CLIENT ALERTS & INSIGHTS

# Recently Published Department of Labor Final Rule Overhauls FLSA Joint Employer Test

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On January 12, 2020, the Department of Labor (Department) announced a final rule to revise and update its regulations interpreting joint employer status under the Fair Labor Standards Act (FLSA) (see prior alert on Department of Labor rulemaking here). The effective date of the final rule is March 16, 2020.

**In the final rule, the Department:**

- clarifies that an employee's "economic dependence" on a potential joint employer does not determine whether it is a joint employer under the FLSA;
- specifies that an employer's franchisor, brand and supply, or similar business model and certain contractual agreements or business practices do not make joint employer status under the FLSA more or less likely; and
- provides several examples applying the Department's guidance for determining FLSA joint employer status in a variety of different factual situations.

In addition, the final rule announced a four-factor balancing test to determine whether an employee's services simultaneously benefits both her employer and one or more other businesses or individuals such that those other businesses or individuals should be deemed joint-employer(s) of the employee, and thus jointly liable for wage violations. Under the test, the agency will consider (1) whether the potential joint employer has the right to hire or fire employees; (2) whether the potential joint employer controls the employees' schedules or conditions of employment *to a substantial degree;* (3) whether the potential joint employer determines the workers' pay rates and the methods by which the workers are paid; and (4) whether the joint employer maintains workers' employment records.

According to Secretary of Labor Eugene Scalia, "[t]his final rule furthers President Trump's successful, government-wide effort to address regulations that hinder the American economy and to promote economic growth … by giving greater clarity to businesses who want to work together, we promote an entrepreneurial culture that has driven American prosperity for decades."

The DOL's wage and hour division has indicated that the final rule should work to break down barriers that keep companies from constructively overseeing, guiding and helping their business partners, and that small business owners should benefit from the final rule by strengthening their relationships with franchisors and other contracting companies.

The National Labor Relations Board has proposed its own joint employment rule, which is expected to be finalized soon, and the U.S. Equal Employment Opportunity Commission recently indicated that it, too, will soon propose a joint employer regulation. Of course, the Labor Department's final rule has no bearing on joint employer determinations made by the DOL and other agencies under other employment under other statutes, such as the Occupational Safety and Health Act, the National Labor Relations Act or Title VII of the Civil Rights Act.

While the final rule represents a win for employers, it remains to be seen how the rule will ultimately be interpreted, even at the agency level. Employers, however, should consider a review of the rule relative to any existing contractor and/or temporary services agreements and consider whether revisions should be made in an effort to take advantage of the new framework for determining joint-employer status under the FLSA. In addition, employers should keep abreast of any rule-making changes in the joint-employer context made by the National Labor Relations Board or the Equal Employment Opportunity Commission, as rule changes made by these two agencies will likely have an impact on employer relationships with business partners, including contractors.

**For more information on this subject, contact a member of Benesch's Labor & Employment Practice Group.**

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