CLIENT ALERTS & INSIGHTS

DOL Proposes Universal Guidance Meant to Simplify Joint Employer Analysis

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Key Takeaways

- The Department of Labor has proposed a new rule to clarify when multiple employers are considered joint employers under the FLSA, FMLA, and MSAPA, aiming to provide clear, consistent guidance for both employers and employees.
- This proposal could significantly impact businesses that use staffing agencies, subcontractors, or share employees, as it outlines specific factors for determining joint employer status and may increase the risk of shared liability for wage and hour violations.
- Employers should review their relationships with staffing agencies, subcontractors, and other business partners, assess their current practices against the proposed four-factor test, and consider submitting comments before the June 22, 2026 deadline to help shape the final rule.

On April 22, 2026, the Department of Labor's Wage and Hour Division proposed a new rule to clarify joint employer status and the related analysis under the Fair Labor Standards Act ("FLSA"), Family Medical Leave Act ("FMLA"), and the Migrant and Seasonal Agricultural Protection Act ("MSAPA"). In doing so, the department stated that it intends to "ensure employees and employers have a clear, consistent understanding of when multiple employers are jointly responsible for protecting the wages and other rights of an employee" in light of "the dearth of departmental regulatory guidance" and "significant differences among the circuit courts."

Horizontal vs. Vertical Joint Employment

One of the first clarifications addressed in the proposed rule is related to "vertical" and "horizontal" joint employment. Specifically, the proposal explains that "[i]n the Department's experience in FLSA cases, vertical joint employment often involves a higher-tier entity, such as a staffing agency client or general contractor, that disputes whether it has an employment relationship with workers who are unquestionably employees of a lower-tier entity, such as a staffing agency or subcontractor, that has a business relationship with the higher-tier entity." Thus, vertical joint employment analysis generally "focuses on the higher-tier entity's relationship with the employees of the lower tier entity."

In contrast, the proposal explains that "horizontal joint employment generally involves situations in which an employee works separate hours for two or more joint employers in the same workweek," and the analysis examines "whether the employers are sufficiently associated with each other with respect to the employment of the employee."

Four Factors for Vertical Joint Employment

The proposal identifies four factors to consider when conducting a vertical joint employment analysis. Specifically, the new rule examines whether the potential joint employer, often an entity that benefits from the obvious employment relationship "(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." These four factors are not particularly new, as they largely incorporate factors identified in earlier, longstanding case law. Apart from the four factors, the proposal discusses the relevance of reserved control, stating that "the potential joint employer's actual exercise of control is more relevant than such ability, power, or right," and indirect control, explaining that "acts which incidentally impact the employee also do not indicate joint employer status."

The proposed rule separately provides guidance on applying the factors, noting that while no single factor is dispositive in determining joint employer status, "if the four factors identified in proposed § 791.115(a) unanimously indicate joint employment or no joint employment, there is a substantial likelihood that the indicated outcome is correct, and additional factors are highly unlikely, either individually or collectively, to outweigh the combined probative value of those four factors." The proposed rule also explains that factors considered in the examination of employer vs. independent contractor analysis "have no relevance in determining joint employer status."

Factors for Horizontal Joint Employment

As it relates to horizontal joint employment, the proposed text explains that "if the employers are acting independently of each other and are disassociated with respect to the employment of the employee, each employer may disregard all work performed by the employee for the other employer in determining its own responsibilities under the FLSA." As examples, the proposal lays out three specific situations where employers are generally sufficiently associated to establish horizontal joint employment: "(1) there is an arrangement between them to share the employee's services; (2) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or (3) they share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

Finally, the proposed rule explains that various specific business practices and contractual requirements that are beneficial to all parties, such as the following, do not necessarily indicate joint employment:

- Operating under a franchise agreement, brand and supply agreement, or similar business model;
- Requirements for compliance with legal obligations or health and safety standards;
- Adherence to quality control and brand reputation standards; and

- Providing handbooks, offering an association health or retirement plan to the employer, or jointly participating in an apprentice program or relationship.

The public comment period will be open through June 22, 2026. We will continue to monitor and report on further developments. Please contact a member of Benesch's Labor & Employment Practice Group for more information.