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BLOGS

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U.S. DOL Publishes Final Rule on Joint Employer Liability Under the FLSA

On January 12, 2020, the U.S. Department of Labor (DOL) published its final rule regarding joint-employer status under the Fair Labor Standards Act (FLSA), the federal wage and hour law. This final rule provides a more employer-friendly joint employer liability standard than previous guidance issued by the DOL under the Obama administration.

In recent years, many employment lawsuits have been brought against entities that do not technically employ the workers bringing the employment-related claims, but may exert some level of control or influence over their employment (such as staffing companies, franchisors, and general contractors). For example, franchisee employees have tried to make franchisors responsible as joint employers for wage and hour violations committed by franchisees. The final rule is meant to provide some clarity on how these claims should be analyzed.

According to the DOL final rule, in determining whether an entity should be considered a joint employer of the worker along with the entity that is the workers designated employer (and therefore liable for FLSA violations committed by the designated employer), the DOL will examine whether the entity:

- hires or fires the employee;
- supervises and controls the employees work schedule or conditions of employment to a substantial degree;
- determines the employees rate and method of payment; and
- maintains the employees employment records.

This new test is designed to be a balancing test, meaning not all the factors must be met to establish a joint employer finding. Additionally, no single factor is dispositive.

Importantly, the final rule also identified specific factors that the DOL would not consider in determining whether an entity is a joint employer. These include:

- operating as a franchisor or entering into a brand and supply agreement;
- contracts requiring compliance with specific legal obligations or certain standards to protect the health or safety of employees or the public;
- contracts requiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation;
- providing sample employee handbooks or other forms;



- allowing store within a store arrangements;
- offering an association health or retirement plan; and
- jointly participating in an apprenticeship program with the employer.

It is important to remember that this final rule only definitively changes the test that the DOL will apply to FLSA matters involving joint-employer allegations. Courts, on the other hand, are free to decide how much deference to provide this new DOL test, as they are not required to follow the test when ruling on joint employer issues under the FLSA. For this reason, employers should still be aware of the FLSA joint employer tests used by the courts in their jurisdiction, as those tests may vary significantly from the new DOL test.

The final rule is scheduled to go into effect on March 16, 2020. We will provide further updates on any litigation challenges to this final rule that may impact the effective date.