

DOL Proposes Withdrawal of the Business-friendly FLSA “Joint Employer” Final Rule

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Article

03.24.2021

On March 11, 2021, the U.S. Department of Labor (DOL) issued a Notice of Proposed Rulemaking to withdraw the Joint Employer Final Rule under the Fair Labor Standards Act (FLSA), which was published during the previous administration and was arguably more business-friendly. The withdrawal indicates DOL will likely propose an alternative that returns to a broader and more extensive interpretation of the joint employer rule that may ultimately impact the determination of who is liable for FLSA wage and hour obligations.

What is Joint Employment?

Joint employment is the principle that an individual can have multiple employers, all of which are potentially responsible for ensuring FLSA compliance. For example, a company that sources temporary employees from a staffing agency may be considered a joint employer of those staffed employees, depending on the nature and extent of the control exerted over the employee's work. The joint employer classification has significant consequences, as a joint employer can be held liable for FLSA wage and hour obligations such as the payment of minimum wage or of overtime to non-exempt employees.

The Joint Employer Final Rule

The Joint Employer Final Rule set forth a four-factor balancing test for determining joint-employer status under the FLSA. Those factors are whether, and to what extent, the alleged employer 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. The Final Rule emphasized that actual, rather than merely theoretical, exercise of control is required to establish a joint employment relationship. That rule was considered a positive development for the business community, as the new standard for determining joint-employment liability under the FLSA was narrower and clearer than was the previous rule.

In response to the rule, several states filed suit in New York Federal District Court to have it vacated. Ultimately, the court did vacate part of the rule, concluding that the Final Rule was impermissibly narrow and that the four-factor test was inconsistent with both the DOL's previous interpretive guidance and a significant body of case law. The court found that the rule was arbitrary and capricious on at least three accounts: it failed to adequately explain the departure from DOL's prior interpretations; did not consider consistency with other DOL regulations; and did not consider the cost to workers.

In DOL's recent announcement, it cited this court decision among the reasons for withdrawing the rule and reconsidering its position, as well as the fact that a split exists among the federal circuit courts of appeal as to the proper joint employer analysis. The department concluded that removing an unduly narrow standard for joint employment would protect more workers' wages and improve their well-being and economic security.

What is the Result?

DOL's proposed withdrawal of this Final Rule is open for public comment until April 12, 2021. After that, the department may choose to withdraw the rule and return to the standards existing before the Final Rule was in effect. Withdrawal of the rule will also provide DOL with an opportunity to consider the legal and policy issues relating to FLSA joint employment and to consider drafting and implementing a new joint employer standard. While DOL's decision is still uncertain, employers will likely see a shift away from the arguably business-friendly Joint Employer Final Rule.

If you would like more information on this or any other related matters, please contact Nexsen Pruet's Employment & Labor Law group.