CLIENT ALERTS & INSIGHTS

Department of Labor Announces Proposed Joint Employer Status Rule

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On April 1, 2019, employers received good news with the Department of Labor's ("DOL") proposed regulation limiting joint employer liability. As expected (see prior alert regarding NLRB rulemaking), the proposed rule narrows when companies can be considered a joint employer.

The main takeaway from the proposal is that the joint employer test will again reinstitute the requirement that the alleged joint employer exert actual control over the workers in question. The DOL now proposes focusing on a four-factor balancing test to determine whether someone that works for one company is also employed by a second company. The factors are whether the second company:

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

Additional factors may be used if they are indicative of whether the potential joint employer (1) exercises significant control over the terms and conditions of the employee's work; or (2) otherwise acts directly or indirectly in the interest of the employer in relation to the employee.

The proposed rule also identifies a number of factors that will show the employee's economic dependence, such as whether the employee (1) is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight; (2) has the opportunity for profit or loss based on managerial skill; and (3) invests in equipment or materials required for work or employment of helpers.

The proposed rule also explains that the potential joint employer's ability, power, or reserved contractual right to act in relation to the employee is not relevant for determining potential joint employer liability, but also clarifies that indirect action in relation to an employee may nonetheless establish such liability.

Finally, the proposal states that a number of issues will not make joint employer status more or less likely. Operating as a franchisor does not make joint employer status any more likely. Similarly, utilizing certain business practices like providing a sample handbook, participating in or sponsoring an association health or retirement plan, allowing a company to operate a facility on another company's property, or jointly participating in an apprenticeship program will not make a company a joint employer. Using certain business agreements that may require an employer to institute workplace safety measures, wage floors, sexual harassment policies, morality clauses, or other

requirements to comply with the law, also will not leave a company more likely to qualify as a joint employer.

The rule is now open for public comment on its proposed regulations. We will continue to monitor the status of joint employer regulations and decisions as the standard evolves.

For more information on this topic, contact a member of Benesch Labor & Employment Practice Group.

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