2020, but as is often the case, it would not be out of the ordinary to see this deadline extended for a few months thereafter.

Conclusion

The normally slow holiday period will apparently be quite a busy time for these three federal agencies and for employers with a stake in the joint employment debate. We will monitor all of the expected rule releases and provide updates as warranted, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions

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

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