Legal Update Article

Department of Labor Proposes Updated Interpretation of Joint Employer Standard Under the FLSA

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Since 1939, regulations interpreting the Fair Labor Standards Act (FLSA) have recognized that two or more "employers" can be jointly and severally liable for a single employee's hours worked under the Act. However, the U.S. Department of Labor (DOL) has not meaningfully updated its joint employer regulation in more than 60 years. That soon may change. On April 1, the DOL issued a Notice of Proposed Rulemaking (NPRM) to update its interpretation of the standard for establishing joint-employer liability under the FLSA.

Characterized as a "deregulatory proposal" by Secretary of Labor Alexander Acosta, the proposed test for joint-employer liability would limit such liability to circumstances where the purported joint employer exercised direct or indirect control over an individual's terms and conditions of employment. This proposed test differs from that currently used by a number of courts, in that it would not consider the purported joint employer's "theoretical" power to control employees or the employee's economic dependence on the purported joint employer. If adopted by the courts, the proposed test should be welcome news for franchisors, staffing agencies, and other businesses that have faced uncertainty regarding their exposure to liability as joint employers under the FLSA.

Background

The standard for joint-employment liability has been the focus of much attention in recent years, as Congress, the courts, the DOL, and the National Labor Relations Board (NLRB) have all addressed the issue. Most recently, the current DOL withdrew an Obama Administration interpretation of joint employment shortly after Secretary Acosta arrived, while the NLRB stated its intention to issue a final rule on the subject later this year.

In this NPRM, the DOL states that it is seeking "to clarify the standard for joint employer status in order to give the public more meaningful guidance and proper notice of what the [joint-employer] regulation actually requires."

Under current DOL regulations, promulgated in 1958, multiple persons can be joint employers of an employee if they are "not completely disassociated" with respect to the employee's employment. According to the NPRM, updated regulations are needed because the "not completely disassociated" standard almost "always result[ed] in joint employer status." The DOL's stated goals are to provide a more uniform interpretation that gives employers greater certainty, as well as to reiterate "its longstanding position that a business model — such as the franchise model — does not itself indicate joint employer status under the FLSA."

The NPRM does *not* make substantive changes to the regulations with respect to where one employer employs a worker for one set of hours, while another employer employs the same worker for a separate set of hours, in the same workweek. In those cases, joint-

employer liability will continue to depend on whether the two employers are "disassociated with respect to the employment of the employee." Rather, the NPRM proposes changes to the DOL's regulations (codified at 29 C.F.R. § 791) interpreting joint-employer liability where an employee works *one* set of hours for an employer that simultaneously benefits *another* person. The NPRM states that the DOL is "concerned that the current regulation does not adequately address" this situation.

The New Test

The NPRM proposes to replace the "not completely disassociated" test with one that focuses on "the potential joint employer's exercise of control over the terms and conditions of the employee's work." Citing the U.S. Supreme Court's decision in *Falk v. Brennan,* 414 U.S. 190 (1973), the NPRM frames the primary question as whether the purported joint employer "exercises substantial control over the terms and conditions of the employee's work."

Derived from the decision of the U.S. Court of Appeals for the Ninth Circuit in *Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465 (9th Cir. 1983), the DOL proposes a four-factor balancing test assessing whether the purported joint employer:

- Hires or fires the employee;
- Supervises and controls the employee's work schedules or conditions of employment;
- Determines the employee's rate and method of payment; and
- Maintains the employee's employment records.

Moreover, the DOL limits the test to "actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability" to take such actions.

The NPRM notes that four other circuit courts of appeal have adopted tests that are similar to the *Bonnette* test, while the remaining circuit courts apply different tests, but "each of them applies at least one factor that resembles one of the Department's proposed factors derived from the *Bonnette* test."

The NPRM further states that "joint employer status is determined by the actions of the potential joint employer — not the actions of the employee or his or her employer." Accordingly, the proposed regulation makes clear that "whether the employee is economically dependent on the potential joint employer is not relevant for determining the potential joint employer's liability under the Act."

In addition, the NPRM provides several examples to illustrate the new test. In one example, a franchisor provides its franchisees with a sample employment application, an employee handbook, and other forms. The franchisee retains sole responsibility for hiring and firing, setting pay rates, controlling the conditions of employment, and maintaining records. In another example, a large company imposes a code of conduct and a wage floor as a condition to being part of its supply chain. Neither of these situations give rise to joint employer liability, the NPRM says, because the potential joint employers do not exercise direct or indirect control over the employees. In contrast, companies are found to be joint employers in two other examples in the NPRM where they set pay rates, directly supervise employees, and make decisions to terminate employees. These examples carve out a significant area in which a company may influence the employment policies of affiliated companies without risking joint employer liability under the FLSA.

What Comes Next?

The proposed regulation is subject to a 60-day public comment period, which will begin once the NPRM is officially published in the Federal Register. Following the public comment period, the DOL will issue a final rule.

The proposed joint-employer regulations are "interpretive" and are not presumptively entitled to deference. The NPRM explains, in detail, that the test outlined is rooted in the text of the FLSA and significant judicial authority.

If you have any questions about the proposed joint-employer test or any other wage and hour issue, please contact the Jackson Lewis attorney(s) with whom you regularly work.