



# Labor Department's New 4-Factor Rule Attempts To Limit Joint Employment

Insights

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The U.S. Department of Labor just finalized its rule that attempts to limit the scope of joint employment liability for wage and hour matters. Although much remains to be seen, this rule may usher in a new era, and could lead to fewer businesses being found to be joint employers by a court or agency when it comes to minimum wage, overtime, and other similar liability under the Fair Labor Standards Act (FLSA). However, many questions still remain about various aspects of this rule, particularly how courts will apply the test's four factors as well as the alternative "catch-all" test. You should now reexamine your business models to capitalize on the new standard, which should take effect on or about March 16, 2020.

## 4-Factor Test, In A Nutshell

The USDOL's new rule will determine 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. It will assess whether the entity:

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

In many ways, the final rule essentially mirrors the draft proposal released in April 2019, but adds the words "to a substantial degree" to the second factor. Important for employers, the USDOL confirmed that no single factor will be dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances.

However, in response to some concern identified after the proposal was released, the agency says that maintaining employment records alone will not demonstrate joint employer status. Very little guidance, however, was provided on how the factors should interact, leaving these questions to be decided by judges and USDOL investigators.

## Details About New Balancing Test

In an attempt to make the joint employment determination simpler and more consistent than the Obama-era standard that aimed to sweep up as many businesses as possible, the agency refashioned a common balancing test – known as the *Bonnette* standard – currently used by a plurality of federal appellate courts.

### ***Hiring Or Firing***

The agency confirmed that the “hiring or firing” factor is narrow, considering only whether the potential joint employer truly hires or fires the employee. It specifically does not contemplate whether the potential joint employer has the “power” to hire or fire the employee in question. The USDOL said that requiring an actual exercise of control in this regard should provide clarity for employers and encourage and increase innovative business agreements.

### ***Supervising And Controlling Work Schedule Or Conditions Of Employment To A Substantial Degree***

As for the second factor, the agency refused to limit the test to only consider day-to-day supervision as a factor that would point to joint employer status. The USDOL pointed to various court decisions from across the country which all note that such a high degree of supervision is not necessary to be considered an indicia of joint employer status. As a consolation, however, the agency noted that courts require at least “substantial” supervision prior to reaching a finding of joint employer status, and therefore added the “to a substantial degree” clause to this second factor.

### ***Determining Rate And Method Of Payment***

This third factor is unchanged from the proposed rule, but the agency did provide some clarifying examples that help explain this factor more clearly. Most importantly, the USDOL said that an entity that requires its suppliers to pay its workers a minimum hourly wage higher than the federal minimum wage, for example, will not be considered a joint employer of the supplier’s employees because of this requirement. In doing so, the agency explained, the entity is not exercising significant control over the supplier’s rate or method of pay, because a simple a wage floor does not equate to control over how and how much supplier should pay its employees. In reviewing the rule closely, we have noted that this is one of the “factors” that may be subject to widely varying interpretations depending upon the court that is considering the factor and the underlying facts.

### ***Maintaining Employment Records***

Some employers will be disappointed to see this fourth factor remain in the equation at all. In a positive development, however, the agency confirmed that maintaining employment records alone will not lead to a finding of joint employer status. Further, the USDOL rule says that records maintained by the potential joint employer related to compliance with contractual agreements are not considered “employment records” such to trigger this factor.

### ***Other Factors***

Many employer groups pushed for the four-factor test to be the only method of finding joint employment, and in particular noted that the agency’s proposed “catch-all” alternative test was

overbroad and could be read to render the four-factor test irrelevant. Although USDOL did not abandon the alternative tests, the agency modified them slightly.

The final catch-all provision states that factors not specifically included in this four-part test may still end up being considered in the joint employment determination. However, this catch-call provision only applies if such unenumerated factors are indicative of whether the potential joint employer exercises “significant control” over the terms and conditions of the employee’s work. We continue to believe that this portion of the test is overbroad and could potentially be abused. However, the proper interpretation of this alternative analysis is yet to be seen, and likely will be different depending upon which judicial circuit considers the test.

