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U.S. Department of Labor Proposes New Joint-Employer Rule Under the FLSA

The proposed rule—which takes a more flexible approach to joint employment than its 2020 predecessor—would restore federal regulatory guidance on joint employment under the FLSA and align the FMLA and MSPA standards to the same framework.

Yesterday, the U.S. Department of Labor published a proposed rule addressing joint-employer status under the Fair Labor Standards Act (FLSA). The proposed rule would restore a joint-employer regulation to 29 C.F.R. Part 791, where the Department's FLSA joint-employer regulations had been located before 2021. It would also amend the Department's regulations under the Family and Medical Leave Act (FMLA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) so that joint-employer status under those statutes is determined using the same Part 791 framework. Interested parties will have until June 22 to submit comments.

If implemented, this proposed rule would fill a gap in applicable guidance resulting from various developments over the past several years. In 2020, the Department under the Trump Administration adopted a joint-employer rule that narrowed the standard for "vertical" joint employment while largely preserving the longstanding approach to "horizontal" joint employment. (Vertical joint employment is where two or more companies benefit from the same hours worked by an employee. Horizontal joint employment is where an employee works separate hours for different companies, but the companies are closely associated.)

Later in 2020, a federal district court vacated the vertical joint employment portions of that rule, reasoning that the Department's interpretation conflicted with the text of the FLSA, including by requiring a joint employer to engage in the "actual exercise of control." The Department under the Biden Administration rescinded the rule in full in 2021, explaining that the 2020 Rule was not supported by the FLSA's text, did not cover all scenarios in which joint employment could arise, and its focus on actual control was inconsistent with the case law.

According to the Department, the new proposed rule is intended to address the resulting lack of FLSA regulatory guidance and the uncertainty that has followed, particularly in vertical joint employment cases. In the release accompanying the proposed rule, the Department acknowledges that "judicial precedent" concerning vertical joint employment "varies between federal courts." *See, e.g.*, *Harris v. Med. Transp. Inc.*, 300 F. Supp. 3d 234, 241-43 (D.D.C. 2018) (summarizing "a dizzying world of multi-factor tests" from different circuits). The Department also explains its view that a rule concerning vertical joint employment "would bring greater uniformity and consistency" to the agency's "enforcement actions by adopting a transparent nationwide analysis."

The proposed rule distinguishes between vertical and horizontal joint employment.

For vertical joint employment, the proposed rule would apply four factors:

1. whether the potential joint employer hires or fires the employee;
2. whether the potential joint employer supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
3. whether the potential joint employer determines the employee's rate and method of payment; and
4. whether the potential joint employer maintains the employee's employment records.

These factors are derived from the "economic realities" test promulgated by the Ninth Circuit in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), a test later adopted by multiple other circuits. Other circuits, however, have deemed that standard too narrow and articulated other factors that must be considered, including the Fourth Circuit, which recently abandoned its use of the economic realities test and crafted "an entirely new joint employment test," which asks a different "threshold question," and is comprised of a different set of factors. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017).

The factors in the Department's new proposal are also largely the same as those in the 2020 Rule, with a few significant changes in application, presumably to address the district court decision that vacated the prior rule. In particular, the proposed rule no longer requires the "actual" exercise of control under these factors to find a joint employment relationship exists, although such control is more relevant to the analysis than mere hypothetical or contractual authority.

The proposed rule also explains that the four factors listed above are not exhaustive and expressly provides that an employee's economic dependence on the potential employer and place of employment may be relevant, although less probative. This is also a change from the 2020 Rule, which only permitted the consideration of additional factors "if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work."

For horizontal joint employment, the relevant inquiry remains whether the employers are "sufficiently associated" with each other with respect to the employee's employment. The proposed rule identifies three recurring situations:

1. where there is an arrangement to share the employee's services;
2. where one employer acts directly or indirectly in the interest of the other in relation to the employee; or
3. where the employers share control of the employee because one controls, is controlled by, or is under common control with the other.

Where horizontal joint employment exists, hours worked for the two employers in the same workweek must be aggregated, and each joint employer is jointly and severally liable for wages due, including any overtime wages, which must be calculated at a joint regular rate. *See* 29 C.F.R. § 778.115 (rate of pay is determined by dividing "total earnings"—the total compensation earned from each employer—by the "total number of hours worked at all jobs").

The text of the proposed rule provides examples that analyze how these factors apply in practice. The proposed rule clarifies that the examples are "illustrative" and "limited to substantially similar factual situations." These examples cover several factual scenarios:

- A company that contracts with a third-party vendor, such as a cleaning company;
- A company that engages temporary labor from a staffing agency;
- Two companies that separately hire the same individual to perform the same work, such as two restaurants that hire the same cook;
- An association that provides optional health coverage and pension plans that its members may offer to their employees;
- A company that contracts with multiple other businesses in its supply chain and requires them to comply with a code of conduct, such as paying employees a minimum wage; and
- A franchisor that supplies certain proprietary software and employment forms to one of its franchisees.

The proposed rule also states that several business models and business practices would not, standing alone, make joint-employer status more or less likely. These include franchising, brand-and-supply agreements, and similar business models, as well as contractual requirements relating to general legal compliance, health and safety, and quality control.

This proposed rule follows another rule proposed by the Department in February regarding its interpretation of who qualifies as an "independent contractor" versus "employee" under the FLSA, MSPA, and FMLA. (Comments on that proposal are due by April 28.) While both proposed rules address relationships between employers and contracted workers, the proposed joint-employer rule does not directly address the question of worker classification as either an employee or independent contractor. Instead, the new proposal treats joint employment as a separate inquiry and explains that factors such as opportunity for profit or loss, skill and initiative, and worker investment may be relevant to worker classification, but not to whether companies are joint employers.

The terms of any final rule will depend on the Department's response to comments submitted during the notice-and-comment period. Legal challenges are possible once a final rule is adopted.

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