BLOGS
Employment

New York Federal Court Strikes Down Department of Labor Joint Employer Regulation

In a blow to the franchisor community, a federal court in New York invalidated the joint employer regulation recently issued by the U.S. Department of Labor (DOL).

In a blow to the franchisor community, a federal court in New York invalidated the joint employer regulation recently issued by the U.S. Department of Labor (DOL). *New York v. Scalia*, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020). The regulation, which took effect in March 2020, set the standard for determining whether a secondary entity acts as a "joint employer" under the Fair Labor Standards Act (FLSA) and is therefore jointly liable with the primary employer for any FLSA violations. This theory of liability is commonly asserted against franchisors in an attempt to hold them accountable for wage and hour violations alleged by franchisee employees.

The regulation adopted a more business-friendly "totality of the circumstances" test, whereby courts were instructed to evaluate four factors to determine whether a secondary entity was a joint employer. These factors are whether the secondary 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. The regulation also made clear that only actual control, not a right to control, should be considered in a joint employer analysis. Further, the regulation stated that several "economic dependence" factors often used by courts to determine joint employer status should no longer be analyzed. Most notably, the regulation specifically stated that the franchise business model should not automatically indicate joint employer status among franchisors as it relates to franchisee employees.

The court invalidated the regulation on several grounds. First, the court held that the regulation was in direct conflict with the statutory text of the FLSA. In particular, the regulation only focused on the definition of "employer," and ignored the related definitions of "employee" and "employ," both of which have been used by the courts when determining whether an entity is a joint employer. Second, the DOL departed from its previous joint employer regulations without providing any rationale for doing so. Third, the regulation overly focused on "control" as the touchstone inquiry. This finding directly contradicted established case law holding that the congressional intent in the FLSA was to reject the common law definition of employment, "which is based on limiting concepts of control and supervision." Fourth, the regulation contradicted the DOL's own views on economic dependence, which it finds to be a proper inquiry in determining whether a worker is an employee or independent contractor. According to the

Related People

Maisa Frank
Partner

Washington, D.C.

202.295.2209

maisa.frank@lathropgpm.com

Richard C. Landon
Partner

Minneapolis

612.632.3429

richard.landon@lathropgpm.com

court, the DOL did not provide any persuasive rationale for why the inquiry is appropriate for determining whether an entity is an "employer" of a worker but not for determining whether an entity is a "joint employer." Finally, the court held that the regulation should be set aside because it did not "adequately consider the Final Rule's cost to workers."