CLIENT ALERTS & INSIGHTS

Southern District of New York Vacates DOL's "Direct and Immediate Control" Requirement for Joint Employer Status

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On September 8, 2020, the U.S. District Court for the Southern District of New York issued its opinion in *New York v. Scalia et al.*, S.D.N.Y., No. 20-01689, vacating the Department of Labor's ("DOL") April 27, 2020 final rule which reinstated the "direct and immediate control" test for determining when an employer is a vertical "joint employer" as it relates to the Fair Labor Standards Act ("FLSA"). The Court noted that it was vacating the DOL's final rule only as to "vertical joint employers," such as a general contractor and a subcontractor as joint employers of the subcontractor's worker. The Court left the rule as to "horizontal joint employers" (such as two legally-distinct entities with similar ownership that both employ the same individual) untouched.

In seeking to return to the traditional "direct and immediate control" test for determining whether an employer is a joint employer (originally dating back to the Supreme Court's opinion in *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964)), the DOL's rulemaking reasoned that an employer is only a "joint employer" if it qualifies as an "employer" as defined under the FLSA. The *Scalia* Court, however, found that the rule defined "joint employer" too narrowly. The Court noted that the DOL incorrectly ignored the fact that the FLSA's definitions of "employee" and "employ," which are necessarily tethered to the FLSA's definition of "employer," broaden the scope of the "joint employer" definition. Further, while the common law definition of employment focuses on control, the Court noted that the existence of an employer-employee relationship under the FLSA turns on an "economic realities" test-that is, where a worker economically depends on an employer, an employment relationship exists.

The Court's opinion vacating the narrowed standard for determining joint vertical employer status as arbitrary and capricious is the latest installment in a now years-long saga of judicial and administrative actions aimed at clarifying the scope of the "joint employer" definition. Beginning with the election of President Trump, the NLRB began efforts to return to the "direct and immediate control" standard. In December 2017, the NLRB overruled *Browning-Ferris* in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017), returning to the direct and immediate control requirement (see alert here). However, just two months later, the NLRB vacated the *Hy-Brand* decision and reinstated *Browning-Ferris* after determining that Board member William Emanuel should have recused himself from the *Hy-Brand* decision (see alert here).

The NLRB then shifted its focus to rule-making and released a proposed rule in September 2018 to reverse *Browning-Ferris* (see alert here). The DOL followed suit and proposed a rule similarly revising its joint employer test in April 2019 (see alert here), which was finalized in January 2020 (see alert here

) and became effective on April 27, 2020 (see alert here).

Potential Impact for Employers

The most significant implication of qualifying as a "joint employer" under the FLSA is being held jointly and severally liable with all other "joint employers" for damages for FLSA violations. Under the DOL's rule, the pool of potential joint employers in an FLSA action is narrowed to employers with direct and immediate control over the aggrieved employee. With the Southern District of New York in *Scalia* accepting the broader definition of "joint employer", however, potential joint employers need not have exercised direct and immediate control over an employee to be liable. For example, if a general contractor hires a subcontractor whose employee brings a claim under the FLSA, all "joint employers," including the general contractor, are jointly and severally liable. If the subcontractor becomes insolvent, the general contractor may be liable even if it never exerted any control over the subcontractor's employer.

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