### **Factors That Are Irrelevant Under New Test**

Just as important as examining which factors will be examined under the new rule are those factors that are to be ignored by those interpreting the new joint employment test. The agency took the time to specifically articulate several aspects common to modern business arrangements that will not be factored into its joint employment consideration. They include:

- **Unused Right To Control:** The agency changed gears from its April proposal by concluding that an employer’s ability, power, or reserved contractual right to act with respect to the employee’s terms and conditions of employment may actually be relevant to that person’s joint employer status. However, the agency has confirmed that the entity must actually exercise — directly or indirectly — one or more of the four control factors in order to be considered a joint employer. “Standard contractual language reserving a right to act, for example, is alone insufficient for demonstrating joint employer status,” the agency confirmed.
- **Economic Dependence:** Whether an employee is economically dependent on the potential joint employer will also not be relevant. In fact, the agency identified certain factors that should 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;
  - invests in equipment or materials required for work or for the employment of helpers; and
  - the number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services.
- **Franchisor Relationships:** The agency notes that operating as a franchisor or entering into a brand and supply agreement, or using a similar business model, does not make joint employer status more likely.
- **Enforcing Legal Obligations:** A potential joint employer’s contractual agreements requiring the employer to comply with specific legal obligations, or to meet certain standards to protect the health or safety of its employees or the public, do not make joint employer status more or less likely. These include provisions that mandate compliance with the FLSA or other similar laws, require the maintenance of sexual harassment policies. require background checks. ensure

require the maintenance of certain management policies, require safety, health checks, ensure

employers establish workplace safety practices and protocols, or to mandate that workers receive training regarding matters such as health, safety, or legal compliance.

- **Maintaining Standards:** Similarly, requiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation will not make joint employer status more or less likely. The agency pointed to agreements specifying the size or scope of the work project, requiring the employer to meet quantity and quality standards and deadlines, requiring morality clauses, and requiring the use of standardized products, services, or advertising to maintain brand standards as illustrative examples.
- **Standard Human Resources Forms:** The practice of providing a sample employee handbook, or other forms, to the employer will not impact the joint employment assessment.
- **“Store Within A Store” Arrangements:** The new rule confirms that allowing the employer to operate a business on its premises will not be factored into the legal test.
- **Health And Retirement Plans:** Offering association health plans or association retirements plan to the employer or participating in such a plan with the employer will not be considered.
- **Apprenticeships:** Finally, the new rule makes clear that jointly participating in an apprenticeship program with the employer will not make joint employer status more or less likely.

## Concerns Remain

While these new standards are an improvement for the business community from USDOL’s previous guidance on joint employment, as noted above, some concerns still linger. First, the new rule provides little guidance regarding the weight to be given to each of the four factors. The fact that the new standard is a balancing test open to interpretation could lead an aggressive fact-finder to find a particular business circumstance warrants a finding of joint employment, while a similar circumstance could be found to be a harmless arms-length business relationship by another investigator or court.

With respect to the second factor, there are bound to be questions, disagreements, and litigation over the question of how “substantial” the supervision and control over an employee’s work schedule or conditions of employment need to be in order to tip the scales toward a joint employment finding. By not including a definitive test, such as day-to-day supervision, the agency has left open a question that may cause some headaches down the road.

Next, despite the clarifying language confirming that the maintenance of employment records cannot, by itself, lead to a finding of joint employment, many believe that such a mundane task does not belong in the analysis at all.

Finally, and perhaps most importantly, the final version of the regulations create uncertainty because it includes catch-all language stating that agencies and courts may, in their discretion, rely on factors not included the four-factor test.

## What’s Next?

According to USDOL, “these factors are simple, clear-cut, and easy to apply.” The agency’s efforts aim to provide employers with clarity and when it comes to FLSA compliance, saying that the test will assist stakeholders, as well as courts, in determining joint employer status with greater ease and consistency. “This simplicity will provide greater certainty to both employers and workers as to who is and is not a joint employer before any investigation or litigation begins,” it said. Although only time will tell, if courts and the agency take these goals into account, the new tests could result in better outcomes for employers who are alleged to be joint employers.

The new rule will take effect on or about March 16, 2020, depending on when the rule is formally published in the Federal Register. Now is the time for you to work with your counsel to determine whether you can adopt business changes that maximize your ability to take advantage of the new joint employment standard. While not perfect, these regulations may enable you to operate with more flexibility and more certainty when it comes to wage and hour responsibilities.

We expect the National Labor Relations Board to unveil its own finalized joint employment rule any day now, and the Equal Employment Opportunity Commission is expected to follow suit sometime in 2020. 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 Wage and Hour Practice Group.

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**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](#)

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